IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOAHNNESBURG

Reportable

Case No: JA03/2020

In the matter between:

TOTAL SOUTH AFRICA (PTY) LTD **Appellant**

and

REON MEYER **First Respondent**

RONNIE BRACKS N.O **Second Respondent**

NATIONAL BARGAINING COUNCIL FOR

THE CHEMICAL INDUSTRY **Third Respondent**

Heard: **16 February 2021**

Delivered: **02 June 2021**

Coram: Davis JA, Coppin JA and Molefe AJA

JUDGMENT

DAVIS JA

Introduction

[1] This appeal concerns two separate issues. In the first place the question arises for consideration as to whether, having found that the dismissal of the first respondent was both substantively and procedurally unfair, the court *a quo* exercised its discretion judicially in ordering the appellant to pay the equivalent of twelve months' remuneration as compensation to the first respondent in terms of s 193 (1) (c) of the Labour Relations Act 66 of 1995 ('LRA'). The second issue concerns a finding that the appellant committed an unfair labour practice by failing or refusing to grant the first respondent a post-retirement medical benefit. The appellant had offered a post-retirement medical aid benefit ('PRMB') to its employees. In terms of the applicable policy 'upon normal ill health or early retirement', employees who joined appellant on or before 31 December 2001 were entitled to an increased medical aid subsidy of 75%, notwithstanding the provisions of the specific retirement fund. First respondent contended that this policy was applicable to him in the same way that the appellant had granted the PRMB to nine employees who were retrenched in 2010. The appellant had refused to offer the PRMB to the first respondent and contended that the case of the 2010 retrenchees was clearly distinguishable from the position of the first respondent. The second leg of this appeal thus concerns whether the refusal by the appellant was correctly classified by the court *a quo* as an unfair labour practice, in that the appellant had failed to provide an objective rational or fair justification for the difference in treatment.

[2] The finding that the first respondent's dismissal was both substantively and procedurally unfair is not the subject of an appeal before this court. For the purposes of this judgment, this finding of the court *a quo* is common cause. Consequently, the factual matrix to which I now refer can be suitably truncated.

The background facts

[3] The first respondent was employed by the appellant with effect from 1 May 1987 as an Assistant Accountant. By the time of his dismissal, he was employed in the position of Treasury Accountant. However, from 1993 he was seconded to Total Exploration South Africa, which changed its name to Total Coal South Africa ('TCSA') in 2003. TCSA was a subsidiary company within the Total group.

[4] In December 2013 it was announced that the TCSA would be sold to Exxaro. This proposed transaction caused some anxiety to the first respondent. Thus, at his annual performance appraisal in February 2014, he raised his concerns with Mr Pravesh Mohan, who held the post of Manager: Accounting in TCSA. In particular, he was concerned as to how the proposed sale to Exxaro would impact on his position as an employee who had been seconded to TCSA and whether Exxaro would honour the secondment agreement with the appellant. It appeared at this point that he was the only TSA employee seconded to TCSA.

[5] A series of meetings then took place between executives of TCSA and the appellant. Suffice to say that on 11 September 2014 appellant, by way of Nonhlanhla Shabangu, informed first respondent that, although appellant did not have a vacancy at that time; 'we are looking at moving the employee to another division, once that is done we will then have an opening.' However, it appears that at this point the appellant had already begun the process of calculating the first respondent's severance package.

[6] On 20 November 2014 a further meeting took place between executives of TCSA and the Human Capital Manager of the appellant, Siyabonga Radebe. At this meeting Mr Radebe informed the first respondent that there were no suitable vacancies within the organisation of the appellant and that he would consequently be retrenched. Very little discussion took place in that meeting, which lasted no more than 20 minutes.

[7] On 24 November 2014 the first respondent emailed Mr Radebe, emphasising the importance of the PRMB to him and his family and explaining why it should be extended to him. In his correspondence, he pointed out that PRMB 'was given to staff who were retrenched in 2010', a point confirmed by Mr Jabulani Khumalo, appellant's Divisional Manager, Human Resources Administration. Notwithstanding arguments put up by the first respondent, the appellant refused to extend the PRMB to him. The only clear reason offered for the differentiation between the 2010 retrenches and the appellant was that 'the terms and conditions of the 2010 restructure were only applicable for that period and therefore the rationale hereof was relevant to that era.' By 23 December 2014 the appellant made its final offer for a severance package, which included an amount equal to two years of PRMB. The first respondent's retrenchment became effective on 31 December 2014. He entered into a new employment contract with TCSA which was effective from 1 January 2015, but this contract did not recognise his previous length of service at the appellant, nor was he offered any PRMB benefit.

