THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C 103 / 16

In the matter between:

RELTON FRED BOOYSEN **Applicant**

and

THE SOL PLAATJE MUNICIPALITY **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Second Respondent**

P M VENTER N.O. (AS ARBITRATOR) **Third Respondent**

Heard: **24 May 2017**

Delivered: **8 December 2017**

Summary: Bargaining Council arbitration proceedings – challenge of compensation awarded by arbitrator – ordinary test for review appropriate – s 145 of LRA 1995 – principles considered – reasonable outcome approach applied

Compensation – determination of quantum of compensation by arbitrator – principles applicable – exercise of a discretion by arbitrator – no indication that discretion not properly exercised

Peremption – acquiescence in the award followed by later review application – peremption applicable – applicant prohibited from challenging award

Review application – supervisory duty of Court – remedying of injustice – incorrect calculation of compensation – error remedied

Review application – proper case not made out for review – review application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicant has brought an application to partially review and set aside an award of an arbitrator of the South African Local Government Bargaining Council (the second respondent), which application has been brought in terms of Section 145 of the LRA,[1] as read with Section 158(1)(g). The applicant does not seek to challenge the award of the third respondent where it came to finding that the applicant had been unfairly dismissed by the first respondent. What the applicant is challenging is the consequential relief afforded to him by the third respondent for such unfair dismissal. The applicant never sought reinstatement from the outset, but was not satisfied with the *quantum* and calculation of the compensation then awarded to him by the third respondent, which, according to the applicant, constituted a reviewable irregularity. The review application was opposed by the first respondent.

[2] Arbitration proceedings were convened before the third respondent, as duly appointed arbitrator of the second respondent, on 11 January 2016. In an arbitration award dated 26 January 2016, the third respondent determined that the applicant had been unfairly dismissed by the first respondent, and

[1] Act 66 of 1995.

awarded the applicant compensation equivalent to 3(three) months' remuneration.

[3] Dissatisfied with this outcome, the applicant pursued a review application. The applicant's review application was filed in Court on 9 March 2016. With the third respondent's arbitration award having been handed down on 28 January 2016, the applicant's review application was therefore brought within the 6(six) weeks' time limit as contemplated by Section 145 of the LRA, and is thus properly before Court.

[4] In opposing the review application, the first respondent did not limit its opposition only to the merits of the application. The first respondent specifically raised a defence of peremption, contending that the applicant has acquiesced in the award of the third respondent and it was thus impermissible for the applicant to challenge the award on review.

[5] I will now proceed to consider the applicant's review application, starting with the setting out of the relevant factual background relating to the issues raised by the parties, including the facts relating to the issue of peremption raised by the first respondent.

The relevant background

[6] The applicant commenced employment with the first respondent on 1 September 2010 on a five year fixed term contract of employment. He was appointed as manager financial accounting and reporting. At the time, his remuneration package was R582 795.00 per annum, with no contributions towards any funds.

[7] The applicant contended that despite being initially employed on a fixed term contract of employment, his employment status was later changed in 2014 to that of being a permanent employee, occupying the position of manager financial statements. By 2015, the applicant held the position of senior manager financial accounting and reporting.

[8] The first respondent's case was that the applicant was not a permanent employee, but that he remained a fixed term contract employee, despite the position changes.

[9] Where it came to the termination of employment of the applicant, he was informed in writing by the first respondent on 17 July 2015 that the term of his contract would expire on 31 August 2015. In this regard, the applicant contended that he was dismissed as a result of this termination notice, whilst the first respondent contended that the applicant was never dismissed but his five year fixed term contract of employment simply came to an end.

[10] The case was never about whether the applicant had a reasonable expectation of the renewal of his fixed term contract of employment and was thus dismissed as contemplated by Section 186(1)(b) of the LRA. The applicant's case was that because he was a permanent employee and not a fixed term contract employee, any purported reliance on automatic termination of employment based on a fixed term contract was thus erroneous, and would be a dismissal.

[11] The third respondent, as touched on above, decided this case in favour of the applicant. He relied on a collective agreement relating to conditions of service entered into during 2013, which agreement also involved the first respondent. In terms of this collective agreement, all fixed term appointments in the first respondent, save only for certain specified exceptions, had to be made permanent. The applicant's position did not fall within one of these exceptions. As a result, the third respondent concluded that the applicant was permanently appointed, and this meant that he was dismissed when the first respondent simply sought to rely on the purported automatic termination of his contract of employment.

