



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 2607/16

In the matter between:

SOUTH AFRICA STATE THEATRE

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

ADVOCATE GA JANSEN VAN VUURES N.O

Second Respondent

LINDELWA GLOARIA MAHLABE

Third Respondent

Heard: 12 September 2018

Delivered: 20 September 2018

Summary: Review application – award is unassailable – no reason to interfere with the amount of compensation.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] This is one of the unmeritorious review applications. The applicant (State Theatre) seeks an order to review and set aside the arbitration award of the second respondent (the commissioner) issued under case number GATW6553-16 dated 28 October 2018. The commissioner found the dismissal of the third respondent (Ms Mahlabe) both procedurally and substantively unfair and awarded her compensation equivalent to 12 months' salary.
- [2] The State Theatre filed supplementary heads of argument wherein, it persisted that the commissioner committed a reviewable irregularity. It is submitted, in the alternative, that in the event the Court finds that the dismissal of Ms Mahlabe was unfair, compensation equivalent to three months' salary is fair in the circumstances of this case.
- [3] The application is ardently opposed by Ms Mahlabe.
- [4] The essence of the State Theatre's challenge is that the commissioner erred in finding that there was no settlement agreement concluded between the parties. In finding so, the commissioner neglected to have regard to the verbal settlement agreement between the parties; that the terms thereof were to the benefit of Ms Mahlabe; and that Ms Mahlabe changed her mind when the settlement agreement was presented to her.

Background

- [5] The facts in this matter are to a great extent common cause. Ms Mahlabe had been in the employ of the State Theatre since 18 August 2008. Her contract of employment was terminated on 8 April 2016 and she was a Marketing Manager.
- [6] Ms Mahlabe was confronted by State Theatre with rumours that she was no longer content with her employment and wanted to leave. In fact, during the arbitration it was Ms Mapayi, the Human Resources Manager, testified that

Mr Jay, the Producer, requested her to facilitate discussions with Ms Mahlabe. There were then several meetings with Ms Mapayi, consequently. As a result, an option of mutual separation was explored. The draft settlement agreement was presented but she refused to sign as she wanted to seek legal advice.

- [7] Ms Mahlebe's attorneys of record corresponded with the State Theatre seeking clarity on the terms of the draft settlement agreement and challenged the processes that had been followed at that stage. Unfortunately, there was no answer from the State Theatre. Nonetheless, Ms Mapayi conceded in cross examination that Ms Mahlabe did indicate to her that she was no longer interested in the proposed mutual termination of her contract of employment and that the matter should be dealt with through her attorneys of record.
- [8] The State Theatre went ahead and terminated Ms Mahlabe's contract of employment. In its opening address during the arbitration, it was submitted that Ms Mahlabe's employment was terminated in terms of the contract of employment which allows each party to do so on notice. It is instructive that Ms Mapayi conceded that the draft settlement agreement was just a mere offer by the State Theatre which was never accepted by Ms Mahlabe.

Evaluation

- [9] The commissioner was spot on in his finding that there was no agreement, either verbally or in writing to terminate Ms Mahlabe's contract of employment on mutual basis. Even if the State Theatre was operating under the impression that Ms Mahlabe had verbally agreed to the terms of the draft settlement agreement, that impression ought to have been easily dispelled by the correspondence from her attorneys' of record. The applicant's counsel was all over the transcribed record, splitting hairs in an attempt to find something that could hold without any success.
- [10] In the absence of an agreement terminating Ms Mahlabe's contract of employment on mutual basis or evidence to justify that her dismissal was

effected in accordance with section 188(1) of the Labour Relations Act¹ (LRA), the commissioner's finding that Ms Mahlabe's dismissal was procedurally and substantively unfair is unassailable.

- [11] That takes me to the issue of relief. We must be reminded of the principles expressed in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*,² endorsing the guideline in determining what is just and equitable compensation that can be awarded under section 194(3) of the LRA laid down in *Minister of Justice and Constitutional Development v Tshishonga*.³ The Labour Appeal Court (LAC), as per Judge President Waglay, stated the following:

'Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put, differently, 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".

...In *Minister of Justice and Constitutional Development v Tshishonga* (*Tshishonga*), this Court in an award of *solatium* referred to the delictual claim made under the *actio iniuriarum* for guidance in what would constitute just and equitable compensation for non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one's dignity, the relevant factors in determining the quantum of compensation in these cases included but were not limited to:

'...the nature and seriousness of the *iniuria*, the circumstances in which the infringement took place, the behaviour of the defendant

¹ Act 66 of 1995 as amended.

² [2015] 11 BLLR 1081; (2015) 36 ILJ 2989 (LAC) paras 22 to 24.

³ [2009] 9 BLLR 862 (LAC) at para 18.

(especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the *iniuria* had taken place...' (footnotes omitted)

[12] In this instance, it is clear that the commissioner had had regard to, *inter alia*, the circumstances surrounding Ms Mahlabe's dismissal of which he termed 'ruthless and brutal'. In my view, compensation equivalent 12 months' salary is appropriate given the fact that it is for both procedural and substantive unfairness.

[13] Ultimately, it seems that the applicant is oblivious of the review test as succinctly expounded by the LAC in *Head of the Department of Education v Mofokeng*,⁴ where it was, *inter alia*, stated:

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, ... this court in *Gold Fields* ... held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in the setting aside of the award. It must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome...'

[14] I am convinced that the commissioner aptly construed the applicable test and consequently rendered a reasonable award.

Conclusion

[15] In all the circumstances, the commissioner's findings cannot be assailed and as such the application stands to be dismissed.

[16] When it comes to costs, it is trite that costs in this Court do not follow the result. However, this is a typical case where costs must be granted. The

⁴ *Mofokeng* [2015] 1 BLLR 50 (LAC) at paras 30 to 33; see also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

State Theatre was misguided in launching the review application as it is patently unmeritorious.

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

Order

1. The application for review is dismissed.
2. The State Theatre is ordered to pay the costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate K.A Wilson

Instructed by: Motalane Kgaria Inc

For the first respondent: Advocate G Mashigo

Instructed by: Motanya Madiba Attorneys

LABOUR COURT