

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 284/09

In the matter between:

WILLIAM MOHLAKOANA

Applicant

and

THE COMMISSIONER, COMMISSION FOR

CONCILIATION, MEDIATION AND

ARBITRATION

1st Respondent

ROBINSON LIQUORS (PTY) LTD T/A

ULTRA LIQUORS

2nd Respondent

JUDGMENT

LAGRANGE,AJ

Introduction

1. This is a review application in which the applicant, Mr Mohlakoana, who represented himself in these proceedings, seeks to set aside only the commissioner's award of compensation of two months' salary following a finding by the commissioner, that his dismissal by the third respondent was substantively, but not procedurally, unfair.

2. The applicant was dismissed on 16 September 2008 and the arbitration award was issued on 25 January 2009, after being employed for two years.
3. The applicant's grounds of review were not stated with the clarity one might expect of parties who are represented by legal practitioners or labour law specialists. The applicant, who appears throughout to have prosecuted the review without legal assistance or expert advice, claimed that the commissioner erred in awarding him only two months' compensation and that it was not 'just and equitable' as he had been unfairly dismissed. Although not stated as a ground of review as such the applicant also alleged in his founding affidavit that the award of two months compensation had been made "although my date of dismissal was 16/09/2008 and the arbitration award was issued on the 25/01/2009".
4. The applicant also believed that his continued unemployment at the time of this hearing was a factor that should be considered but eventually conceded that the commissioner could only have been expected to decide the issue of compensation on what was before him at the time of the arbitration hearing on 16 January 2009. In court, when asked to elaborate on why he felt there was something wrong with the award, he said the commissioner had not applied his mind to the issue of compensation. It is apparent from the applicant's perspective that he could not make sense of the award of compensation in relation to the loss of income he had suffered by the time the award was issued.
5. The third respondent, represented by Mr Frahm-Arp, argued that the founding affidavit did not disclose a ground of review though it acknowledged that some allowance had to be made for imprecise pleading in the case of a lay person in the applicant's position. The third respondent nevertheless persisted with its argument that the applicant had failed to set out any evidence in support of his contention that the compensation award should be altered.
6. In support of its argument, the employer cited the authority of *Business Design Software (Pty) Ltd & another v Van der Velde* [2009] 8 BLLR 746 (LAC), on the basis that the LAC held that a failure to set out any of the limited grounds upon which a court may interfere is fatal to a claim that an award of compensation

should be altered. The court in that instance cited a number of other cases in which the courts have had to consider circumstances in which a decision taken in the exercise of a judicial discretion may be interfered with on appeal. The test has been characterised more than once in these terms:

“(T)he power to interfere on appeal with the exercise of a discretion is limited to cases in which it is found that the trial Court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons...”¹

7. In this matter the commissioner had decided that the applicant’s dismissal by the respondent was substantively, but not procedurally, unfair. The applicant, a warehouse manager, had been dismissed for gross negligence allegedly resulting in stock losses in excess of R 100 000 over a period of two months.
8. The commissioner concluded on the basis of the evidence before him that the standard of care to be exercised by the applicant in the performance of his duties was unknown and that it was therefore meaningless to talk of gross negligence, or even negligence, in the circumstances. In reaching this conclusion the commissioner was obviously influenced by what he perceived to be inadequate training and preparation of the applicant for the duties he was expected to perform, compounded by a lack of clarity about what those duties entailed, for which the commissioner held the respondent responsible.
9. Following his conclusion that the dismissal was substantively unfair, the commissioner then simply ordered the second respondent to pay the applicant compensation equivalent to two months’ remuneration, declaring it ‘just and equitable’.
10. Other than invoking the phrase ‘just and equitable’, no reasons are provided by the commissioner why he ordered this particular form of relief given the options

¹ See e.g, *Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335D-F or *Shepstone & Wylie and others v Geysers* NO 1998 (3) SA 1036 (SCA) at 1044I-1045A.

available to him under section 193(1) of the Labour Relations Act, 66 of 1995 ('the LRA'). The applicant, who contends that the award of compensation was not just and equitable in the circumstances, was evidently mystified why the commissioner awarded two months' compensation having found the dismissal substantively unfair, particularly given the fact that already more than four months had elapsed between the date of his dismissal and the date of the arbitration award being issued.

11. In *Amalgamated Pharmaceuticals Ltd v Grobler NO & others* (2004) 25 ILJ 523 (LC) at 525, the Labour Court held that:

'The failure or omission by the commissioner to provide reasons for her award does not per se render the award irrational and therefore reviewable on the grounds of gross irregularity.'

12. It is true that there are cases like *Grobler's* case above, in which the Labour Court has upheld the decision of arbitrators who have not sought to explain the reasons for the award of compensation they have made. However, in those instances it was at least obvious from the reasoning of the arbitrator in the rest of the award why such a remedy was granted.²

13. It is true that the applicant had some difficulty articulating his ground of review, but he was clearly struggling to understand the basis of the relief awarded and therefore believed the arbitrator had failed to apply his mind properly to the question of the appropriate compensation.

14. In this instance, it the commissioner has not provided the slightest clue to the reasoning behind his decision to award two months' remuneration as just and equitable compensation for a substantively unfair dismissal. Whilst the commissioner has a discretion in determining the remedy he granted, there is no evidence he exercised it judicially. The mere fact that the commissioner concluded that the compensation he had determined was 'just and equitable' adds nothing of substance to his reasoning.