[12] The third respondent then concluded that this dismissal of the applicant was without reason, that no procedure had been followed, and consequently the dismissal was both substantively and procedurally unfair. Considering that the applicant did not seek reinstatement, what the third respondent then had to do was to decide on appropriate compensation to be afforded to the applicant.

[13] As to the salary the applicant was earning, he produced his final 'normal' payslip, dated 15 July 2015. In terms of this payslip, the applicant earned a salary of R36 566.00, a travel allowance of R15 097.00, a housing allowance of R502.00, a telephone allowance of R1 258.20, and then also what was reflected as an 'additional allowance' of R11 259.18. This gave a total gross monthly remuneration package of R64 682.38.

[14] The third respondent decided to award the applicant 3(three) months' remuneration in compensation. But the third respondent calculated this award based on a monthly salary of R40 432.00 for the applicant, giving a total sum of R121 296.00 in compensation awarded.

[15] Where it comes to the facts relating to the first respondent's peremption case, this was set out in the first respondent answering affidavit. According to the first respondent, the due date for payment of the compensation awarded to the applicant, in terms of the arbitration award, was 9 February 2016. The first respondent complied, without reservation, with the award, and made full payment to the applicant on that date.

[16] Having received the payment, the applicant never sought to contradict receipt of the payment on the basis that he still intended to challenge the arbitration award further, or was dissatisfied with the amount awarded. He retained the payment without any reservation of rights. Even to the point of filing his review application about a month later, the applicant did nothing to contradict or challenge the payment he received.

[17] The applicant also never tendered return of the payment he received. When he filed the review application, he similarly never tendered repayment of the amount paid to him. The applicant kept payment of the compensation he was awarded in terms of the award, and still pursued a review application.

[18] Significantly, and as will be addressed hereunder, the applicant never filed a replying affidavit in order to contradict these averments by the first respondent.

[19] I will now proceed to decide the applicant's review application, starting with the setting out of the test for review.

The test for review

[20] The applicant's review challenge, even though it does not relate to the findings in respect of the substantive and procedural unfairness of his dismissal, still relates to the outcome arrived at by the third respondent as part of his award. An arbitration award clearly has two parts, in the case of a finding that the dismissal of an employee was unfair, the first part being the finding on the merits, so to speak, followed by the second part of consequential relief afforded. The latter part is regulated by Section 193 of the LRA.[2] Thus, and with consequential relief simply being a component of the same award, the same review test applies, as would be the case of any other review challenge relating to the merits of such award.

[21] As such, what the review applicant must show to exist in order to succeed with a review application is firstly that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. But even if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. In what is by now probably the most often quoted judgment in employment law, the Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] articulated the question that must be answered as:

> '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'

[22] Thus, and if the outcome arrived at is nonetheless reasonable, despite any irregularity, error or failure on the part of the arbitrator, that is equally the end of the review application. In order to succeed, there must be an unreasonable

[2] Section 193(1) reads: 'If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal; (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or (c) order the employer to pay compensation to the employee.'

[3] (2007) 28 ILJ 2405 (CC) at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.

outcome. As to when an outcome would be considered to be unreasonable, the Court in *Herholdt v Nedbank Ltd and Another*[4] said:

> '…. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

And in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[5] it was held:

> '…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[23] What is thus envisaged by the reasonableness consideration referred to above, is a determination based on all the evidence and issues before the arbitrator, in order to decide whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[6] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome

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[4] (2013) 34 *ILJ* 2795 (SCA) at para 25.
[5] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.
[6] See *Fidelity Cash Management* (*supra*) at para 102.

arrived at by the arbitrator, as a reasonable outcome.[7] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[8] it was held:

> '…. the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[24] I will now proceed to apply the above review test in deciding the applicant's review application, by firstly identifying the grounds of review raised.

Grounds of review

[25] In order to properly decide a review application, it is also important to identify the grounds of review upon which the application is founded. These grounds must be properly set out and identified in the founding affidavit. A review application can only be decided on the basis of the grounds of review so raised. As was said in *Northam Platinum Ltd v Fganyago NO and Others*[9]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[26] In his review application, the applicant pertinently raised the issue that the third respondent incorrectly determined what the amount of his remuneration was, and only took his basic salary into account. According to the applicant, his total gross monthly salary amounted to R73 992.38, and not R40 432.00 as held by the third respondent to be the case. As such, and according to the applicant, his compensation award was calculated incorrectly.

