IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J2106-15

In the matter between:

DARREN SAMPSON **Applicant**

And

SOUTH AFRICAN POST OFFICE SOC LIMITED **Respondent**

Heard: **24 November 2016**

Delivered: **10 May 2017**

Summary: Section 188A of Labour Relations Act, 1995 – consequence of a court order setting aside a dismissal award and ordering a rehearing of the disciplinary matter - *status quo ante* restored - order revives retrospectively the contract of employment - employee reverts to his status as an employee on precautionary suspension - once the dismissal is reviewed and set aside, it cannot result in a dismissal remaining in force - the new arbitrator is not asked to confirm or set aside any existing dismissal – employee entitled to *backpay*.

JUDGMENT

WHITCHER J

Introduction

[1] This application concerns the impact and effect of a successful review by an employee against a pre-dismissal arbitration award in circumstances where the review court ordered that the matter is remitted to the arbitration tribunal for a rehearing. Does this order revive retrospectively the contract of employment, so that the employee continues to be employed as if he had never been dismissed?

[2] The Applicant was employed by the Respondent from 1 April 2011 as Manager: Legal Services. In terms of his contract of employment, he was remunerated at an all-inclusive remuneration package of R520 000.00 per annum. An amount of 62.5% of the contracted remuneration package was pensionable. The contract remuneration package included all company contributions such as pension, medical aid, car insurance, and fuel and maintenance allowances.

[3] On 3 November 2011 he was suspended with pay pending an investigation into allegations of misconduct. In January 2012 he was charged with breaching his fiduciary duty. The allegation was that he had access to confidential information, discussed such information with unauthorised personnel and indicated an intention to copy, save or print such confidential information for the purposes of using it to the detriment of the Respondent. He was further charged with gross insubordination. The allegation was that he refused to obey an instruction to hand over a hard disk drive, or provide access to same, on which the Respondent suspected him to have copied its confidential information. This was followed by a pre-dismissal arbitration in terms of section 188A of the Labour Relations Act, 1995. On 4 June 2012, the

Arbitrator found the Applicant guilty of the said charges and handed down the sanction of dismissal with immediate effect.

[4] On 13 July 2012, the Applicant applied for the arbitration award to be reviewed and set aside. There was no appearance on behalf of the Respondent at the review hearing on 3 September 2015, and the Labour Court in effect granted a default order (there is no judgment or reasons for the order) in the following terms: the award is reviewed and set aside and the matter is remitted to Tokiso for a rehearing of the matter before a different arbitrator.

[5] On 8 September 2015, the Applicant's attorney wrote to the Respondent submitting that, in light of the court order, the Applicant's dismissal has been reviewed and set aside with the result that the employment relationship that existed between the parties before the dismissal had been re-established. The court order had effectively reverted the relationship to where it was immediately prior to the Applicant's dismissal. Prior to his dismissal, the Applicant was on suspension with full pay pending the finalisation of the arbitration, and this was the situation the parties must revert to.

[6] The letter went on to say that the Respondent must arrange for a disciplinary hearing (arbitration) on the original charges to be held *de novo* in terms of the court order.

[7] It was further submitted in the letter that since the Applicant was dismissed on 4 June 2012 and the court in effect re-instated the employment relationship effective from 4 June 2012, Applicant must be *compensated* for this period being 3 years and 3 months. In addition, since he was now an employee of the Respondent, the Applicant must be paid monthly the salary he was paid while still an employee commencing from September 2015.

[8] On 9 September 2015, the Respondent confirmed receipt of the above letter. On 18 September 2015, the Respondent informed the Applicant's attorneys that it required a copy of the court order before it could respond to the Applicant's demands. A copy of the court order was provided on 22 September 2015.

[9] On 25 September 2015, the Respondent denied the Applicant's claims and submitted that the effect of the court order was that the "dismissal still stands until the outcome of the arbitration". The Respondent stated that it will not be arranging a disciplinary hearing/arbitration: the matter was remitted back to Tokiso Dispute Settlement (Pty) Ltd for a fresh hearing before a different arbitrator.

[10] In this latter statement, the Respondent was evidently submitting to the Applicant that it personally had no obligation to organise another arbitration and that the court ordered Tokiso to do same on service of the order by the Applicant. The Applicant submitted in this hearing that the Respondent's view on the matter was wrong and that the Respondent was obliged to arrange for a new pre-dismissal arbitration. The Applicant did not however express this view in a responding letter to the Respondent.

[11] On 26 October 2015, the Applicant launched this application, submitting that the court order in effect revived retrospectively the contract of employment as if he had never been dismissed

Analysis

[12] The Respondent contended that the status of an arbitrator in a section 188A process is *sui generis* in that the arbitrator stands in the role of a chairperson of an internal disciplinary hearing and also as an arbitrator. In this regard, when a pre-dismissal arbitration award is reviewed and set aside, the dismissal ruling remains as the court generally does not review and set aside outcomes of internal disciplinary hearings. If, in law, the setting aside of the award automatically revived retrospectively the contract of employment, such that the employee continues to be employed as if he had never been dismissed, the court would have expressly ordered the retrospective reinstatement of the Applicant, albeit on suspension with pay, pending the outcome of the new arbitration. The court, in the review application, did not substitute the award of the Arbitrator nor did it reinstate the Applicant. It simply reviewed and set aside the award and ordered the matter to be arbitrated afresh, and this cannot be equated to retrospective reinstatement.

