REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of Interest to the other Judges

Case No: JA 47/2010

In the matter between:

MONGEZI TSHONGWENI **Appellant**

and

EKURHULENI METROPOLITAN MUNICIPALITY **Respondent**

Heard: **23 February 2012, 1 June 2012**

Delivered: **15 June 2012**

JUDGMENT

MURPHY AJA

1. The appellant appeals against a decision of the Labour Court (van Niekerk J) in which it held that the dismissal of the appellant in July 2006 was procedurally fair but substantively unfair. It however limited the relief awarded to the appellant to the payment of compensation

equivalent to nine months remuneration and ordered the appellant to pay the costs of the trial proceedings excluding the costs of preparation.

2. After his dismissal, the appellant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). When conciliation failed, the applicant applied to have the matter referred to the Labour Court for adjudication in terms of section 191(6) of the Labour Relations Act[1] ("the LRA"). Presumably, on the basis that the dispute was of some complexity, the Director of the CCMA granted the application and referred the dispute to the Labour Court.

3. The respondent has filed a notice of cross appeal against the finding of the Labour Court that the dismissal was substantively unfair. The notice of cross appeal was filed late and the respondent accordingly has filed an application for an order condoning the late delivery of the cross appeal. The application for condonation is opposed by the appellant.

4. The appellant was employed in the capacity of Executive Director: Public Safety in terms of section 56 of the Local Government: Municipal Systems Act,[2] on a fixed term contract commencing 1 April 2002 for a period of five years ending 30 March 2007. His dismissal arose out of alleged transgressions on his part in relation to the procurement of certain outsourced services. The respondent's department of public safety, of which the appellant was the head, had responsibility to appoint service providers to serve summonses in criminal matters falling within its jurisdiction. Clause 9.4 of the appellant's written contract of employment provided:

> '…. the Executive Director will at all times comply with the Municipality's performance management, quality and teamwork

[1] Act 66 of 1995.
[2] Act 32 of 2000.

> standards, systems and/or policies as agreed upon from time to time between the City Manager and the Executive Director in writing.'

Clause 9.5 obliges the Executive Director to assist the City Manager in effective, efficient and accountable administration in accordance with the applicable municipal finance and procurement legislation. The appellant was furthermore bound by the provisions of section 217 of the Constitution which provides that when an organ of state contracts for goods and services, it must do so in accordance with a system that is "fair, equitable, transparent, competitive and cost effective". It was unquestionably part of the appellant's responsibility to ensure compliance with the respondent's procurement and tender policy in so far as it affected his department.

5. After a disciplinary hearing which lasted 20 days, the appellant was found guilty of misleading the City Manager with regard to the appointment of the companies selected to serve summonses for the municipality; and of appointing the companies in March 2003 without having proper authority to do so, without following proper procedures and without having regard to the stated tender requirements for the prospective appointees. He was dismissed on 5 July 2006, more than three years after the appointments were made, and approximately nine months before his contract of employment was due to expire.

6. Shortly before the appointment process which is the subject of the dismissal dispute, the respondent had cancelled a previous tender process to appoint service providers to serve summonses on its behalf for a period of 24 months.

7. On 26 February 2003, the Tender and Procurement Committee of the respondent adopted the following resolutions in relation to the appointment of contractors to serve summonses:

> '2.That the tender BE RE-ADVERTISED to ensure compliance of the Tender and Procurement Policy …. (sic)

> 4.That the Executive Director: Public Safety BE AUTHORIZED to deal with the issuing of summons by inviting quotations on a month to month basis, for a maximum period of three (3) months.'

8. The appellant's subordinate, Mr. Sam Sibande, formulated a specification outlining the requirements that prospective bidders had to comply with in order to be appointed. Original tax clearance certificates from the South African Revenue Service not older than six months had to be attached to the quotation, and the contractor was required to have telephone and fax facilities for communication during office hours, as well as the necessary infra-structure and resources to serve summons. All prospective bidders were to tender at the same price, namely R25 for personal service and R15 for non personal service. The documentation also required the bidders to complete information relating to directorships, financial information , including bank accounts, authorities for signature, information relevant to infra-structure and resources available, plant and equipment, size of the enterprise, staffing profile, previous experience, financial ability to execute the project, equity ownership, SMME status, local content, use of sub-contractors and job creation.