[27] Where it came to the *quantum* of compensation awarded, the applicant contends that all the third respondent took into account when deciding the issue of compensation was that the applicant had an expensive vehicle and

[7] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[8] (2015) 36 ILJ 1453 (LAC) at para 12.
[9] (2010) 31 ILJ 713 (LC) at para 27.

also had a number of investment properties giving him an income. According to the applicant, the third respondent however did not consider that he had substantial monthly expenses and had not earned a salary since his termination of employment. The applicant also complains that the third respondent failed to consider that the first respondent has 'flagrantly' violated a collective agreement. In short, the applicant considered the *quantum* of compensation awarded to him to be so insufficient, so as to constitute a reviewable irregularity on the part of the third respondent.

[28] In the case of review applications, the grounds of review in the founding affidavit may be supplemented, after the filing of the record of review, by way of a supplementary affidavit.[10] The applicant did not seek to supplement his grounds of review, and on 15 June 2016 filed a notice in terms of Rule 7A(8)(b) that he stood by the notice of motion and founding affidavit. This leaves only the grounds of review in the founding affidavit for consideration.

The issue of peremption

[29] Before considering the applicant's grounds of review, I will first deal with the issue of peremption. As said, this was specifically raised by the first respondent in the answering affidavit, and never disputed by the applicant in a replying affidavit. The fact that the applicant has not disputed what the first respondent has said in the answering affidavit about the issue of peremption, on reply, must mean that the contents of the first respondent's answering affidavit stands as uncontested evidence where it comes to this issue.[11] As said in *Sgt Pepper's Knitwear and Another v SA Clothing and Textile Workers Union and Others*[12], where the Court specifically dealt with a legal dispute having been specifically raised in the respondent's answering affidavit, but no replying affidavit having been filed by the applicant to contradict it:

[10] See Rule 7A(8) of the Labour Court Rules; *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.
[11] Compare *National Union of Mineworkers and Others v Impala Platinum Ltd and Another* (2017) 38 ILJ 1370 (LC) at paras 12 – 13; *FMW Admin Services CC v Stander and Others* (2015) 36 ILJ 1051 (LC) at para 19; *Visagie v Nylsvlei Game Dealers CC and Others* (2015) 36 ILJ 2662 (LC) at para 19; *Lutchman v Pep Stores and Another* (2004) 25 ILJ 1455 (LC) at para 11.
[12] (2012) 33 ILJ 2178 (LC) at paras 14 and 16.

> 'In the absence of any replying affidavits, I am bound by the rule set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*. In other words, I must consider those facts averred in the applicants' affidavits which have been admitted by the respondents, together with the facts alleged by the respondents …'

[30] Therefore, and where it comes to the issue of peremption, the following facts are pertinent: (1) The applicant never indicated any intention to challenge the arbitration award at the outset of receiving the same; (2) the arbitration award stipulated a date for compliance, being 9 February 2016, and this was adhered to by the first respondent; (3) the applicant was paid, and then retained, the compensation as stipulated in the award, without any dispute or protest on his part; (4) it was never indicated prior to, at the time or immediately after the applicant was paid the compensation that he was in any way dissatisfied with the award, nor did he seek to engage the first respondent on this; (5) the applicant was properly assisted by IMATU throughout the proceedings, and it similarly did not raise any dispute in this regard; and (6) the applicant never tendered payment of the compensation paid to him, back to the first respondent, even when and then after filing the review application.

[31] The principles relating to peremption were authoritatively dealt with in *Dabner v SA Railways and Harbours*[13] as follows:

> 'The Rule with regard to peremption is well settled and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced to it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it.'

And recently, the Constitutional Court in *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[14] applied the *ratio* in *Dabner* in the following manner:

[13] 1920 AD 583 per Innes CJ.
[14] (2017) 38 ILJ 97 (CC) at para 26.

> 'Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against. *Dabner* articulates principles that govern peremption very well … The onus to establish peremption would be discharged only when the conduct or communication relied on does 'point indubitably and necessarily to the conclusion' that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order.'

[32] In *National Union of Metalworkers of SA and Others v Fast Freeze*[15] the Court held as follows where it came to the issue of peremption:

> 'If a party to a judgment acquiesces therein, either expressly, or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be perempted, ie he cannot thereafter change his mind and note an appeal. Peremption is an example of the well-known principle that one may not approbate and reprobate, or, to use colloquial expressions, blow hot or cold, or have one's cake and eat it. Peremption also includes elements of the principles of waiver and estoppel.'