When matters are remitted for a rehearing by the review court, employees do not become reinstated.

[13] The short answer to the Respondent's first submission is that section 188A (8) provides that:

> "The ruling of the arbitrator in an inquiry has the same status as an arbitration award, and the provisions of sections 143 to 146 apply with the changes required by the context to any such ruling".

[14] I turn now to the consequence of a court order setting aside a dismissal award and ordering a rehearing of the disciplinary matter. I agree with the Applicant's counsel that the *status quo ante* is restored. Once the dismissal is reviewed and set aside, it cannot result in a dismissal remaining in force. The new arbitrator is not asked to confirm or set aside any existing dismissal. The act of setting aside a dismissal award is the act of literally setting the 'conviction' aside, it is akin to pretending it never happened. It is a rescission in which the situation is restored to the state which previously existed.

[15] In this matter, the court order set aside the original decision to dismiss the Applicant and the original decision to dismiss him effectively 'vanishes' and he is treated as if he had never been dismissed. The order revived retrospectively the contract of employment between the Applicant and the Respondent. In my view, this must be implicit in an order that sets aside, without qualification, a decision to dismiss the Applicant. He thus reverts to his status as an employee on precautionary suspension.

[16] The understanding above is fortified by a consideration of the powers granted to the court under Section 145(4) of the LRA. This section expressly gives the court the power 'to *determine* the matter in the manner it considers appropriate' or to make *any order* it considers appropriate about the procedures to be followed to determine the dispute'.

[17] In a review, as Grogan points out:

> "If an award is *set aside,* therefore, the court has a range of options between *making no additional order* – in which case the *status quo ante* the award revives – and remitting the matter to the CCMA or bargaining council for a fresh hearing. If the court decides to *determine* the matter itself, it makes the order the errant commissioner should have made".

Claim for payments

[18] There is however a twist to this case. In this application, the Applicant stated that he took steps to mitigate his "damages" in that, during September 2012, being 3 months after his dismissal, he found employment with Legal Aid where he remains employed.

[19] The Applicant however did not tender his services to the Respondent, even as an employee on paid suspension, but seeks certain payments, calculated from the date of his dismissal to date hereof. He claims that, but for his dismissal, he would have been entitled to receive this remuneration. In this regard, he set out a schedule in his affidavit which purports to record the monthly gross remuneration he was paid by Legal Aid from October 2012 to October 2015, the date he instituted this action.

[20] The Respondent submits that the Applicant has not proved his damages as he did not attach payslips from Legal Aid.

[21] The Respondent takes issue with the Applicant saying on one hand that he is their employee and must be paid but on the other hand not tendering his services and in fact working for another employer.

[22] The Applicant's Notice of Motion indeed does not seek as relief that he be accepted back into employment; an order directing the Respondent to reinstate him. The Applicant seeks only a remittal for a rehearing. The review itself revolved around procedural errors which denied him a fair hearing on the merits and thus impacted on the substantive fairness of his dismissal. It is an open question how any theoretical, future pre-dismissal hearing will take place but it will be on a *de novo* basis. This means that the new arbitrator could well decline to dismiss the Applicant on the available evidence.

[23] Given my ruling above that a review court's setting aside of an arbitrator's award revives an employment contract, I see no impediment to the Applicant being paid what is essentially *backpay* [the use of the term damages is incorrect] for the period between his dismissal and the date of the review court's decision. This is to be calculated as the difference between what he would have earned as an employee of the Respondent and what he did in fact earn at Legal Aid between 4 June 2012 and 3 September 2015. Whether he tendered his service at the Respondent for this period is irrelevant because, although this decision was later overturned, the legal position at the time was that there was no contract between him and the Respondent. He was dismissed and the fact that he worked for another employer during the time his contract with the Respondent was unlawfully terminated does also not disqualify his claim for backpay that flows from the revival of that contract under the review court's order.

[24] The next question is whether the Applicant should be paid for any period *after* the review court's decision. In his Notice of Motion, the Applicant only sought to be remunerated up until the date he instituted proceedings ("hereof"); which was 26 October 2015. Despite the fact that in his Heads of Argument he sought payment up until the date of judgment in this matter, there was no formal revision of the relief sought. The 26 October 2015 is therefore the end date in respect of the claim for remuneration that I can consider.

