IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1871/14

In the matter between:

IMATU obo AMY SENKHANE	**Applicant**
and	
EMFULENI LOCAL MUNICIPALITY	**First Respondent**
M.N.S. DAWSON N.O.	**Second Respondent**
SALGBC	**Third Respondent**

Heard: **28 April 2016**

Delivered: **29 July 2016**

JUDGMENT

WHITCHER J

[1] In the arbitration award in issue, the second respondent (the arbitrator) found the suspension on full pay of Senkhane constituted an unfair labour practice and ordered the first respondent (the respondent) to immediately uplift the

suspension and permit the employee to return to work. The arbitrator took a decision not to award any compensation to the employee, this in circumstances where the employee had also sought compensation for the unfair labour practice.

[2] The applicant has taken issue with the arbitrator's decision not to award compensation to the employee and on this basis seeks to review and set aside the relevant part of the award in terms of section 145 of the LRA and have it substituted with an order awarding compensation equivalent to twelve months' remuneration to the employee.

The evidence before the arbitrator

[3] Discipline and suspension in the respondent is regulated by a collective agreement, The Disciplinary Procedure and Code Collective Agreement of 21 April 2010, concluded at the SALGBC.

[4] Clause 14.6 reads as follows:

> *"The suspension or utilization in another capacity of the employee shall be for a fixed and pre-determined period and shall not exceed a period of three (3) months".*

[5] Clause 6 reads as follows:

> *"The Employer shall proceed forthwith or as soon as reasonably possible with a Disciplinary Hearing but in any event not later than 3 months from the date upon which the Employer became aware of the alleged misconduct. Should the Employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for condonation to the relevant Division of the SALGBC".*

[6] Senkhane had been employed by the respondent as a social worker since April 1998 and is still so employed. On 28 February 2013, the respondent placed her on precautionary suspension with full pay.

[7] On 10 December 2013, the applicant wrote a letter to the respondent demanding that the suspension be uplifted. The respondent did not do so. The matter was then referred to the SALGBC.

[8] At the time of the arbitration hearing in July 2014, Senkhane had been on suspension for a period of sixteen months and no disciplinary proceedings had been proceeded with.

[9] The respondent led no evidence and thus failed to justify the prolonged suspension. Senkhane testified that her prolonged suspension in the absence of any disciplinary action, together with having to constantly fend off questions about her situation from family, friends and colleagues had left her feeling humiliated and violated by the respondent. The respondent agreed that such a prolonged suspension could potently be embarrassing to the employee.

The arbitrator's reasoning

[10] The arbitrator found that Senkhane's suspension was unfair and set aside the suspension and directed the employee to return to work. The arbitrator however refused to award compensation to Senkhane and stated her reasons as follows:

> *"The applicant union was well aware that the suspension had exceeded the three months and notwithstanding that they continued without taking any steps to bring it to the attention of the employer and continued to allow the suspension to go on. I am of the opinion that the Collective Agreement is there to create a harmonious and equitable working conditions and is not there for the parties to see how they can profit from an irregular or wrong doing by the employer".*

Grounds of review

[11] The applicant contended that in failing to award any compensation, and, in particular the maximum compensation of 12 months' remuneration to Senkhane, the arbitrator failed to appreciate the principle *ubi jus ibi remedium*

(where there is a right there is a remedy)[1] and the following principles laid down by the Labour Appeal Court in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert.*

[12] In *Hibbert,*[2] the LAC held as follows:

> "[22] The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that s/he has suffered.[3] The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not to be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.
>
> [23] 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*[4] and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated.[5] 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[6] the employer. It is not

[1] The principle that where one's right is invaded or destroyed, the law give s a remedy to protect it or damages for its loss.

[2] [2015] 11 BLLR 1081 (LAC) per Waglay JP [Ndlovu and Coppin JJA concurring]; (2015) 36 *ILJ* 2989 (LAC).

[3] An employee who has been subjected to an unfair labour practice or unfairly dismissed and who has immediately found other better employment suffers no loss but may still be entitled to compensation under the LRA.

[4] This was first raised in *Johnson and Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC) with regard to procedurally unfair dismissals.

[5] The LRA and the EEA in matter such as this give effect to the fair labour practice right entrenched in the Constitution of the Republic of South Africa Act 108 of 1996.

[6] We do not need to enter into the debate on whether or not *solatium* contains a penal element suffice to say that the monetary prejudice the employee suffers must equate to some form of a punitive element but not a penalty in the context of criminal and criminal procedural laws. Compare S Vettori "The Role of Human Dignity

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".

[24] The determination of the quantum of compensation is limited to what is "just and equitable".[7] The determination of what is "just and equitable" compensation in terms of the LRA is a difficult horse to ride. There are conflicting decisions regarding whether compensation should be analogous to compensation for a breach of contract or for a delictual claim. In my view, and as I said earlier, because compensation awarded constitutes a *solatium* for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation awarded in unfair dismissal or unfair labour practice matters is more comparable to a delictual award for non-patrimonial loss. While a delictual action (ie action *injuriarum*) for non-patrimonial loss is fashioned as a claim for damages, it is no more than a claim for a *solatium* because it is not dependent upon patrimonial loss actually suffered by the claimant. Hence, awards made under a delictual claim for non-patimonial loss may serve as a guide in the assessment of just and equitable compensation under the LRA. In *Minister of Justice & Constitutional Development v Tshishonga (Tshishonga),*[8] 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*

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in the Assessment of Fair Compensation for Unfair Dismissals" PER/PELJ 2012 (15)4 102/231-123/231 when he says *"The cap on compensation for automatically unfair dismissal is double that of "ordinary dismissal", namely 24 months' salary as opposed to 12 months' salary. Perhaps this could be construed as an intention on the part of the legislature to introduce a punitive element in the amount of compensation awarded for automatically unfair dismissals since these reasons for dismissal seem to be morally reprehensible and repulsive to our sense of justice."* At 109/231.