The Court then analysed all the authorities relating to this issue and summarized the considerations where it came to this principle in the following manner:[16]

> 'From the above authorities it seems to me that the relevant principles can be summarized as follows:
>
> (a) Where a right to appeal exists, the party desiring to appeal loses the right to appeal where he has acquiesced in the judgment.
>
> (b) Such acquiescence may be express, or implied from the conduct of such party.
>
> (c) Acquiescence by conduct requires an overt act by such party, ie conduct which conveys outwardly to the other party his attitude towards the judgment.

[15] (1992) 13 ILJ 963 (LAC) at 969I – 970A.
[16] Id at 973F – 974C.

(d) The overt act must be consistent with an intention to abide by the judgment, and inconsistent with an intention to appeal against such judgment.

(e) The test is objective. It is the outward manifestation of such party's attitude in relation to the judgment that must be looked at, not his subjective state of mind or intention.

(f) Where there is such overt conduct, a mental reservation or resolve not to acquiesce in the judgment will not avail the party who by his conduct evinces an intention to abide by the judgment.

(g) The state of mind of the party mentally reserving his right to appeal must yield to his conduct which plainly contradicts such an intention.

(h) The court must be satisfied that the conduct in question, when fairly construed, necessarily leads to the conclusion that the party intends abiding by the judgment.

(i) If more than one inference may fairly be drawn from the conduct in question, this will not be sufficient to prove renunciation. The conduct must be unequivocal.

(j) The onus of proving that a party has renounced his right to appeal rests on the party alleging such renunciation.

(k) Voluntary payment, or acceptance of payment, as the case may be, in terms of a judgment, will usually be sufficient to satisfy a court that the party has acquiesced in the judgment.'

[33] Applying the aforesaid summary of considerations in *Fast Freeze*, *in casu*, it is clear that there was never an express acquiescence in the award by the applicant. It would thus have to be a case of implied acquiescence inferred from the conduct of the applicant. Importantly in this instance, the first respondent voluntary made payment in terms of the award which was accepted without reservation by the applicant. As said in *Fast Freeze*, this would normally be sufficient to satisfy a conclusion that the applicant has acquiesced.

[34] In addition, there are further considerations supporting acquiescence by the applicant. These considerations are that the applicant never expressed any reservations he may have about the award, to the first respondent. Whatever he may have been thinking in his own mind about the award, this simply does not matter unless he conveyed it to the first respondent. Then, and when the applicant received the payment, there is equally no reaction. Simply put, he does not tell the first respondent that he does not want the payment because he is unhappy with the award, he is going to challenge the award, and it can have its money back. All that the first respondent can see is compliance on its part, followed by silence from the applicant. Weeks pass without any contradiction from the applicant, and then a review application lands. Finally, and despite filing this review application, the applicant still keeps the money and does not tender paying it back. In my view, it is no wonder the first respondent cried peremption.

[35] Objectively considered, the kind of conduct of the applicant as summarized above, especially considering that he was assisted by IMATU, expressed an outward manifestation of acquiescence in the award. It is reasonable to infer that the applicant had no intention to challenge the award, and only had a change of heart much later. But by then it simply was too late. And even then this change of heart is not without retaining some elements of acquiescence, in that the applicant keeps the payment in terms of the award and does not tender to pay it back. As said in *Fast Freeze*:[17]

> '… Appellants knew their rights. They knew they had the right to appeal. This is common cause on the papers. They knew they had the right to receive payment in terms of the judgment, and they did so receive payment. What they did not know, or may not have realized, was the legal effect of exercising one of these two options. But that is the situation that arises in every case where it is alleged that a right of appeal has been renounced.'