9. The quotation bids were opened in a public process on 5 March 2003. Five service providers were appointed from a total of 22 bidders. The respondent's case is that the bids of the successful service providers did not meet with the requirements of the specifications and that other bids, which did comply, were rejected.

10. The appellant was suspended from his employment about 18 months after the bidding process on 4 October 2004. As mentioned, he was dismissed on 5 July 2006, that is, three years after the appointment of the service providers.

11. The respondent called only one witness in support of its case in the proceedings before the Labour Court, namely Mr. Khanye who was employed by it as a chief accountant. It is unnecessary to canvass his

evidence in any detail. It established that the quotations of the five successful bidders were defective in certain respects. The defects took the form of a failure to supply information regarding bank details, telephone and fax facilities, authorised signatories, job creation, infra-structure and the like. Most did not provide tax clearance certificates, though the record shows that these were in fact provided a few days later. Mr. Khanye testified that the failure to comply with the specifications was generally fatal, and normally would result in the disqualification of the bid. He denied that it was competent for the department requiring the services to waive compliance with the specifications in cases where the bid documentation supplied incomplete information.

12. After Mr. Khanye had been cross-examined by counsel for respondent, the court *a quo* posed certain questions for clarification to him. It had emerged during his evidence that the specifications were put together by the tender and procurement department and that the tender documentation was standard. The following exchange is of some importance:

> '**Court***:* Now do you know anything about the applicant's role in this process, and by this process I am referring to the award of the tender for the provision of services on a month to month basis subject to a maximum of three months and I am also referring to the request for the extension of that arrangement?
>
> **Khanye**: No.
>
> **Court:** Do you have personal knowledge of the applicant's involvement or role in that process?
>
> **Khanye:** No, my Lord.'

This testimony in effect amounted to an admission by the respondent's sole witness that he had no knowledge of any conduct by the appellant pertaining to the procurement, quotation and appointment processes in

respect of the invitations to bid, and thus he was not able to pronounce on whether the appellant had committed any misconduct.

13. With full comprehension of the difficulty such an admission posed to its case, the respondent has sought to argue on appeal that the documentary evidence alone is sufficient to establish that the appellant was guilty of misconduct. It is common cause that on 10 March 2003, the appellant signed a letter addressed to the City Manager which was prepared by Mr. Sibande in support of the recommendation that the preferred bidders be appointed. The letter records that quotations were invited through the respondent's tender and procurement office on 28 February 2003 and the closing date was 5 March 2003. It records further that twenty-two prospective companies submitted their quotations for the project, that all quotations were opened in public in an auditorium on the respondent's premises and that the quotations were then taken to the tender and procurement office for registration. The letter notes that a meeting was held on 10 March 2003 attended by officials of the respondent's departments of corporate services and public safety, including Mr. Sam Sibande, but not the appellant, where, according to the letter 'it was resolved that Public Safety must go ahead to appoint companies to deliver the aforementioned service without using any form of criteria'.

14. The meeting was attended by Mr. Malcolm Myeza of the finance department who advised the public safety department that the quotation system should be used but that it could go ahead and "pin-point" companies and that there was "no need to follow any form of criteria to pin-point the companies". He also advised that the pin-pointed companies who had not supplied tax clearance certificates should be phoned to do so and that no company should be appointed without submitting the required certificates. It is common cause, as I have said, that all the successful bidders submitted tax clearance certificates within days of the meeting.

15. The letter sets out a motivation for why the successful bidders were found to be suitable to supply the services.

16. The letter essentially sought approval and authorisation from the City Manager to go ahead in the way proposed, and further intimated that approval for the process had been given by the Executive Director Corporate and Legal Services and the Strategic Executive Director. It is common cause that the City Manager signed the letter and granted approval. It is therefore not disputed that the department had sought and obtained authorisation from three of the appellant's superiors, before appointing and contracting with the successful bidders. At some stage all three added their signatures to the letter as a means of signifying their approval.

