IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN DURBAN)

Reportable

CASE NO. D1101/13

In the matter between:

TYRONE NEILMORGAN HARRIS	**Applicant**
and	
MSUNDUZI MUNICIPALITY	**First Respondent**
COMMISSIONER V SONI N.O.	**Second Respondent**
THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC)	**Third Respondent**

Heard: 01 February 2017

Delivered: 20 April 2017

Summary: Review of compensatory award – travelling allowance - irregularities or errors in relation to the facts or issues may produce an unreasonable outcome – compensation in terms of s194 to be morally right and fair, if not award reviewable - misdirection committed by commissioner - the result is compensation which is way out of proportion with the amount spent by the Applicant for work purposes - award reviewed and corrected.

JUDGMENT

Labour Court

CELE J

Introduction

[1] This is an application for the review and correction of the arbitration award issued in this matter by the Second Respondent and it is based on section 145 (2) of the Labour Relations Act.[1] In terms of the award, the Second Respondent found that the First Respondent committed an unfair labour practice against the Applicant and awarded compensation to the Applicant in the amount of R25 146-00. The Applicant does not seek the review of the entire award, but seeks to review the finding of the Second Respondent relating to the quantum of compensation awarded and her failure to award legal costs of the arbitration to the Applicant. The review application was filed late. Condonation was sought for such lateness and it was granted at the hearing of the application. The First Respondent belatedly opposed the review application and sought condonation for such lateness. Condonation was also granted at the hearing of the matter.

Factual Background

[2] Most of the facts in this matter remained common cause between the parties. The Applicant was in the employment of the First Respondent since 1 December 2003 in the position of a Science Inspector earning R12 000-00 per month at times material to this matter. His duties entailed the policing of the Municipal area

[1]Act Number 66 of 1995, as amended (the LRA).

Labour Court

to ensure compliance with municipal by-laws. He had therefore to do a lot of field work, for instance by visiting private properties. To that end he was furnished with a council motor vehicle to use for such travelling and he kept a logbook registering monthly kilometres he travelled. Out of the regular use of the council motor vehicle its condition deteriorated to the point of being not road worthy. He reported the poor condition of this motor vehicle to his supervisor Mr L Muller and the motor vehicle was finally taken out of the road sometime in October 2007.

[3] The First Respondent had a locomotion policy scheme for its employees with three facets. One of those was the running travel allowance with acronym RTA, in terms of which employees could then be reimbursed for the cost of the use of their motor vehicles for work purposes. In the absence of a council motor vehicle the Applicant said that he used his private motor vehicle for work purposes from October 2007 onwards. In February 2010 the Applicant discussed with Mr Muller about him buying his motor vehicle, use it for work purposes and claim under the RTA. Mr Muller agreed with the proposal and to that extent issues a letter to the Applicant to facilitate the purchasing of that motor vehicle as it disclosed that if he bought it he would be entitled to the locomotion allowance. He bought himself a Nissan bakkie which he said in evidence he used for work purposes.

[4] On 16 February 2010 the Applicant completed and submitted his application forms for the locomotion allowance and handed them to Mr Muller who recommended the granting of the allowance and passed the application forms on

Labour Court

to Mr Vishad Jadoo, a clerk in Mr Muller's section. Mr Jadoo made copies of Applicant's mileage book and transmitted the application with copies of the mileage to Ms Roshni Padayachee in the Finance Department for further processing. Ms Padayachee processed the application and forwarded it to the department of internal audit who were to check and if satisfied that all requirements were complied with, would then sign the application and return it to Ms Padayachee for onward transmission to the Chief Financial Officer (CFO) for final approval authorizing the Pay Office to pay a claim in terms of that allowance.

[5] Once the application was in the department of internal audit it was found that all application supporting schedules were attached to the application except the 6 months mileage information required for the approval of the allowance and a query was noted. What then was required was to obtain the 6 months mileage. In the event such information for whatever reason could not be furnished, a written motivation had to be furnished by the line manager, Mr Muller and a Strategic Manager. In the instant case Mr Muller had supported the application by recommending that the payment of the allowance be authorized.

[6] Because of the query raised by internal auditors the payment of the allowance was never authorized. A stalemate was reached as the Applicant, supported by Mr Muller contended that the 6 months mileage had been supplied and attached to the application but Ms Padayachee disputed the assertion. The Applicant,

Labour Court

aggrieved by the turn of events, lodged a grievance and when it could not successfully be resolved, he referred an unfair labour practice dispute relating to the provision of benefits for conciliation and later for arbitration.