[36] Although the Courts in *Dabner*, *SA Revenue Service* and *Fast Freeze* dealt with peremption where it comes to the right to appeal, the same principle applies equally to the right to review an arbitration award issued in terms of the dispute resolution processes under the LRA. After all, and in the lay tongue, a

[17] Id at 974J – 975B.

review of such an award could be described to be an appeal of it.[18] For example, and in *National Education Health and Allied Workers Union on behalf of Tumana v Commission for Conciliation, Mediation and Arbitration and Others,*[19] the Court dealt with the following scenario:

> 'In this case the applicant expressed its intention to challenge the arbitration award by launching a review application. However, three days after an order dismissing the applicant's claim owing to the delay in its prosecution was granted, Maseti addressed a letter to Kirchmann telling him to instruct his client to comply with the arbitration award by paying the applicant the amount of R95,401 that the third respondent was ordered to pay by the second respondent. In the letter it is unequivocally stated that the matter was finalized by the Labour Court on 3 March 2011. By accepting that the matter was finalized on 3 March 2011 the applicant expressly communicated an intention not to contest the decision of 3 March 2011. Having accepted that the matter was finalized the applicant is precluded from changing its mind and seeking to note an appeal. When a matter is finalized it comes to an end and may therefore not be pursued.'

[37] In dealing with an application for a cross review, the Court in *Jusayo v Mudau NO and Others*[20] said the following in dismissing the cross review:

> '…. Its indicated and unreserved intention to comply with the order against it to pay the calculated amount of compensation to the applicant in compliance with the first respondent's order, precluded absolutely its right subsequently to contest the award in terms of which that order was made.'

[38] This Court in *Balasana v Motor Bargaining Council and Others*[21], *Venture Otto SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*[22] and *Bidair Services (Pty) Ltd v Mbhele NO and Others*[23] also specifically dealt with peremption in the case of review applications, and accepted that the principle indeed applied to review applications. In

[18] See for example *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others* (2017) 38 ILJ 527 (CC) at para 85, where Froneman J said: '…Arbitration under the LRA is merely adjudication without a right of appeal. Instead of a right of appeal only a right to review exists.'
[19] (2012) 33 ILJ 666 (LC) at para 10.
[20] (2008) 29 ILJ 2953 (LC) at para 17.
[21] (2011) 32 ILJ 297 (LC) at para 11.
[22] (2005) 26 ILJ 349 (LC) at 352.
[23] (2016) 37 ILJ 1894 (LC) at para 40.

circumstances comparable to the matter *in casu*, and which in my view would equally now apply, the Court in *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and Others*[24] held:

> '… I have little hesitation in concluding that the required threshold in establishing the existence of peremption has been satisfied in casu. The fact is that the applicant party, which includes a well-established and experienced trade union, knew what its rights were. Whatever its subjective intentions may have been, this is simply irrelevant as these intentions were never conveyed to the first respondent until long after the award had unconditionally been complied with. Without any challenge or reservation of rights being recorded beforehand, the individual applicant accepted reinstatement and the compensation payment in terms of the award. As stated, the first respondent fully complied with the award without condition. All of this is followed by a review application that is not even brought in time, but some two months after being due. Accordingly, the challenge to the award by the applicant came too late. The award had been acquiesced in. The benefits in terms of the award had been accepted without reservation. There is simply nothing in the conduct of the applicant union and the individual applicant which could feasibly indicate any other intention than acquiescing in the award.'

[39] I am accordingly satisfied that the first respondent's case of peremption is a good one. The first respondent has satisfied the *onus* that rested on it to convince this Court that the applicant exhibited outward conduct of the kind indicating that he had acquiesced in the third respondent's award, and had no intention of challenging it. He clearly had a change of heart later, but by then it was too late. He cannot be allowed to blow both hot and cold, and should be held to his initial chosen course of action.

[40] But I say all of the above with one important reservation. This relates to the fact that the applicant's remuneration was in my view clearly completely incorrectly calculated by the first respondent. Whilst I accept that peremption must mean that the applicant is bound to the *quantum* of 3(three) months' remuneration awarded by the third respondent, it would in my view simply be a

[24] (2015) 36 ILJ 232 (LC) at para 46.

gross injustice to calculate this amount in compensation so patently incorrectly, and then allow it to stand. In terms of its general supervisory duty of arbitration proceedings in the CCMA and the bargaining councils,[25] this Court is duty bound to intervene where a gross injustice is apparent in those proceedings. In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others*[26] the Court said:

> '… In my view, … arbitration proceedings must be lawful, reasonable and procedurally fair, and that the Labour Court, in exercising its powers in terms of s 145 of the LRA, is duty bound to supervise the CCMA and the exercise of its arbitration functions, so as to ensure that this happens and this is indeed the case …'