17. The respondent contends that the letter was misleading in that it did not point out the defects in the information supplied by the bidders and did not point out that there were other bidders that had been disqualified despite satisfying the requirements by supplying fuller information and completing the documentation properly. It also denied that "pin-pointing" without following any criteria was an acceptable way of procuring services for the municipality.

18. In his evidence before the Labour Court, the appellant explained that the letter had been drafted by Sibande who had taken full responsibility for the procurement process. He had not attended the meeting of 10 March 2003 where the decision to pin-point had been taken. He maintained that had the bids not been approved by his superiors he would not have made the appointments. Throughout his testimony he insisted that he had played a minimal role in the process. He had not seen the advertisement for quotations, nor was he given the bid documentation submitted by the bidders to scrutinise. He played no immediate part in the assessment and evaluation of the bids. He conceded that he had been the person authorised by the Tender and Procurement Committee in terms of the resolution of 26 February 2003 to invite the bids, but he understood his involvement to be limited. As

far as he was concerned, the advertising and the evaluation of the bids was "an administrative process… not a process that is run by me personally, but it is run by Sam Sibande who is responsible for tender and procurement activities in my department". Despite some suggestion in argument that it was improbable, this evidence was not disputed or contradicted in any meaningful or convincing way.

19. The appellant described the specification as being a "standard form that is issued by tender and procurement office that falls under finance" and reiterated that these had not been brought to his attention at any stage. When asked if he had considered the relevant quotations, he replied emphatically:

> '… in this case this document … did not come to my office for my consideration. It has nothing to do with me. Any executive director, any city manager, any strategic executive director has nothing to do with these documents, thus tender and procurement office is responsible for these processes.'

20. The appellant accepted unequivocally that the bid documentation was defective and problematic, but he qualified his concession by stating:

> 'If I may repeat ... it is not my domain to look at tender or bid documents, it is not my function.'

In response counsel for the respondent referred him to clause 7.2.1 of the respondent's procurement policy and put it to the appellant that he had a duty to consider the quotations which he had failed to do. The clause reads:

> 'After all the tenders or quotations addressed to the Municipal Manager have been opened and recorded on a list, it shall be forwarded to the head of the relevant department concerned. After the tenders or quotations have been entered on a comparative list and evaluated by the head of the relevant department shall return (*sic*) the tender documents together with a recommendation to the Tender and Procurement Committee for consideration.'

The appellant accepted that in the final analysis he was accountable but reiterated that the responsibilities, functions and powers had been delegated to Sam Sibande.

21. No evidence was led by the respondent to show that the appellant's conduct was in breach of the rules of procurement or that he had acted improperly by delegating his responsibilities to Sam Sibande. Khanye, it will be re-called, was unable to comment on the appellant's conduct. No other official testified that it was the policy and practice of the respondent that the Executive Director of a department was obliged personally to determine the specifications and to evaluate each bid, or that delegation was in breach of the rules to the extent that a valid and fair reason existed for the appellant's dismissal. At best for the respondent, therefore, on the evidence before the court, the only wrongdoing of which the appellant might have been guilty was his negligence in relying upon Sibande's recommendation and in appending his signature to the letter of 10 March 2003 without properly checking the information and documentation upon which the recommendation was based. And even then, there is no direct evidence by any of his superiors which confirms that he breached the rules by relying on Sibande's representation that all was in order. Moreover, the evidence does not disclose whether or not the appellant's seniors perused and considered the bid documentation prior to approving the proposal and giving authorisation for it to be actioned. Consequently, if there was indeed any negligence on the part of the appellant, it is not possible to determine whether his conduct was the proximate cause of an irregular or improper appointment of any service provider.

22. As already mentioned, the court *a quo* held that the dismissal was substantively unfair. It did so on the basis that Khanye's admission and the absence of any other evidence meant that the respondent had failed to establish either that the applicant had committed the misconduct he was alleged to have committed, or that his dismissal

was the appropriate sanction in the circumstances. It held that the respondent had failed to discharge its onus to prove that the dismissal was substantively fair.

