IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Case Number: C160/09

REPORTABLE

In the matter between:

PRIMESERVE STAFF DYNAMIX (PTY) LTD	Applicant
and	
URSULA BULBRING N.O	First Respondent
MIBCO	Second Respondent
MERCIA CHRISTIANS	Third Respondent
BRIAN CHRISTIANS	Fourth Respondent
ALEC ARENDSE	Fifth Respondent

JUDGMENT

MOSHOANA AJ

INTRODUCTION

[1] This is a review application brought in terms of Section 145 of the Labour Relations Act. The applicant, a labour broker had in its employ the third to the fourth respondents. The respondents were initially employed by a company known as United States American Brush Filling Company (USABCO). USABCO outsourced its human resources to a labour broker known as SLH. After SLH's contract was terminated, the applicant was awarded the functions which were outsourced to SLH. As a result, the applicant interviewed some of the employees from the SLH pool and employed them to continue with the work at USABCO.

[2] The three respondents were amongst the employees who were employed to continue to service USABCO. All the three respondents were employed with effect from 17 August 2007 in capacities of broom assembly supervisor, special department supervisor and despatch supervisor respectively. The three respondents were dismissed on 15 November 2007 on account of misconduct.

BACKGROUND FACTS

[3] During or about August 2007, the applicant was awarded a contract to broker labour for USABCO. This contract was initially awarded to SLH. After being

awarded the contract, the applicant, entered into contracts of employment with the third, fourth and fifth respondents. During or about October 2007, USABCO conducted a polygraph testing. The third and fourth respondents failed the polygraph test. The fifth respondent refused to undergo the polygraph test. On or about 26 October 2007, the said respondents were given notices to attend a disciplinary hearing. The third and fourth respondents faced similar allegations.

[4] They ranged from misrepresentation during recruitment, breach of trust by failing a polygraph test, theft of stock and bringing the applicant into disrepute. In addition the fifth respondent faced allegations of refusal to adhere to a polygraph test.

[5] The hearings were conducted on 6 November 2007. As a result, the respondents in question were dismissed. Aggrieved by the dismissal, they referred a dispute to the second respondent. The first respondent was appointed to arbitrate the dispute. On 27 January 2008, the first respondent published his award. In the award she found that the dismissals of the respondents in question were procedurally fair but substantively unfair and awarded them compensation of 36 (thirty six weeks) each. Aggrieved by the award, the applicant launched these proceedings. The respondents did not oppose the application.

GROUNDS FOR REVIEW.

[6] In its review papers, the applicant only attacked the award of compensation. In its contention, the award is not justifiable. It is not one that a reasonable decision maker would have awarded.

ARGUMENT

[7] Advocate Leslie appearing for the applicant, argued that the first respondent in exercising her discretion was wrong by stating that the respondents in question had a long service. In his submission, the respondents in question only had three months or thereabout in terms of service with the applicant. He argued that by stating that the said respondents had a long service, the first respondent must have wrongly taken into account their service with USABCO. Such, he argues, is apparent from the body of the award where the first respondent recorded that the third respondent worked for USABCO for 21 years and the fifth respondent worked for USABCO and SLH for a period of 24 and half years and 7 years respectively.

[8] At the end he argued that applying the *Sidumo* test, the award of compensation is reviewable. Relying on *Viljoen v Nketoana Local Municipality (2003) 24 ILJ 437 (LC) and Johnson and Johnson (Pty) Ltd v CWIU (1999) 20 ILJ 89 (LAC),* he argued that compensation awarded under Section 194(1) was in a form of

solatium for wounded feelings and unfair treatment. Therefore, in his submission, an amount equivalent to three months was appropriate.

ANALYSIS OF EVIDENCE AND ARGUMENT.

[9] The first issue to be dealt with is whether the authorities relied on by the applicant advances his case that compensation of three months was appropriate. In *Johnson's* case the court was concerned with Section 194(1) before amendment, which read thus:

"If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must equal the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or the adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of dismissal. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting the claim".

[10] The judgment did not deal with Section 194(2) which specifically had the wording *just and equitable*, which now has been introduced in the amended Section 194(1). The yardstick for both procedural and substantive fairness is that of just and equitable in all the circumstances. *Viljoen* followed *Johnson* when it also dealt with Section 194 (1) before amendment. So those authorities are unhelpful to me and would have been unhelpful to the first respondent.