The decision of the court *a quo*

[8] On 14 October 2016 the second respondent issued an arbitration award in which he dismissed the first respondent's case, finding that his dismissal from the employment of the appellant has been both procedurally and substantively fair.

[9] The first respondent approached the court *a quo* on review, seeking to have the award set aside. Prinsloo J, in the court *a quo,* found that second respondent had fundamentally misconceived the nature of enquiry before him, by finding that the appellant had complied with all its obligations towards the first respondent by 'transferring him' to TCSA, which had the effect of avoiding a retrenchment. By contrast, Prinsloo J held:

> 'It is evident from the evidence that the applicant was retrenched notwithstanding that a vacant position was available because he did not have

> a chartered accountant's qualifications. This in circumstances where the applicant's undisputed evidence was that he would have been able perform the duties of subsidiary accounting manager and where there was no evidence placed before the arbitrator to show that the applicant did not possess the necessary skills to perform the functions attached to the position of subsidiary accounting manager'.

[10] Prinsloo J found further that the appellant had never engaged in a joint consensus seeking process which was designed to avoid the dismissal of the first respondent. He had not been provided with any alternatives which could be considered prior to the appellant taking a decision to retrench him. There was, in short, no meaningful consultation process conducted between the parties. Accordingly, the appellant had failed totally to comply with the provisions of s 189 of the LRA prior to dismissing the first respondent.

[11] As noted, these findings are no longer subject to an appeal. The only aspect of this part of the case which requires this Court's attention is that, following the finding that the first respondent's dismissal was substantively and procedurally unfair, Prinsloo J ordered that the appellant pay the first respondent compensation equivalent to twelve months' remuneration calculated at his rate of remuneration on the date of dismissal.

Appellant's case concerning the award of compensation

[12] Mr Boda, who appeared on behalf of the appellant, submitted that the first respondent had secured employment in 2015 at TCSA, only because of his previous employment with the appellant and as a result of discussions which had taken place between the appellant and TCSA. He contended further that, when the first respondent obtained employment at TCSA, it was still a subsidiary company of the appellant. He also noted that it was common cause that the appellant had paid the first respondent a severance package of R 2.9 million.

[13] Mr Boda submitted that the court *a quo* had thus erred, when it found that the R 2.9 million severance package was money to which the first respondent was entitled because he was retrenched after being employed for 28 years, and further, that the severance package received did not deprive him of the *solatium* to which he was entitled as a result of being dismissed unfairly. The facts, in Mr Boda's view, dictated that a different result should have been reached by the court *a quo*. The immediate employment which the first respondent obtained after his dismissal from the appellant's employ, together with the severance package, which included an amount equivalent to two years of medical aid benefit, was critical and had to be considered in any award of compensation. Further, the severance payment amounted to more than four times the statutory requirement as provided for in the Basic Conditions of Employment Act 75 of 1997. The appellant's case was that it was manifestly unfair not to take into account the *quantum* of the severance package when the court awarded the maximum amount of compensation of twelve months to the first respondent in terms of s194 of the LRA.

[14] In support of this submission, Mr Boda cited the judgment of the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2008] 12 BLLR 1129 (CC) at para 43:

> '[a] court or commissioner has a discretion to determine the extent of retrospectivity of the order of reinstatement or re-employment. In exercising the discretion, a court or an arbitrator may address, amongst other things, the period between the dismissal and trial as well as the fact that the dismissed employee was without income between the period of dismissal, ensuring, however that an employer is not unjustly financially burdened if retrospective reinstatement is ordered or rewarded.'

[15] In Mr Boda's view, the court *a quo* had not taken sufficient account of the quantum of the severance package which had the consequence that the first respondent had suffered no financial loss as a result of the retrenchment.

Indeed, he had been placed in a greater financial position than he was prior to the retrenchment.

First respondent's case

[16] By contrast, Mr Leslie, on behalf of the first respondent, submitted that the appellant's case incorrectly conflated an award which was based on patrimonial loss and a *solatium* awarded for the indignity caused by the suffering of rank unfair treatment at the hands of an employer such as the appellant. He relied on the decision in *Johnson and Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) at para 41:

> 'The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another. So too in this instance.'

See also *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* [2015] 11 BLLR 1081 (LAC) at paras 22 – 23.

[17] *Johnson and Johnson, supra* has represented the legal position adopted by this Court for more than 20 years. It is sound precedent which must be followed. Thus, the award of compensation limited as it is in terms of s 194 of the LRA, cannot be equated to the staunching of patrimonial loss suffered by an employee, as a consequence of an unfair dismissal, in this case, both procedurally and substantively. By contrast, an award of compensation as envisaged in sections 193 and 194 read together constitutes a payment in lieu of an impairment of an employee's dignity.