23. That finding, as stated earlier, is the subject of the cross appeal, the late noting of which requires condonation.

24. In terms of rule 5(5) of the Rules of the Labour Appeal Court, a notice of cross appeal must be delivered within ten days, or such longer period as may on good cause be allowed, after receiving notice of appeal from the appellant. The appellant was refused leave to appeal in the court *a quo.* The appellant then petitioned and obtained leave to appeal from this court. In both proceedings the respondent expressly reserved its rights to institute a cross appeal against the court *a quo's* findings in relation to substantive fairness. After the appellant was granted leave, counsel for the respondent reminded the instructing attorney to deliver a notice of cross appeal within 10 days. The attorney simply forgot to do so. The omission of the attorney was discovered only when the Registrar issued a directive for heads of argument to be filed. Leave to appeal was granted on 2 December 2010. The notice of appeal was delivered on 23 December 2010. The cross appeal was delivered on 29 June 2011, 171 days late.

25. Whether condonation should be granted depends on the degree of lateness, the explanation for it and the applicant's prospects of success in order to establish the existence or otherwise of good cause. Where, as in this case, the degree of lateness is lengthy and the only excuse being the negligence of the legal representative, the applicant for condonation is required to make out a strong case that the cross appeal has good prospects of success.

26. For reasons that appear from the preceding analysis, the respondent's prospects of reversing the finding of substantive unfairness are not good. The evidence presented on behalf of the respondent at the trial was simply insufficient to establish that the appellant breached the

procurement policy. As explained, there is no evidence that contradicts the appellant's testimony that the responsibility had been properly delegated or supporting the conclusion that it was against practice and policy for the appellant to have relied on the report made by Sibande. There is equally no basis for concluding that the letter of recommendation, incomplete as it may have been, was the sole causal factor leading to the appointments. To the extent that the appellant neglected his duties by not checking whether the recommendation was justifiable with reference to the bid documentation, it is doubtful whether that misconduct, if indeed such, would justify dismissal.

27. The misconduct, if that, was not shown to have been deliberate or wilful, and in so far as it may have been negligent, there is no evidence that the respondent or any of the unsuccessful bidders suffered undue prejudice or harm as a direct result of the flawed process or supporting the conclusion that it was against practice and policy for the appellant to have relied on the report made by Sibande. It is not sufficient to assert, as the respondent does, that the unsuccessful bidders must have suffered harm. There needed to be evidence that but for the irregularity they in fact suffered harm. To hold otherwise is to venture into the realm of speculation.

28. In a final attempt to find substantive fairness, counsel argued that the appellant had not shown himself to be remorseful for his negligence. It contended that the appellant's testimony revealed that faced with the same situation, he would have acted similarly. By that token, it was submitted, the appellant demonstrated his unreliability and hence that the continuation of the relationship became intolerable to the point that dismissal was an appropriate sanction. Counsel founded this submission upon a rather limited dialogue during cross-examination. After counsel had demonstrated the deficiencies of the bid of a company called Ubhoko Financial Services, the following exchange occurred:

'**Counsel**: Based on what is contained in this document which you see now, would you have appointed Ubhoko or not?

Appellant: I would have appointed them on the basis of the meeting and the advice that I got from my seniors and the approval thereof.'

I do not consider the appellant's response to signify an obdurate attitude. The appellant was merely seeking to exculpate himself by saying that he had acted on advice and with authorisation.

29. In the final analysis, the court *a quo's* finding of substantive unfairness cannot be faulted. The issue is best disposed of by refusing the application for condonation for the late delivery of the notice of cross appeal on the grounds that good cause has not been shown.

30. In his notice of appeal the appellant lists no less than 39 grounds of appeal. In summary, they challenge the court *a quo's* findings on procedural fairness, the remedy granted and the award of costs. Since the exhibits dealing with procedural issues in the court *a quo* did not form part of the record on appeal, counsel for the appellant wisely conceded during argument that the court was not in a position to properly assess the findings of the court *a quo* in relation to procedural fairness. The appellant accordingly abandoned the grounds of appeal pertaining to those issues.