[11] Section 194(1) as it stands now, obligates an arbitrator and the Labour Court to award compensation which is just and equitable in all the circumstances. The section does not prescribe what is just and equitable. That being so, the determination of what is just and equitable is left within the powers of the arbitrator or the Labour Court as the case may be. The only check for the exercise of the power is the limitation. The section states that such compensation may not be more than 12 months.

[12] It therefore is correct as found by the arbitrator that she had discretion, when it came to the amount of compensation. As I said, the only hindrance in exercising that discretion is the limitation of 12 months. Therefore it cannot be easily said that where the amount is within 12 months, the commissioner or the Labour Court was wrong.

[13] In *Kemp t/a Centralmed v Rawlins (2009) 30 ILJ 2677(LAC),* Waglay JA as he then was, writing for the majority had the following to say about Section 194(1):-

"*Although s 194(1) sets out the parameters for the amount of compensation the arbitrator or the Labour Court may order, the arbitrator or the Labour Court has a discretion to decide on the appropriate amount. The parameters do not hinder the choice; it merely sets the outer limits beyond which the arbitrator or the Labour Court may not go. Within the limits, however, the arbitrator or the Labour Court may make any decision which it considers to be the correct one."*

[14] Despite the fact that I am bound by the above, I fully agree with Waglay DJP. I further fully agree with the following:-

"When the discretion that is challenged is a discretion such as the one exercised in terms of s 194(1) the test that the court, called upon to interfere with the discretion, will apply is to evaluate whether the decision maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether the decision maker adopted an incorrect approach".

[15] It is apparent that what his Lordship Waglay was suggesting is an evaluation and not prescription of factors to be taken into account. To my mind, all the reviewing court should do is to look at the factors which the arbitrator states that he or she considered in exercising his or her discretion and then decide whether they are fanciful, farfetched and wrong, motivated by bias, insubstantial or incorrect to adopt.

[16] I suppose that if the arbitrator exercises discretion without setting out factors considered before exercising discretion, such is a reviewable irregularity- latent in nature. The discretion is not an absolute one. It still has to pass the scrutiny of the reviewing court. As it was correctly held by Ngcobo J as he then was in *Sidumo* that it is not necessary for a reviewing court to ask what did the commissioner mean by a statement? Nonetheless in the matter before me, the first respondent did set out the factors she took into account when exercising discretion.

[17] All I have to do is to evaluate them. Perhaps before I do that, I must remind myself that I am dealing with an exercise of discretion at the level of a review. Therefore what the Constitutional Court had said in the matter of *National Coalition for the Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)* is apposite. It said:-

"*A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts and principles.*"

[18] Although the above dealt with an appeal situation, I want to believe that it applies with equal force in a review, since it involves the question of exercise of discretion. In *Kemp*, although referring to a discretion in s 193(1) (c), the court said that in essence a review of a discretion in terms of s 193(1) (c) is essentially no different to an appeal because the reviewing court will be required to consider all the facts and the circumstances which the arbitrator, in this instance, had before it and then decide based on a proper evaluation of those facts and circumstances whether or not the decision is judicially a correct one.

[19] I am not sure in my mind though that an arbitrator need to be judicially correct or his decision has to be lawful and reasonable since he or she performs

administrative functions as opposed to judicial functions. Without deciding this, as I am bound by the *Kemp* decision, my inclination is that the question in review should be whether the decision is lawful and reasonable as opposed to whether it is judicial if there is a difference between judicial and lawful.

[20] I now turn to evaluate the factors taken into account by the first respondent in exercising her discretion. The first to consider was the long service. It is not the applicant's case that by considering long service she acted wrongly. The applicant's gripe seems to be that the long service was calculated by taking into account the service at USABCO when the situation contemplated in Section 197(2) did not arise. It is common cause that the respondents in question commenced employment with the applicant only on 17 August 2007 and were dismissed on 15 November 2007. By comparison, such was not a long service. If this court were to adopt a strict approach, then it is clear that the first respondent was factually wrong when she found that there was long service. There is a strong and growing concern about labour brokers-their existence that is.

[21] One of the concerns is that of job security and tenure of service. In terms of Section 197 (2) (b) of the LRA, a transfer would include a transfer of all obligations and rights. From the facts of this case, it is clear that when the respondents in question were outsourced from USABCO to SHL, their rights also transferred by law. Their service would not have been interrupted as it were. Equally, when they were outsourced to the applicant, by law, their service accumulated from USABCO should not have been interrupted. The situation set out above is the law. Whether the first respondent did not expressly, in her award

state that position, such does not detract from the fact that, that is how the law is. With that legal position, the applicant's gripe was that the first respondent did not overtly mention that the provisions of Section 197 applied.