Arbitration

[7] The First Respondent objected to the jurisdiction of the third Respondent by contending that the participation in the travelling allowance was not a benefit as envisaged in section 186 (2) (a) of the LRA. The submission was that in terms of the allowance, employees were reimbursed for the cost of the use of their motor vehicles for work purposes and that they had to meet the set requirements of the policy. Relying on Apollo Tyres South Africa (Pty) (Ltd) v CCMA & Others,[2] the Second Respondent correctly dismissed the point *in limine* raised and found that the transport allowance was a benefit as envisaged in the LRA.

[8] Essentially two factual disputes were contested by the parties. The first turned on whether the Applicant was at all material times supplied with a council motor vehicle to use and if so, whether he was entitled to claim the allowance. The second issue was whether the 6 months mileage records were submitted as part of the application supporting schedules. The first issue was easily resolved as witnesses of the First Respondent conceded that the Applicant qualified for the allowance. The 6 months mileage records issue was resolved in favour of the

[2] [2013] 5 BLLR 434 (LAC).

Labour Court

Applicant. The probabilities of the matter favoured that approach. If the mileage documents were not supplied at all, Ms Padayachee would be the first to query the application. She did not and instead she forwarded the application for further processing by the internal audit department. These documents must have been lost between her office and that of the internal audit. The First Respondent has not even filed a counter-review application and therefore these findings are not being challenged. As already alluded to, the Applicant only seeks to review the findings of the Second Respondent relating to the quantum of compensation awarded and the failure of the Second Respondent to award legal costs of the arbitration to the Applicant.

The computation of compensation

[9] Evidence of the Applicant is that had the First Respondent approved the Applicant's application for a travel allowance in 2010, the Applicant would have been entitled to claim a reimbursement of his travel costs at the rate of R4-191 per kilometer traveled, or R4 191-00 per 1000 km traveled. As confirmed by his immediate supervisor, Mr Muller Applicant would have traveled in excess of the set minimum of 300 km each month for the purposes of business travel. The Second Respondent found that it was undisputed that the Applicant would have travelled beyond the average mileage requirement. In terms of the policy the employee would be paid for the actual kilometres travelled, if such was less than 1000 km in a month. If the distance travelled was more than 1000 km per month,

Labour Court

1000 km would be paid for as the maximum.

[10] The total number of leave days taken by the Applicant from 01 April 2010 to 27 August 2013 as provided at arbitration by the First Respondent amounted to 267 days. After removing non-work days (public holidays and weekends) in the period 01 April 2010 to 27 August 2013, the number of work days left was 875. The Applicant said that he would have been present at work and traveling for work purposes for a period of 875 days – 267 days = 608 days. In order to calculate the total allowance owing to the Applicant, the Applicant said one is required to multiply the total number of days by the travel allowance per day. The average number of working days in a month in the Local Government Sector is 21.74.[3] The Applicant said that the total daily cost of the monthly allowance was R4 191-00 divided by 21.74, which amounts to R192-78 per day. Therefore, the total allowance owed to him, he said, amounted to 608 X R192-78 = R117 210-74. This calculation was provided to the arbitrator by agreement between the parties, and was contained in the Applicant's Heads at Arbitration.

[11] The Applicant submitted that the calculation of R117 210-74 was clear, fairly simple to understand and could be considered to be the loss suffered by the Applicant at the hands of the First Respondent in terms of the unfair labour practice. He averred that it was to be expected that compensation which was just and equitable, would take this calculation into account above everything else. He

[3] (South African Local Government Bargaining Council: Main Collective Agreement)

Labour Court

said that nothing would be more just and equitable than attempting to place the Applicant in the financial position he would have been in had he not been unfairly treated. Instead, the arbitrator awarded compensation in the amount of R25 146-00, being the equivalent of 6-months of travel allowance. The submission was that compensation was arrived at arbitrarily, because there is no rational basis for it, particularly after the calculation above was submitted for the consideration of the arbitrator. There is no evidence tendered by the First Respondent which explained a different basis for calculation as the position taken was that the Applicant was not entitled to any payment. The arbitrator did not raise any issues with the calculation itself, but instead raised other issues. As correctly summarized by the Applicant, the Second Respondent, inter alia, found that:

1 The Applicant was assaulted by a senior manager in his department as a result of the fact that he was reluctant to utilize his own, unsubsidized, transport to perform his duties.

2 The Applicant was forced to use his own vehicle, which rendered him out of pocket.

3 Labour law was based on social justice and there is no justice if the Applicant is not compensated.

4 She had to consider compensation on the basis of the unfairness

Labour Court

committed and the amount that he would have received on a monthly basis saying that: "Advocate Moodley estimated the amount to be R117 210-00, after taking into account all forms of leave and non-attendance at work."[4]

5 She was guided by the breakdown furnished by Advocate Moodley.

6 The Applicant used his own vehicle for many years, which enriched the Respondent and impoverished him.

7. She could not grant compensation to be in line with the payment that the Applicant would have received, as that calculation was in excess of the statutory 12-month period.