31. With regard to the question of remedy, there was much debate in the court *a quo* concerning the implications of the appellant's contract of employment being one of fixed duration, which in the normal course would have expired nine months after he was dismissed. As a general rule, in terms of section 193 of the LRA, but subject to the exceptions listed in section 193(2), where an employee's dismissal is substantively unfair the court must grant reinstatement or re-employment. Where the court does not order reinstatement or re-employment then in terms of section 193(1)(c) of the LRA it may order the employer to pay compensation to the employee. Section 194 limits the amount of

compensation payable to an amount which is just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration in the case of ordinary unfair dismissals or 24 months where the dismissal is categorised as automatically unfair.

32. Section 193(2)(c) of the LRA allows the Labour Court or the arbitrator, on finding a dismissal to be unfair, to decline to order the employer to reinstate or re-employ the employee where it is not reasonably practicable for the employer to do so. The question which exercised the court was whether it was competent to reinstate an employee when the contract had expired through the effluxion of time, on the basis that despite the cessation of the contract the employee had a reasonable expectation that the initial contract would have been renewed for a further fixed term. For reasons that will appear presently, it was unnecessary for the court to decide this question because there was another compelling ground which the court correctly recognised as an adequate basis for refusing reinstatement.

33. In my opinion, but without deciding the point, there is merit in the proposition that it rarely will be reasonably practicable to reinstate an employee whose fixed term contract of employment has expired, where, as in this case, the renewal of the contract for a second fixed term requires statutory authorisation (in terms of section 57 of the Local Government Municipal Systems Act) and the employee has expressly agreed in the initial contract that he would not entertain any expectation of renewal or extension beyond the initial fixed period. The purpose of such a term is to ensure that renewal of the contract will take place by means other than mere expectation. The intention is for the parties to embark upon further negotiations directed at assessing previous performance, setting new targets and objectives, and imposing new conditions premised upon past experience. It aims at ensuring efficiency at the highest level of local government. In the face of such an explicit intention, neither party could reasonably assume the existence of an expectation of automatic renewal. By the same token,

the employment of senior managers in local government, governed by section 57, must be done in terms of a written contract, and renewal for a fixed period depends on the prior satisfactory attainment of identified performance objectives and targets. The reluctance of the court *a quo* to create a new contract for a municipal manager on the basis of legitimate expectation accordingly reflects prudent and appropriate deference to the contractual requirements applicable to senior managers in the local government sector.

34. The proper reason for refusing reinstatement though is that the appellant made it abundantly clear in his testimony that he did not want to be reinstated. Section 193(2)(a) of the LRA provides that reinstatement will be required unless the employee does not wish to be reinstated. The appellant obtained a new job and commenced employment in a senior position with the Gauteng Provincial Government in February 2010, almost four years after his dismissal. It was put to the appellant during cross-examination that although he sought reinstatement, if he succeeded in his claim he no longer had any intention of re-commencing employment with the respondent because he preferred to remain in his new position. The appellant conceded without hesitation that such was indeed his intention. In argument before us, counsel for the appellant submitted that notwithstanding such concession it would be permissible for the court to order reinstatement for the period between 5 July 2006 (the date of dismissal) and 31 January 2010 (the day before the appellant commenced employment with the Gauteng Provincial Government). He argued that reinstatement is "a multifaceted remedy" and that nothing in the LRA prevented the Labour Court from making a qualified order of reinstatement, which did not oblige the appellant to tender his services for the future. The effect of such an order, were it to be granted, would be that the appellant would be paid his remuneration for the stipulated period, but he would be excused from tendering his services.

35. Counsel's submission is founded upon a fundamental misconception regarding the nature of the statutory remedies available for unfair dismissal in terms of the LRA. Reinstatement, re-employment and compensation, as the exclusive remedies for unfair dismissal, (now provided for in section 193(1) of the LRA), were introduced into labour legislation to remedy the absence of satisfactory relief for the unfair termination of the contract of employment by employers. At common law the only remedy available to a dismissed employee was an action for wrongful breach of contract. As in all cases of breach of contract, the injured party could elect to sue for specific performance or for damages. A claim for specific performance in terms of a reciprocal obligation will succeed only where the party claiming performance has performed or at least tenders performance. In the context of an employment contract, a claim for specific performance is a claim for reinstatement on the same terms and conditions of employment that existed at the date of dismissal and must be accompanied by a tender by the employee to resume services or at least to fulfil the principal obligation under the contract to make his or her services available. The employee's entitlements under a contract of employment are dependent on the availability of his or her services to the employer and not the actual rendering of services.[3]