[22] Advocate Leslie argued that since Section 197 was not mention, this court would be left guessing-using the words of his Lordship Ngcobo J as he then was in *Sidumo.* I cannot agree with him on that. The statement that she took into account long service does not leave this court guessing as to what she meant. It is one thing not to understand a statement and it is another to say the statement is not factual. What his lordship Ngcobo was referring to was the former, whereas, the argument of the applicant relates to the latter.

[23] In so far as the latter is concerned, there is evidence that the three respondents worked for USABCO and SLH for a number of years. Actually the first respondent recorded those years of service in her award. Then the question to be asked is whether the statement that the respondents had long service is supported by any evidence? In my view it is. The fact that they did not accumulate that with the applicant is a red herring. This is not a matter where the respondent started from scratch with the applicant. Their services were outsourced from USABCO to SLH and then to the applicant. The fact that the applicant interviewed and selected them is of no moment given the history of their employment. Accordingly, I cannot fault the first respondent for concluding that there was long service.

[24] There is nothing wrong in taking into account the length of service for the purposes of determining the compensation amount. In fact I did not understand Advocate Leslie to be arguing otherwise.

[25] The next factor was that the applicant is a large company. The applicant's submission in this regard is that the relevance thereof is questionable. I do not understand why. I suppose it can be said that a large company is in a better financial position to pay a specific fine unlike a small company. Again I suppose it is a factor to be taken into consideration when reducing compensation or awarding little that a company is small and financially not viable. I am unable to find fault in taking into account this factor. It is not the applicant's case that in fact it is a small company and there is testimony on record to support that.

[26] The next is that the dismissal is substantively unfair. It did not appear to me that the applicant found any fault with this factor. It is so that the dismissal was substantively unfair. In terms of the LRA, the primary remedy for that is reinstatement. In *SAA v Bogopa and others (2007) 28 ILJ (LAC),* Zondo JP writing for the majority had the following to say:-

"*I am satisfied that, once the respondents were not granted reinstatement, it was fair that they be awarded the compensation that the court a quo awarded them."*

[27] The court a quo in *SAA* had awarded 12 months compensation. The statement above suggests that if a dismissal is substantively unfair and the primary remedy

is not awarded, it is not unfair to award maximum compensation even to a relatively new employee. I shall later in this judgment consider whether the evaluation by the court requires pricing or not.

[28] Securing of alternative employment was another factor. In the light of the *SAA judgment supra,* it would have been fair to award the respondents in question maximum compensation since the primary remedy was denied. This factor actually worked in favour of the applicant and to the detriment of the respondents in question. In *Kemp*, this factor ranked amongst factors to have been considered when deciding whether compensation should be granted in terms of Section 193(1) (c). The applicant cannot and should not be heard complaining about this factor. Having evaluated all the factors, I am unable to find any basis as set out in the authorities reviewed above to interfere or set aside.

[29] I now turn to the question whether the evaluation exercise involves pricing. By that I mean-should the fact that an employee has been dismissed without a fair reason qualify for a fat price as it were at the time of assessment? In my view the approach should not be different from the one adopted when considering condonation. So that being the case, it is inappropriate in my view for a reviewing court to start pricing. If that was permissible then one would be appealing as opposed to reviewing. For instance if the reviewing court were to say this factor should have fetched this price therefore I reduce the price of compensation, that, in my view, would amount to usurpation of power. All the reviewing court has to do is to evaluate each using the test as espoused by the authorities referred to above as a barometer. If each should be considered or could also have been

considered by the reviewing court if it was sitting as an arbitrator then all is in order. The evaluation should not be for substitution but for establishing whether the barometer is met. Therefore in my view no factor should weigh more that the other.

[30] Although, there seem to be cogent and defendable reasons that the fact that the dismissal was for unfair reasons and reinstatement is denied such should fetch a bigger price. So even if I were to accept, which I do not, that the service of the respondents in question was shorter, the fact that they were dismissed without a fair reason and were denied reinstatement should have weighed heavily with me not to interfere with the discretion.

[31] In the result, I am constrained to make the following order:-

1. The application for review is dismissed with no order as to costs.

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G. N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 04 February 2010.

Date of Judgment: 05 February 2010

APPEARANCES

For the Applicant: Adv Leslie instructed by Haywood De Bruyn Attorneys, Belville, Cape Town.

For the respondents: No appearance.