[7] The LRA provides that the amount of compensation ordered must be "just and equitable".

[8] [2009] 9 BLLR 862 (LAC) and the cases cited therein.

defendant (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…'.[9]

[25] The above *dictum* should serve as an appropriate guideline in determining what is just and equitable compensation that can be awarded under s194(3) of the LRA."

[13] The applicant contended that this judgment confirmed that unfair conduct, especially of the nature described in this case, amounts to an impairment of the employee's dignity and must be remedied with an award of compensation and that the further purpose of a compensation award is to penalise the employer and deter further comparable offending conduct.

[14] In this regard, the applicant submitted, it was undisputed that Senkhane suffered humiliation and impairment to her dignity as a result of the prolonged suspension. The applicant contended that the impairment of dignity will not be remedied if no award of compensation is made.

[15] Moreover, the respondent deserved censure with an appropriate compensation order because its conduct was egregious in that it persisted with a prolonged unlawful suspension in the face of the union's demand and the referral to the bargaining council, knowing full well it had no valid defence.

[16] The applicant contended that the arbitrator's specific reasoning failed to take into account the following material facts: (i) the respondent had a legal duty to set the suspension aside once three months had elapsed and this duty was not dependent on a demand from the union. The union had no obligation to demand the setting aside of the suspension; (ii) the respondent kept the employee on suspension for 17 months, knowing full well that it had no justification for same; and (iii) the respondent's conduct constituted an attack on the dignity of the employee, which was proved by her evidence.

[9] At para 18.

[17] The respondent contended that the arbitrator did provide a remedy for the unfair labour practice, namely an order that the suspension be uplifted and the employee return to work. The respondent contended that the arbitrator was not obliged to grant further relief in the form of compensation. In any event, the arbitrator gave a reasonable considered explanation for not awarding further relief in the form of compensation.

Finding

[18] Section 193(4) of the LRA provides that an arbitrator may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.

[19] In *SAPO*[10] and *Nondomo,*[11] the Labour Court approved the remedy of compensation as a *solatium* in cases where the arbitrator had found that a suspension on full pay was unfair and ordered the employer to permit the employee to return to work. The only issue was the computation of compensation.

[20] Setting aside a suspension is not a primary remedy in the nature of specific performance as the setting aside of a suspension merely has the consequence of the suspended employee having the right to return to work.

[21] In *Mofokeng*,[12] the LAC (per Murphy AJA) found the process of judicial review on the grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and *proportionality*. Murphy AJA went on to find that in undertaking a review the reviewing judge must have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck.

[10] *SAPO Ltd v Jansen van Vuuren NO & others* [2008] 8 BLLR 798 (LV).
[11] *MEC for Tourism, Environmental & Economic Affairs, Free State v Nondomo & others* [2005] 10 BLLR 974 (LC).
[12] *Head of Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) para 31.

[22] Thus, at the very least, in order for an arbitration award to be reasonable, it must be both rational and proportional.

[23] It is also now trite that where an arbitrator ignores materially relevant facts, and it is established that but for this, the arbitrator would (on the probabilities) have come to a different result, the result arrived at by the arbitrator is *prima facie* unreasonable. And if there exists no basis in the evidence overall to displace the *prima facie* case of unreasonableness, then the decision stands to be set aside on the grounds of unreasonableness.[13]

[24] To my mind, in considering whether to award compensation or not, it is not unreasonable to take into account the applicant's failure to pursue her rights expeditiously and thus attempt to avoid or mitigate the adverse impact of the suspension. However, in fairness to both parties and to achieve a reasonable equilibrium between the rights, duties and interests of both parties, the arbitrator was obliged to take into account all relevant factors, including the conduct of the other party as well. In this regard, the arbitrator failed to take into account the following materially relevant facts and considerations: (i) the respondent had a legal duty to set the suspension aside once three months had elapsed and this duty was not dependent on a demand from the union; (ii) the respondent kept the employee on suspension for 17 months, knowing full well that it had no justification for same; (iii) the suspension adversely affected the dignity of the employee; and (iv) the respondent ought to be penalised to deter further comparable offending conduct.

[25] In my view, if the arbitrator had taken these factors into account, the arbitrator would, on the probabilities, have come to a different result, that is, that compensation is appropriate in the circumstances of this case. This is because these factors were materially relevant to the decision and carried a lot of weight. In these circumstances, the decision of the arbitrator not to award compensation is *prima facie* unreasonable.

[26] The next enquiry is whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness. To my mind there is none,

[13] *Head of Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) para 33.

since there is no legal basis to place the onus on the applicant to act to correct a patently unfair suspension. In the result, the decision not to award compensation stands to be set aside on review on the grounds of unreasonableness.

[27] I do not consider it practical and expedient to remit the matter to the bargaining council to determine the quantum of compensation, considering all the relevant facts are before me. I deem it fair and equitable to award the employee compensation equivalent to three months' remuneration.

[28] In determining the amount of compensation, I have taken into account the conduct of both parties, including the fact that the applicant and the employee did unnecessarily delay in pursuing the unfair labour practice dispute and in a sense contributed to the adverse impact of the suspension. I have also taken into account the fact that the employee suffered no financial loss since she was on suspension with pay.

Order

[29] In the premises, the following order is made:

1. The arbitration award on compensation issued by the second respondent is reviewed and set aside and replaced with an award that the first respondent must pay to the employee (Amy Senkhane) compensation equivalent to three months' remuneration.
2. There is no order as to costs.

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Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: Mr V Mkwibiso, from IMATU.

For the first respondent: Adv Z S Sibeko, instructed by TMN Kgomo & Associates.