36. Prior to the 1980's our courts rarely awarded specific performance of a contract of employment on the ground that it was inadvisable to compel one person to employ another whom he does not trust in a position which imports a close relationship.[4] This meant that an employee in the event of a wrongful termination of employment was restricted to a claim for damages to remedy the breach. Where damages are sought as a surrogate for performance they relate to the monetary value of the performance agreed upon but not received. Such damages in the employment context were normally of a limited amount because of the application of the general principle that an injured party is only entitled

[3] *Johannesburg Municipality v O'Sullivan* 1923 AD 201.
[4] *Schierhout v Minister of Justice* 1926 AD 99 at 153.

to his or her positive interest. The basic principle in the assessment of damages is that the plaintiff should be placed in the position he or she would have been in had the contract been fully performed. All that is required for the lawful termination of a contract of employment, for there to be full performance, is notice of termination in an indefinite term contract and the expiry of the period in a fixed term contract. Damages for breach in the employment context accordingly will be either the amount payable as notice pay in an indefinite term contract or the salary payable for the unexpired period of a fixed term contract, less any sum the dismissed employee earned or could reasonably have earned during the notice period or the unexpired period of the contract, such being the actual loss suffered by him.[5] Hence a plaintiff's damages could never be more than the notice pay due under the contract or the salary owing in respect of the unexpired fixed term.

37. The unfair dismissal regime was introduced in the 1980's, following the recommendations of the Wiehahn Commission of Enquiry into Labour Legislation, precisely in recognition of the fact that contractual principles and remedies offered employees paltry protection. Since then employees can sue on a wider cause of action (unfairness rather than wrongful breach) and the statutory remedies of reinstatement re-employment and compensation are available. In *Equity Aviation Services (Pty) Ltd v CCMA and Others*,[6] the Constitutional Court explained the meaning of the word reinstate as follows:

> 'The ordinary meaning of the word "reinstate" is to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards worker's employment by restoring the employment contract. Differently put, if employees are reinstated they

[5] *Myers v Abramson* 1952 (3) SA 121 (C) at 127C-D.
[6] [2008] 12 BLLR 1129 (CC) at para 36.

> *resume* employment on the same terms and conditions that prevailed at the time of their dismissal.' (Emphasis supplied)

Reinstatement may be ordered from a date later than the date of dismissal (section 193(1)(a) of the LRA) and thus may be of limited retrospectivity. Re-employment implies termination of a previously existing employment relationship and the creation of a new employment relationship, possibly on different terms both as to period and the content of the obligations undertaken. In both instances, as in the case of the common law remedy of specific performance, the employee must make his services available if the remedy is to be maintained; there must be a willingness to resume employment. Aside from the requirements of the common law, that much follows in part, it would seem to me, as the corollary arising from the provision in section 193(2)(a) of the LRA that reinstatement or re-employment should be ordered unless the employee does not wish to be reinstated or re-employed.

38. Compensation is the remedy available to an employee who is found to be unfairly dismissed but not granted the remedy of reinstatement or re-employment. As alluded to earlier, in terms of section 193(2) read with section 193(1)(c) of the LRA, compensation is payable where the employee does not wish to be re-instated or re-employed, where the continuation of the employment relationship would be intolerable, where reinstatement or re-employment is reasonably impracticable or where the dismissal was only procedurally unfair. Importantly, the LRA does not grant an employee a remedy to sue for damages for unfair dismissal. In most cases an award of compensation (capped at 12 months remuneration for unfair dismissals, and 24 months remuneration for automatically unfair dismissals)[7] will be more than an award of damages at common law, especially where the contract is for an indefinite period. On the other hand, it could be less in the case of a fixed term contract, depending on the balance of the period remaining

[7] Section 194 of the LRA.

after dismissal. An employee seeking damages for termination of employment in excess of the statutory amount of compensation will accordingly have to sue the employer for a wrongful breach of contract.

39. The appellant's claim for reinstatement, in the guise he wants it, cannot be maintained because he is not prepared to make his services available to the employer and he does not want to be put back in the job.