[41] The payment of compensation is regulated by Section 194(1) of the LRA.[27] It is clear that this Section contemplates that compensation is based on the employee's remuneration at the time of dismissal. In turn, 'remuneration' is defined in the LRA[28] as meaning 'any payment in money or in kind, or both in money and in kind'. The BCEA[29] has an identical definition. In terms of Section 35(5) of the BCEA, the Minister of Labour may by notice determine whether a particular category of payment, whether in money or in kind, forms part of an employee's remuneration. This was indeed done in 2003,[30] and it has been determined that an employee's remuneration would include a housing or accommodation allowance as well as a car allowance, and any other cash payment not specifically excluded in the schedule to the notice. There is no reason why these same considerations should not be equally applied for the purposes of deciding what is 'remuneration' where it comes to compensation awarded under Section 194(1) of the LRA.

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[25] See *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) at para 21; *National Union of Metalworkers of SA and Another v Wainwright NO and Others* (2015) 36 ILJ 2097 (LC) at para 57; *Chabalala v Metal and Engineering Industries Bargaining Council and Others* (2014) 35 *ILJ* 1546 (LC) at para 13; *Pep Stores (Pty) Ltd v Laka NO and Others* (1998) 19 *ILJ* 1534 (LC).at paras 23 – 25; *Deutsch v Pinto and Another* (1997) 18 *ILJ* 1008 (LC) at 1011 and 1018.

[26] (2013) 34 ILJ 2347 (LC) at para 37.

[27] The Section reads: 'The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal'.

[28] Section 213.

[29] Basic Conditions of Employment Act 75 of 1997, Section 1.

[30] By way of GN 691 in *GG* 24889 of 23 May 2003.

[42] The applicant's payslip of July 2015 was never in dispute. It clearly conveys what the applicant's remuneration consists of. The allowances reflected in the payslip would be the kind of allowances that are considered to be part of the applicant's normal monthly remuneration. Simply applying this payslip, which is as easy as it gets, the applicant's monthly remuneration where it comes to awarding compensation, would be R64 682.38.[31] The applicant's contention in the founding affidavit that his monthly remuneration was R73 992.38 is unsupported by any documents or evidence, and I shall have no regard to it. What is however important is that the first respondent, in its answering affidavit, in fact confirms the amounts as reflected in the July 2015 payslip of the applicant as being correct. It is of course so that this remuneration is the applicant's gross remuneration, prior to deduction.

[43] I cannot comprehend where the third respondent got the amount of R40 432.00 from. It does not match anything that I could find in the record. It is irreconcilable with the payslips that was before him. And if this amount was somehow considered by the third respondent to be a net payment, this was inappropriate and incorrect, as compensation is awarded to an employee in terms of the LRA on the basis of gross remuneration, and it is up to the employer to first make all the requisite statutory deductions before paying the compensation over to the employee.[32] But the first respondent itself clearly did not consider this amount awarded to be a net amount, considering that it deducted taxation of R45 357.96 from the amount of R121 296.00 awarded in terms of the award, before making payment to the applicant.

[44] In my view, the applicant should enjoy the fruits of a correctly calculated 3(three) months' remuneration award as compensation, which is what he got. This means it must be 3(three) months based on his actual remuneration, and not some arbitrary amount the third respondent in effect plucked out of the air. The 3(three) months remuneration in compensation should have been calculated on the basis of a monthly remuneration of R64 682.38, giving a total

[31] The payslip includes a once off deduction of R1 202.17 for short time, which must obviously be counted back.
[32] See *Eckhard v Filpro Industrial Filters (Pty) Ltd and Others* (1999) 20 ILJ 2043 (LC) at para 13; *Barnard v Shellard Media (Pty) Ltd* (2000) 21 ILJ 2248 (LC) *at para 16; Naidoo v Careways Group (Pty) Ltd and Another* (2014) 35 ILJ 181 (LC) at paras 14 – 15; *Themba v Mintroad Sawmills (Pty) Ltd* (2015) 36 ILJ 1355 (LC) at para 60.

of R194 047.14. In such circumstances, the calculation of the third respondent simply cannot be allowed to stand, even if I apply peremption, and I will deal with this further in the conclusion I have reached at the end of this judgment.

[45] For the same of completeness, and even if I am wrong in my decision where it comes to the issue of peremption, I am nonetheless of the view that there is simply no merit in the applicant's review challenge of the *quantum* of compensation decided on by the third respondent, for the reasons I will next deal with below.