8. She found that 6-month's compensation based on his average allowance would be fair, in considering the fact that the Applicant sometimes used the Respondent's vehicle and stayed away due to illness.

9. In any event, compensation was vastly different from a reimbursement claim.

10. She did not believe that it is fair to award the maximum compensation, as the Applicant was not fault-free. If at any stage he took the initiative to

[4] See paragraph 54 of the award.

Labour Court

keep a proper logbook, he would have been entitled to back pay of the allowance.

[12] The Applicant averred that the Second Respondent committed a gross irregularity or misconduct in that she:

- Wrongly believed that the quantum of compensation of R117 210 claimed by the Applicant exceeded the salary limit of 12 months when it was common cause that the Applicant earned R12 000 per month, equal to 144 000 per annum;

- Held that the Applicant sometimes used the council vehicle and stayed away due to illness when in fact there was no evidence that the Applicant used council vehicle at any time from 2010, instead there is evidence that he did not;

- Considered sick leave taken by the Applicant when such sick leave taken had already been factored in the figures given to her and therefore cause sick leave period to be deducted twice;

- Was at odds with her earlier finding when she stated that the Applicant ought to have kept a logbook. She had already correctly stated that in any event, the reason that the Applicant did not keep the travel logbook was because his travel allowance was never approved. He was not being obstructive or uncooperative.

[13] According to the First Respondent the decision of the Second Respondent was not reviewable essentially on the bases that:

Labour Court

- ❖ The decision is not obviously wrong, as even if there are alternative decisions which the Second Respondent could have made which would have been reasonable, the decision which the Second Respondent did arrive at is not outside the range of reasonableness;

- ❖ The Second Respondent, in determining the issues before her, was not determining a question of law, but was called on to make a decision involving a judicial discretion. As such, the Second Respondent was determining a question which involved the determination of what is right, just, equitable and reasonable. She accordingly was called upon to exercise a moral or value judgement;

- ❖ There is no error or misdirection on the part of the Commissioner which caused the unsuccessful party to lose the arbitration. The arbitrator did not misconceive the nature of the enquiry, nor can it be said that she committed any material error or irregularity in relation to the result of the arbitration;

- ❖ The arbitrator correctly understood the nature of the enquiry which she was required to undertake. The arbitrator was confronted with a situation in which she had to make the best of the material which was available to her. It is apparent that the arbitrator approached the situation correctly.

Labour Court

Evaluation

[14] The law governing the test for review is trite. As set out in *Sidumo and another v*

Rustenberg Platinum Mines Ltd and others[5] the Constitutional Court held that:

"[106] …. Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse section 145 of the LRA.

[107] The reasonableness standard was dealt with in *Bato Star*. In the context of section 6(2) (h) of PAJA 3 of 2000, O`Regan J said the following :"(A) n administrative decision will be reviewable if, in Lord Cooke`s words, it is one that a reasonable decision-maker could not reach".

[108] This Court recognised that scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny. However, the distinction between appeals and reviews continues to be significant.

[109] Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge`s own opinions. "This court in *Bato Star* recognised that danger. A judge`s task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution".

[5] (2007) 28 ILJ 2405 (CC).

Labour Court

[15] The test for review is then whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach. In *Fidelity Cash Management Service v CCMA*,[6] per Zondo JP (as he then was) at paragraph 102, the Labour Appeal Court stated in relation to the Sidumo test:

> "…there can be no doubt now under Sidumo that the reasonableness or otherwise of a commissioner's decision does not depend – at least solely – upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account."

[16] The threshold as to when a decision might be set aside on review was dealt with by Murphy AJA in *Head of Department of Education v Mofokeng and others*,[7] a decision relied on by Mr Dutton for the First Respondent, where it was held that:

> "Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result."…[8]

[17] Clearly therefore, irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome. With all these legal principles referred to above in mind, the application has now to be considered. In this application Court has to deal with a question of judicial

[6] (2008) 29 ILJ 964 (LAC) para 102.
[7] (2015) 36 ILJ 2802 (LAC) (Mofokeng)
[8] At para 33.