40. What the appellant really wants is not reinstatement (the resumption of his employment) but his salary for the period he was unemployed between July 2006 and February 2010, that is 43 months salary which would be an amount in excess of R2 million. Such an amount would be his positive interest, which would be the actual loss of his salary for the 9 months remaining as the unexpired period of his fixed term, as well as consequential losses in respect of the salary he would have earned had his fixed term contract been renewed for at least 34 months. The foremost problem with granting such a remedy is that, as already said, the LRA does not provide for damages for unfair dismissal. Where reinstatement is not granted, the court is limited to granting compensation in a maximum amount of 12 months.

41. It is also improbable that the appellant would succeed at common law in recovering consequential damages. Aside from the fact that no case has been made in support of a wrongful breach of contract, the appellant contractually warranted that he had no expectation of renewal and consequently on that ground his loss might legitimately be held to be too remote. That conclusion would be reinforced by the fact of the breakdown of the trust relationship in this case. It is more than arguable that the appellant could not reasonably have entertained any expectation of renewal in the circumstances. It should also be kept in mind that the dismissal here did not consist of an expiry of a fixed term contract in the face of a reasonable expectation of renewal.[8] The

[8] Section 183 of the LRA defines a dismissal to include a termination of employment arising from the non-renewal of a fixed term contract where the employee entertained a reasonable

appellant was dismissed by the employer terminating the contract on the grounds of alleged misconduct. The irony, of course, and this perhaps underlies the appellant's innovative formulation of his claim for damages as a claim for reinstatement, is that had the appellant been employed in terms of an indefinite term contract, and had he wanted reinstatement, he may possibly have succeeded in his claim for back pay – an apparent anomaly under the LRA perhaps. Whether he would have received the full amount would have depended on the court favourably exercising its discretion to reinstate him retrospectively to the date of dismissal. But whatever the outcome he would still have been obliged to tender his services.

42. To summarise, the appellant is not entitled to reinstatement because firstly he was not prepared to make his services available to the respondent. Secondly, even had he wanted reinstatement it might have been reasonably impracticable to grant it considering the requirements of the local government legislation. And, thirdly, had he wanted reinstatement and the court was bold enough to grant it and write another fixed term contract for the parties, most likely such reinstatement (or re-employment) would have been of limited retrospectivity. And finally, the appellant is not entitled in terms of the LRA to the damages he seeks (which he optimistically labels as reinstatement).

43. In granting an amount of nine months salary as compensation, the Labour Court was evidently guided by the fixed contract having nine months to run at the date of dismissal. The court exercised its discretion properly. In the absence of any misdirection or error, there is no basis for interfering with the award of compensation.

44. In the final analysis, the appellant is not entitled to reinstatement in the guise that he seeks it and there is no basis for interfering with the

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expectation of renewal. Even where that situation applied, the court or arbitrator will always be required to assess the fairness of the non-renewal.

compensation award, with the result that the appeal against the remedy granted by the Labour Court cannot be upheld.

45. The appellant has also appealed against the costs order of the Labour Court. It will be recalled that despite the appellant's success the Labour Court refused to grant him his costs for preparation and ordered him to pay the respondent's costs of the trial. The court justified its orders on two grounds: firstly, because the appellant had rejected an offer of settlement in the amount of nine months salary made on the morning of the trial; and secondly, it felt that the manner in which the appellant had conducted the various proceedings (the disciplinary hearing and the trial) permitted the refusal of costs.

46. When a successful party has been deprived of his costs in the trial court, an appeal court will enquire whether there were any grounds for the departure from the ordinary rule that costs should follow the result. If there are no good grounds it should interfere. However, it should be reluctant to interfere with the discretion of the trial court merely on the grounds that it might have taken a different view of the sufficiency of such grounds.[9]

47. On the morning that the trial commenced, counsel for the respondent submitted a written offer purporting to be made in terms of rule 22A, of the Rules of the Labour Court, in terms of which the respondent undertook to pay the appellant for the remaining balance of the fixed term contract within 21 days of the acceptance of the offer, provided the offer was accepted by 14h00 on the first day of the trial. The offer was rejected.