² See e.g. *Bezuidenhout v Johnstone NO & others* (2006) 27 ILJ 2337 (LC) at 2349-2351, paras [55] – [65] and *Rowmoor Investment (Pty) Ltd v Wilson & Others* (2008) 29 ILJ 2275 (LC) at 2283 paras [43] – [46].

15. Even though an arbitrator has a discretion and a degree of latitude on what to award in the way of compensation, it would be anomalous if the duty imposed on an arbitrator in terms of section 138(7)(a) of the LRA to provide brief reasons with an award did not include providing brief reasons for any remedy granted. For the employee and employer parties to any arbitration proceedings the most important components of any award are the arbitrator's findings on the merits of dispute itself and any consequential relief granted. There is no reason why an arbitrator's justification for an award should be confined to the findings on the merits of the dispute only.
16. Unless the justification for the relief can be readily discerned in the findings on the merits, as in the cases mentioned above, an arbitrator ought to provide brief reasons for the relief granted. In this case, the rationale for an award of two month's remuneration cannot be determined from the commissioner's findings on procedural and substantive unfairness.
17. Accordingly, I am satisfied that there is no evidence that the commissioner exercised a proper judicial discretion in arriving at the order he made and, in the absence of an obvious rationale in his other findings for the relief granted, the commissioner's failure to provide reasons for the relief, in this instance, also amounts to misconduct in the performance of his duties as an arbitrator under section 145(2)(a) of the LRA.
18. I am also of the view that without evidence of considerations which informed the arbitrator in the exercise of his discretion, it cannot simply be assumed that he exercised his discretion in a rational manner based on what was 'fair and equitable in all the circumstances', whatever latitude may be allowed an arbitrator in the exercise of that discretion. There is no evidentiary basis for concluding that any reasonable arbitrator could award the relief granted, even if it was competent relief in terms of the powers of the arbitrator under section 194(1) of the LRA.
19. Before reaching a decision in this case, I referred the parties to the recent unpublished judgment of the LAC in the matter of *Boxer Superstores (Pty) Ltd v Nokothula Grace Zuma and others (DA 6/207)* dated 9 May 2008 and asked

for any additional submissions they might wish to make in the light of that decision.

20. The second respondent was of the view that it was irrelevant because in that case the question before the court was why the commissioner had awarded compensation rather than reinstatement after finding that the employer had failed to prove that the dismissal of the employee was substantively fair. In *Boxer Superstores*, the court *a quo* concluded that in the absence of reasons why the employee was reinstated, it was appropriate for the court to simply substitute the award of compensation with an award of reinstatement. The LAC agreed that the award was irrational but disagreed with the solution adopted by the Labour Court.
21. It is true in this instance the court is not confronting the issue of an award in which the arbitrator does not explain the reasons for awarding a certain amount of compensation, rather than another form of remedy such as reinstatement, to an employee whose dismissal was found to be substantially unfair. Here the issue is whether the commissioner's failure to provide reasons for an award of compensation on the low end of the scale of compensation for a substantively unfair dismissal, renders his award reviewable and the focus is on whether he exercised his discretion judiciously, not whether he applied his mind to the provisions of section 193.
22. However, despite the different considerations which apply to the decision to grant relief in the two cases, the common defect in the two awards under consideration is the absence of manifest reasons for the relief granted.
23. In *Boxer Superstores* the arbitrator had found the employer had failed to discharge the onus of proving that the dismissal was substantively unfair and had awarded compensation equivalent to three months' remuneration. At paragraph [11] of the LAC decision the court expressed the failure of the arbitrator and what he ought to have done thus:

“[11] The third respondent's award was manifestly irrational and to that

extent the judgment of Pillay J is correct. It is irrational because the third respondent gave no reasons for awarding compensation after having found that the appellant had failed to discharge the onus in relation to substantive dismissal. What third respondent should have done was to have said in effect: I have examined the evidence. It appears to me that, given the grave nature of the charges levelled against first respondent that is of dishonesty, it is clear that the relationship between the two parties is at the level where they cannot longer work together. Reinstatement would therefore be inappropriate, reemployment would be inappropriate because of the conclusions reached by the appellant as set out in my award. Accordingly in terms of the powers that I have under Section 193(2), I make a small award of compensation.”

24. In the circumstances, it seems appropriate to adopt an approach similar to that of the LAC in *Boxer Superstores* and remit the matter to the third respondent to reconsider his decision on an appropriate award of compensation, after setting out his reasons for his original order of compensation and after hearing any evidence the parties may lead which is relevant to the determination of an appropriate award of compensation.

Order

Accordingly, the following order is made:

- a. The second respondent’s award of compensation of two months’ remuneration is reviewed and set aside.
- b. The second respondent must record his reasons for the remedy he granted on 25 January 2009.
- c. After hearing such evidence that the parties are in a position to lead concerning an appropriate award of compensation which is just and equitable, the second respondent must reconsider his decision on the appropriate amount of compensation.



ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 9 February 2010

Date of judgment: 13 April 2010

Appearances:

For the applicant: Mr J Moyo of
Moyo Attorneys Inc.

For the respondent: Adv G F Malan
Instructed by Leppan Beech Inc.