[18] This case is illustrative. The first respondent's rights to be treated fairly, with care and concern and to enjoy the benefits of an adequate consultation process, as provided for in the LRA, before being retrenched, were ignored by a large and powerful employer, which unquestionably had the resources to ensure that its human relations management policy was congruent with the clear objectives of the LRA. The award of compensation represents a monetary response to the clear breach of an employee's rights and cannot be equated with the amount awarded in respect of the patrimonial loss suffered by an employee, such as the first respondent.

[19] This conclusion does not detract from a *dictum* of this Court in *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 at para 30 in which this Court held that the question as to whether an employee had suffered any financial loss as a result of a dismissal should be taken into account in the award of compensation. It follows that a benefit granted in this case by the appellant to the first respondent, such as a severance pay, which is significantly in excess of the amount provided for under the Basic Conditions of Employment Act, should have been taken into account in the assessment of what constitutes 'just and equitable' compensation in terms of s 194 of the LRA. In my view, this was not a case where the maximum award of compensation of twelve months was justified. This case does not involve the kind of egregious conduct by an employer which would justify a maximum award of compensation. This conclusion, however, does not mean that no award of compensation should be awarded. The manner in which the first respondent was treated by the appellant and the clear breaches of important provisions of the LRA, regarding retrenchment, justify the award of compensation. In my view, an amount of six months' compensation as a *solatium* would be justified in the context of the facts of this case.

The unfair labour practice

[20] In setting aside the award of the second respondent, that the failure to grant the first respondent PRMB did not constitute an unfair labour practice, Prinsloo J said:

> 'In my view Total failed to provide any evidence to show or establish that there was an objective, rational, fair or justifiable basis on which to treat the applicant differently from the 2010 retrenchees in circumstances where he had satisfied all the required criteria as at the date of retrenchment and where he was effectively in the same position as the 2010 retrenchees who received the PRMB. Total's decision to deprive the applicant of the PRMB could not be justified on any objective ground and the decision was indeed arbitrary and inconsistent.'

[21] This finding of the court *a quo* was based on a careful comparison between the appellant's conduct towards the first respondent and its grant of PRMB to nine retrenchees in 2010. Although the nine were part of a large scale retrenchment exercise, they were considered eligible for PRMB, in addition to severance pay, which they received. The basis upon which the nine retrenchees had been deemed eligible for PRMB was that they had been employed on or before 31 December 2001, were members of the medical aid scheme at that time, and they were at least 50 years old at the date of their retrenchment.

[22] In an email sent by Siyabonga Radebe to the first respondent on 17 December 2014, the appellant's response to the first respondent's case, concerning the alleged differentiation in the former's conduct towards the nine employees, as compared to the appellant, was set out thus:

> 'Conditions relating to the PRMB are not applicable to yourself and therefore you cannot have this guarantee extended to you. Note that the terms and conditions of the 2010 structure are only applicable for the period and therefore the rationale thereof is relevant to that era.'

[23] The first respondent correctly adopted the view that the answer contained in this email hardly constituted an adequate response as to why a different decision had been made in 2010 as compared to his treatment.

[24] Mr Boda submitted that the key evidence was that of Mr Jabulani Khumalo, the Divisional Manager Human Resources of the appellant. This evidence indicated that the appellant had not denied the first respondent post-retirement medical aid benefits, but had exercised a discretion to award a post-retirement medical aid benefit for two years, having considered the first respondent's submission in this regard. Furthermore, none of the employees, who were retrenched in 2010, found employment immediately, whereas the first respondent had secured a job immediately after his retrenchment. Further, the 2010 retrenchment exercise had affected a large number of employees who faced unemployment. For this reason, it had to be considered as a once off process that created no precedent, insofar as the appellant was concerned.

[25] Turning to the first respondent's cause of action, it was predicated on the definition of unfair labour practice as set out in s 186 (2) (a) of the LRA, which includes 'any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the provisions of benefits to an employee.' In *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC) this Court gave content to the phrase 'the provisions of benefits to an employee' as follows:

> 'In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu* or *ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion.' (my emphasis)

[26] It is within this legal context that Mr Khumalo's evidence must be evaluated. Mr Khumalo conceded in his evidence that:

> 'Okay. In 2010, let me just say that I was not part of the HR Team then, because I had moved onto a different department. I was in Finance. So my knowledge of it is from the point of view of being some of the staff who were consulted.'

[27] Hence, Mr Khumalo was hardly in a position to provide concrete evidence to whether an objective standard had been employed in the extension of PRMB in 2010 and whether the distinction between the 2010 employees and the first respondent could not justifiably be classified as arbitrary, capricious or inconsistent conduct, whether negligent or intended. (*Apollo Tyres supra* at para 53)

[28] Mr Khumalo indicated that the provident fund rules, which regulated early retirement, did not form the basis for eligibility for the receipt of PRMB which took place pursuant to the 2010 retrenchment exercise. The evidence revealed that the retirement age of 50 was one of the inherent requirements for the receipt of PRMB, that, as in similar fashion to the nine employees who received PRMB in 2010, the first respondent had been employed before 2002, was a member of the relevant medical aid and was older than 50.