48. The Labour Court's order in respect of the costs of the trial was predicated on the rejection of the offer and the provision in rule 22A(7) that the court may take into account any offer made by a party in terms of the rule in making an order for costs. The problem with the court's finding is that the offer was not made in accordance with the provisions

[9] *Merber v Merber* 1948 (1) SA 446 (A) at 453

of rule 22A. The appellant was given insufficient opportunity to reflect as required by rule 22A(3), which allows the recipient of the offer at least 10 days to consider it. Moreover, the offer did not make any provision for costs and particularly did not state whether the respondent disclaimed liability for costs, as it was required to do for obvious reasons in terms of rule 22A(2)(d). In the light of such, it was unduly harsh and unjustified to deprive the successful appellant of his costs for trial on the grounds that he refused a last minute offer of this kind.

49. As regards the conduct of the trial by the appellant's counsel, the record reveals that counsel was a source of exasperation to the court. His cross-examination was at times seemingly purposeless, and his objections to the admissibility of evidence unfounded and confused. But it cannot be said that his conduct was vexatious, scurrilous or dishonourable. Nor can it be said that any line of cross-examination was needlessly pursued. His questioning was sometimes long-winded and occasionally repetitive. His responses to the court's guidance were sometimes obdurate, unperceptive and at times bordering on disrespectful. But I am unable to conclude that the approach taken was misguided to the extent that it justified depriving the successful appellant of his costs. Moreover, in fairness, counsel presented the appellant's case in an orderly and effective manner. At the end of the day, a trial which was set down for 10 days was completed in 5 days. I also doubt whether it was legitimate for the court to penalize the appellant for the conduct of the disciplinary hearing. There was insufficient evidence to establish that it was objectionable to the extent that it warranted denying the appellant his costs of preparation or trial. In such circumstances, the court erred in making the orders it did. The appeal in respect of costs should therefore be upheld.

50. The appeal and the application for condonation for the late delivery of the cross appeal were originally set down for hearing on 23 February 2012. The respondent had filed comprehensive heads of argument on

29 July 2011 dealing with the application for condonation, and the issues of substantive and procedural fairness. The appellant had not filed heads dealing with condonation or the prospects of success on substantive fairness. Prior to the hearing, I issued a directive to the parties informing them that it was necessary for the appellant to file supplementary heads dealing with the application for condonation, and to furnish the court with the transcript of the disciplinary proceedings admitted into evidence in order to prepare for the appeal against the finding of procedural fairness. On 9 February 2012, the attorney for the respondent addressed a letter to the attorney of the appellant dealing with the directive. In it he stated:

> '… should the course of action elected by your client result in the Judges not being prepared to hear the matter on the 23rd, our client will insist that your client pay the wasted costs occasioned by such failure.'

The appellant did not comply with the directive and failed to deliver heads of argument on the outstanding issues or the transcript. This failure resulted in the appeal being postponed to 1 June 2012. There can be no doubt that the appellant is liable for the wasted costs occasioned by the postponement.

51. As regards the costs of the appeal, both parties have had a measure of success. Accordingly, it is fair that there be no order as to the costs of appeal.

52. In the premises, the following orders are issued:

i) The application for condonation of the late delivery of the notice of cross appeal is dismissed with costs.

ii) The appeal partially succeeds but only in respect of the award of costs. The orders of the Labour Court are accordingly varied to read as follows:

"1. The dismissal of the applicant was substantively unfair.

2. The applicant is awarded compensation equivalent to nine months remuneration to be calculated at the rate of remuneration earned by the applicant on the date of his dismissal.

3. The respondent is to pay the costs of the adjudication proceedings."

iii) The appellant is ordered to pay the wasted costs occasioned by the postponement of the appeal on 23 February 2012.

iv) There is no order as to the costs of the appeal.

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JR MURPHY, AJA

Acting Judge of the Labour Appeal Court

I agree

_____

P TLALETSI, JA

Judge of the Labour Appeal Court

I agree

_____

M MOLEMELA, AJA

Acting Judge of the Labour Appeal Court

APPEARANCES:

For the appellant: Advocate F Memani

Instructed by: Lennon Moleele and Partners

For the respondent: Advocate F Boda

Instructed by: Malherbe Rigg and Ranwell Inc