The compensation award

[46] As said above, the third respondent afforded the applicant 3(three) months' remuneration as compensatory relief. Considering whether this determination by the third respondent is open to successful challenge on review, I will first set out the legal principles applicable when an arbitrator decides on the *quantum* of compensation to be awarded. In *SA Revenue Service*[33] the Court said:

> 'To compensate or not to compensate and if compensation is to be awarded for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of s 194(1) of the LRA …'

[47] It is thus clear that where it comes to the awarding of compensation, the arbitrator is called on to exercise a discretion. The normal basis upon which this discretion is to be exercised is enunciated in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others*[34], as thus:

> 'The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

[33] (supra) at para 50.
[34] (2007) 28 *ILJ* 2238 (LAC) at para 30.

[48] However, and central to any compensation award would be what is overall considered just and equitable in all circumstances established by the facts of that particular matter. As said in *Kemp t/a Centralmed v Rawlins*[35]:

> '… The court has to consider all the relevant circumstances and make such order as it deems fair to both parties in the light of everything ...'

Further, the concept of 'considering everything' as referred to in *Rawlins* must mean a consideration also of the scope and extent of the loss suffered by the employee, the nature and extent of the deviation from what would normally be considered to be fair, whether there may exist any justification for the conduct of any of the parties, any *mala fides* on the part of the employer, and the impact of the sum awarded, on the employer or its business.[36] Also, compensation for substantive unfairness would normally attract a larger amount of compensation than would the case with a dismissal that is only procedurally unfair.

[49] It must also be remembered that an award of compensation in the case of a finding of procedural unfairness includes a *solatium* as a result of the infringement of the employee's right to procedural fairness. In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*[37] the Court held:

> 'The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss.'

[50] More recently, and in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[38] the Labour Appeal Court considered the objective of compensatory relief under the LRA, and said:

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[35] (2009) 30 *ILJ* 2677 (LAC) at para 27. The SCA in *Rawlins v Kemp t/a Centralmed* (2010) 31 *ILJ* 2325 (SCA) upheld the findings of the LAC.
[36] See *Rawlins* (*supra*) at para 20; *SA Revenue Service* (*supra*) at para 52; *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 *ILJ* 974 (LAC).
[37] (1999) 20 ILJ 89 (LAC) at para 41.
[38] (2015) 36 ILJ 2989 (LAC) at para 23.

> '… it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a solatium and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated. The solatium must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising the employer. It is not however a token amount hence the need for it to be 'just and equitable' and to this end salary is used as one of the tools to determine what is 'just and equitable''

[51] Finally, and because an arbitrator when awarding compensation exercises a discretion, this discretion should not be too readily or easily interfered with by this Court on review. In *Rawlins,*[39] the Court specifically said the following where it comes to what must be considered when deciding whether such a discretion should be interfered with:

> 'From the above it is clear that in the case of a narrow discretion - that is a situation where the tribunal or court has available to it a number of courses from which to choose - its decision can only be interfered with by a court of appeal on very limited grounds such as where the tribunal or court-
>
> (a) did not exercise a judicial discretion; or
>
> (b) exercised its discretion capriciously; or
>
> (c) exercised its discretion upon a wrong principle; or
>
> (d) has not brought its unbiased judgment to bear on the question; or
>
> (e) has not acted for substantial reason (see *Ex parte Neethling and others* 1951 (4) SA 331 (A) at 335); or
>
> (f) has misconducted itself on the facts (Constitutional Court judgment in the *National Coalition for Gay and Lesbian Equality* case at para 11); or
>
> (g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles (Constitutional Court judgment in *National Coalition for Gay & Lesbian Equality* at para 11).'

[39] (*supra*) at para 21. See also *Media Workers Association of SA and Others v Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A) at 1397I-1398B.

[52] In specifically dealing with the discretion exercised by an arbitrator in awarding compensation, the Court in *Kukard v GKD Delkor (Pty) Ltd*[40] held:

> '… the court's power to interfere with the quantum of compensation awarded by an arbitrator under s 194(1) of the LRA is circumscribed and can only be interfered with on the narrow grounds that the arbitrator exercised his or her discretion capriciously, or upon the wrong principle, or with bias, or without reason or that she adopted a wrong approach. In the absence of one of these grounds, this court has no power to interfere with the quantum of compensation awarded by the commissioner. … It is, therefore, for Delkor to persuade this court that the quantum of compensation awarded by the commissioner may be impugned on one of the narrow grounds referred to above. …'