Labour Court

discretion as opposed to one of law as the Applicant only takes issue with the quantum of the compensation awarded by the Second Respondent to him and the failure to award legal costs in his favour. This involves issues as to what is right, just, equitable or reasonable, except so far as determined by law. In terms of section 194 (4) of the LRA compensation granted by an arbitrator must be just and equitable in all the circumstances, but must not be more than the equivalent of 12-month's remuneration of the employee. As correctly submitted by the Applicant and according to the Oxford Dictionary, the word "just" means "morally right or fair". The same dictionary defines the word "equitable" as "fair and impartial". Therefore, the phrase used by the legislature in section194 (4) of the LRA must mean that an arbitrator must award compensation which is morally right and fair. Should an arbitrator not award compensation on this basis, such an award might therefore be reviewable on the basis that no other reasonable arbitrator could have made such an award.

[18] The Second Respondent appears, as contended by Mr Moodley, appearing for the Applicant, to have relied on the calculation provided to her by the Applicant to arrive at the amount of R25 160-00 (21.74 days X 6 months X R192-78 = R25 146-22). She simply used the calculation as correct, but reduced the period of the loss from 608 days to 6 months, or 130 days. This indeed does imply that she had no problem with the calculation, by which she admitted she was guided, but failed to extend the period of the loss suffered by the Applicant to more than 6 months. In fact the period of loss was from 01 April 2010 to 27 August 2013, a period of 41 months. The R25 160-00 she awarded as compensation is 79% less than the estimate provided to her by the Applicant.

[19] In terms of section 194 of the LRA the highest amount of compensation she could award is twelve months of his salary, which is R144 000-00. Six months of that compensation is R72 000-00. The Commissioner committed no defect when she used the formula for the determination of the allowance payable but clearly

Labour Court

misdirected herself when she considered the applicable perimeters. The result of that misdirection was an award which was way out of proportion with the amount spent by the Applicant for work purposes. The R25 610-00 was clearly out of kilter when compared with the amount of the undue enrichment in favour of the First Respondent for services rendered. The second consideration relates to the issue of the sick leave. Again here, the Commissioner allowed a deduction of the sick leave twice with no justifiable reason. She clearly committed an arithmetic error which had serious effect on the computation of a fair and just amount of compensation.

[20] On the issue that the Applicant sometimes used the council vehicle, the Commissioner was faced with two contradicting versions. According to the Applicant he never used a council vehicle in 2010 and yet according to Mr Galus Rangan, the Pool Controller, the Applicant was provided with a pool vehicle. The Commissioner had the duty to resolve this disparity in evidence. She found the Applicant to have been an honest witness whose version found support in that of his line manager. The probabilities favoured the acceptance of the version of the Applicant, taking also into consideration that tussle he was involved in with one of the other managers who forced him to get on with his duties.

[21] There is then the issue of having to keep a mileage record. What the Commissioner first did, in my view properly so, was to determine whether the Applicant had any legal duty to keep a record of mileage he travelled and she found that he did not have to as the allowance had to been approved for him. The Commissioner had then to consider evidence of advice given by Mr Muller to the Applicant. The Applicant was advised to keep a record of kilometres he had travelled for work purposes, if he was later to claim for the same. That was sound advice as it would have formulated real or direct evidence to calculate the extent of his loss. The failure to heed that advice had the effect that circumstantial evidence became necessary to compute his claim. I am unable to find any

Labour Court

misdirection or fault on this way of reasoning.

[22] In conclusion, the Applicant has successfully demonstrated that the basis for the computation of his compensation was erroneously done resulting in an unfair and unjust award. The claim is for expenses that were actually incurred in the execution of council work. Compensation to be fair and just should come close to the amount spent by the Applicant, even when one takes into account a failure to keep the actual record. While Mr Muller spoke of 1000.00 km that the Applicant could have travelled, he did not know, nor could he have known the exact distance. That explains his reference to figures such as 600 to 800 km per month. I am of the view that had the Second Respondent not committed the identified defects she would most probably have found that three quarters of the claimed amount was in the circumstances just and fair. That amount comes to R87 908, when rounded up. In a matter where most of the evidence favoured the Applicant throughout the arbitration hearing, it is difficult to understand why the costs order should not have followed the results. In this application as well, I see no reason why the costs order should not be determined by the results of the application.

[23] I therefore issue the order in the following terms:

1. Paragraph 2 of the arbitration award in this matter is reviewed and corrected to read: The Applicant is entitled to compensation in the amount of R87 908 to be paid to him by the First Respondent.

2. The First Respondent is ordered to pay all expenses incurred in the arbitration hearing of this matter.

3. The first respondent is ordered to pay costs of this application.

Labour Court

_____

Cele J.

Judge of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANT: Adv. S Moodley

INSTRUCTED BY Narain Naidoo and Associates.

FOR THE FIRST RESPONDENT: Adv. L T Dutton

INSTRUCTED BY Mdledle Incorporated Attorneys.

Labour Court