[25] In the circumstances of this case, I am hesitant to attach significance to the failure of the employee to formally tender his services after the review court's decision was made. His attorney promptly contacted the Respondent averring that his contract with it had revived. The Respondent dilly-dallied for a while but by 25 September 2015, it had very firmly denied the Applicant's contentions, inter alia, that going forward he was entitled to be remunerated by the Respondent. It would be artificial to expect the Applicant to resign from the other employer where he had been able to mitigate his losses after his unfair dismissal from the Respondent so that he could fully press his claims arising from that unfair dismissal. It is self-evident that a tender of services in so many words would have been rejected and this gesture would have only

added to losses he should not, as per the review order, have sustained in the first place.

[26] I do not wish to downplay the general significance of a tender of services in contract law where both parties have obligations. The failure to tender services after being reinstated or after an order of specific performance can have very serious legal consequences for an employee. However, in the circumstances of this case, it strikes me that the Respondent's attitude towards the review judgment was plain. It wholly and totally disputed the legal basis on which the Applicant based his claim both for payment for the period before the review court's decision – and the period thereafter. The Respondent regarded the legal position to be that the Applicant was still dismissed and consequently would not have accepted a tender of services. I do not understand the Respondent to now argue that they would have acted differently had the Applicant resigned from Legal Aid and arrived at their door in September 2015 offering to work.

[27] It flows from this that the Applicant is also entitled to remuneration calculated as the difference between what he would have earned at the Respondent had he not been dismissed and to what he earned at LegalWise between 3 September 2015 to 26 October 2015.

[28] In respect of both periods mentioned above, any accrued leave in terms of clause 8 of the Applicant's Employment Agreement with the Respondent and prayed for is also payable.

[29] This may all seem a very steep price for the Respondent to pay for an action it took, invoking section 188A, which was designed precisely to avoid long delays in the resolution of disputes and the attendant risk of backpay accumulating in the event of an adverse finding.

[30] As was noted in a slightly different context in *SATAWU & Others v MSC Depots (Pty) Ltd*:[1]

[1] Case no: D449/2011, unreported, 16 June 2012.

> "[19] Section 188A holds the promise of the expeditious resolution of disputes about employee conduct and the swift imposition of a fair sanction for any proven misconduct. Regrettably, in this instance, the CCMA has failed the parties, and frustrated the statutory purpose that underlies the section. The ineptitude with which the pre-dismissal arbitration was conducted resulted in a successful review, and an order that the matter be remitted to the CCMA for re-hearing. The parties have been prejudiced, the respondent more so since it has had in the interim to carry the cost of the applicants' wages. But that is a risk that an employer must run when it decides to place the function of workplace discipline in the hands of an unknown third party. Ordinarily that risk may be worth running. I have referred to the significant cost savings to be had by avoiding the duplication occasioned by elaborate in-house disciplinary enquiries and an inevitable arbitration hearing at which the same allegations are tested in a de novo hearing. But the integrity of the system depends on the expertise of the arbitrator, and that is where the first respondent's initial confidence in the system was betrayed."

[31] Noting that the Respondent's risk is to some extent on-going, I can only say that, in my view, my hands are tied. I cannot suspend the legal consequences of the reviewing courts 'setting aside' of the section 188A dismissal because the effects seems rather onerous on one party. This case seems to have wandered into something of a legal no-mans' land which might benefit from legislative scrutiny in future and the careful crafting of relief sought when reviewing section 188A decisions or when opposing such reviews.

[32] As to backpay, I accept that the Applicant has not provided proof of his earnings at LegalWise and that the Respondent may be deprived of the ability to interrogate the numbers provided in this matter. I will address this in the ruling. Basically, the Respondent can elect to accept the figures put up by the Applicant and pay him accordingly or it can require that the Applicant put up documentary proof of same. Should there be any dispute on quantum, I will be happy to have that issue re-enrolled to be heard by me, if possible, in Chambers.

<u>Order</u>

[33] The Respondent is ordered to pay the Applicant the difference between the remuneration he would have received between 4 June 2012 and 26 October 2015.

[34] The Respondent must additionally pay the Applicant out any accrued leave for the period mentioned in clause 1 above.

[35] Should the Respondent not accept the amount claimed by the Applicant in a schedule to his affidavit in these proceedings in respect of the difference in remuneration levels mentioned in clauses 1 and/or 2 above, it must notify the Applicant of this within 10 days of this judgment.

[36] The Applicant must then, with 10 days of this notification by the Respondent, serve an affidavit on the Respondent and this Court, setting out in an affidavit how he calculated the difference in remuneration levels and/or what payments he contends he should receive for accrued leave and benefits as at 26 October 2015.

[37] The Respondent must then further, within 10 days of receipt of the Applicant's affidavit, serve and file an affidavit setting out its response to the Applicant's affidavit on the remuneration claim.

[38] The Registrar is then ordered to set this issue down for a hearing before me in Chambers by no later than 3 months after the date of the affidavit mentioned in clause 2.3 above.

[39] The Respondent is ordered to pay the Applicant's costs.

_____

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv M A Lennox, instructed by Schindlers Attorneys

For Respondent: Adv K T Mokhatla, instructed by Madhlopa Incorporated