[53] Turning back to the facts *in casu*, and then applying the aforesaid legal principles, the first difficulty the applicant faces is that he has completely failed to make out a proper case that the discretion exercised by the third respondent was in any way *mala fide*, or capricious, or founded on wrong principle. Even if the third respondent was wrong in his approach, that does not make his discretion assailable on review. The best the applicant could come up with in the founding affidavit is that the third respondent placed too much emphasis on factors that would reduce the *quantum* of compensation, and too little emphasis on all those factors which established his prejudice and thus increase compensation. Even if this is so, it falls far short of making out a case on what has been termed to be the 'narrow basis' justifying interference. In any event, the factors the third respondent did consider, he was entitled to consider, and he did not apply incorrect principles. That should be the end of it for the applicant, in seeking to challenge the *quantum* of compensation awarded to him.

[54] There is nothing to indicate that the third respondent did not exercise his discretion where it came to the *quantum* of compensation in a judicial manner. He accepted that the applicant did not suffer the kind of hardship he was complaining about. He further accepted that the applicant has an alternative source of income. He considered the applicant's age, length of service and

[40] (2015) 36 ILJ 640 (LAC) at para 35. See also *Coates Brothers Ltd v Shanker and Others* (2003) 24 ILJ 2284 (LAC) at para 5.

that no inquiry was held before dismissal. Overall, these are all valid considerations. I must confess that having read the record, the applicant certainly has a flair for the dramatic when embellishing his alleged prejudice. Under cross examination, he was unable to truthfully explain how he could maintain his high living standards if he was suffering the kind of hardship he alleged. He did not explain what steps he took to obtain alternative employment. His CV was also in the bundle, and I find it hard to believe that a person as qualified and experienced as the applicant is, would not be able to readily find an alternative source of income. I also do not believe the first respondent was *mala fide*, as it genuinely simply sought to apply what it thought was a fixed term contract of employment, and was in essence scuppered by the application of a collective agreement which had a long and complex history attached to it. Overall, I consider the *quantum* of compensation awarded to the applicant to be, as said in *Rawlins*, fair in the 'light of everything'. The third respondent's determination is thus unassailable on review.

Conclusion

[55] In sum, and based on what is set out above, the applicant's review application, where it comes to the *quantum* of 3(three) months' remuneration in compensation awarded to him, must fail for two reasons. The first is that this is a case where peremption properly applies, and the applicant has acquiesced in the award. The second is that the applicant has in any event failed to make out a case that the third respondent has exercised his discretion when deciding on the *quantum* of compensation to be awarded, in a manner that would justify interference on review.

[56] But the applicant also, as I discussed above, properly and justifiably challenged the issue of the calculation of the compensation awarded to him. In this regard, the amount in remuneration relied on by the third respondent in making the calculation is simply unsustainable on the basis of anything that was before him. It is an injustice that must be remedied. The first respondent has paid the applicant the incorrectly calculated compensation of R121 296.00 (after the deduction of taxation). But, properly considered, what the applicant

should have been paid is R194 047.14. This leaves a balance of R72 751.14. There is no reason why the first respondent should not pay such balance to the applicant, which in my view is proper compliance with the award. This amount would similarly be subject to the normal statutory deductions.

[57] I thus conclude that save for making an order to the effect that the applicant be paid the balance of the compensation awarded to him (as properly calculated), the applicant's review application falls to be dismissed.

[58] In dealing with the issue of costs, both parties asked for an award of costs. I however do not believe that this is a case where any costs order is justified. The applicant, all said, at least had some cause in justifying him bringing the application. Even though he was mostly unsuccessful, I do not think it is fair that he should be burdened with a costs order, especially considering that he was successful at arbitration and was, in the end, unfairly dismissed. I also consider that the pertinent issues were properly narrowed on review. In exercising my wide discretion I have in terms of the provisions of Sections 162(1) and (2) of the LRA, where it comes to the issue of costs, I shall make no order as to costs.

Order

[59] In the premises, I make the following order:

1. The first respondent is ordered to pay the applicant the amount of R72 751.14 (seventy two thousand seven hundred and fifty one Rand fourteen Cents) within 10(ten) days of date of this order.

2. Save for the order in paragraph 1 above, the applicant's review application is dismissed.

3. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv D Chamisa
Instructed by:	Dech – Legal & Associates
For the First Respondent:	Mr R Brown of Harold Gie Attorneys