[29] It followed, therefore, from this evidence that the differentiation between the appellant's conduct towards the nine employees in 2010 and the first respondent was *prima facie* unfair. This finding required the appellant to provide clear reasons in order to justify this differential treatment on objective, rational and fair grounds.

[30] There was no such evidence offered by the appellant that can be gleaned from the record. Thus, the court *a quo* was correct to find that there had been a lamentable failure on the part of the appellant to provide such evidence. No witness, who had any knowledge of the justification or the manner in which the 2010 retrenchment exercise had taken place, was called to testify. The best that Mr Khumalo could offer in his testimony was to note that 'in terms of

our current practice the age restriction has changed. It used to be 50 at a point in time and then changed to 55.'

[31] The problem with this evidence was that no date was even suggested by Mr Khumalo as to when the earlier retirement age had changed; that is, whether the change had taken place in the relevant period between 2010 and 2014. Mr Khumalo then sought to justify the differentiated treatment on the basis that the 2010 retrenchment exercise was a large scale exercise, whereas in 2014 only the first respondent had been affected.

[32] One only has to state this evidence to realise that it provides no rational justification for the differentiation between the nine retrenchees and the first respondent insofar as the same PRMB benefit was concerned. Mr Khumalo then noted that the first respondent 'did not retire', in that he had taken up a position at the TCSA with effect from 1 January 2015. But, as is apparent from the following passage of Mr Khumalo's evidence, it did not appear that payment of the PRMB to the 2010 employees was dependent on their contingent unemployment:

> 'The difference there in my view would have been the employment under a Total Group subsidiary which would not necessarily have been the case with other people who might have had subsequent employment after 2010.
>
> MR LESLIE: Sure. Mr Khumalo let us first deal with the answer to the question. Someone who gains; who gets employed after they are retrenched from Total, would you take away the benefit? Is that the rule? Is that what the company would do?
>
> JABULANI CYPRIAN KHUMALO: To my knowledge no, because when this benefit is paid out. It is paid out on the basis that the person is retiring from Total at that time.
>
> MR LESLIE: And so really what you are left with is that it is because Mr Meyer was employed by a subsidiary within the group.

JABULANI CYPRIAN KHUMALO: Based on the influence which the company had in the process.'

[33] The sharp point is that, if the appellant was not concerned with whether the 2010 employees had obtained alternative employment after their retrenchment and that this fact had been irrelevant to their entitlement to receive the PRMB, then there does not appear to be any rational basis to justify the differentiated treatment on the basis that the first respondent took up employment with TCSA. Once the first respondent had succeeded in showing, as he clearly did, that *prima facie,* the appellant had treated the 2010 employees in a different manner to the conduct to which the first respondent had been subjected, then it behoved the first respondent to provide a rational and justifiable basis for this differentiated treatment. This it failed to do, in that there was no evidence put up to gainsay the first respondent's case of differentiated treatment. The only conclusion that can be drawn is that reached by the court *a quo,* namely, that the appellant's decision was arbitrary, capricious and inconsistent, and thus amounted to an unfair labour practice in terms of s 186 (2) (a) of the LRA.

The cross-appeal

[34] The court *a quo* declined to make an award of costs in favour of the first respondent on the basis that the appellant's opposition to the relief sought before the court *a quo* had not been vexatious. Although it was argued by Mr Leslie that, given the appellant's opposition to the review application, the first respondent was compelled to incur substantial costs, the court *a quo* exercised its discretion not to award costs, presumably on the basis that the principal relief sought by the first respondent was reinstatement in respect of which he had been unsuccessful. There does not appear to be any justification to interfere with the discretion exercised by the court *a quo* in this regard.

[35] However, in this appeal, the first respondent has been substantially successful in opposing the appeal. Accordingly, costs should be awarded in his favour, insofar as the costs of the appeal are concerned.

[36] In the result,

1. The appeal succeeds in part. The order of the court *a quo* of 9 October 2019 is set aside and replaced with the following:

2. The arbitration award issued on 14 October 2016 under case number GPCHEM 324 – 14/15 and GPCHEM 405-14/15 is reviewed and set aside;

3. The arbitration award is substituted with a finding that:

    3.1 The applicant's dismissal was substantively and procedurally unfair;

    3.2 The first respondent committed an unfair labour practice by failing or refusing to grant the applicant his post-retirement medical benefit.

    3.3 The first respondent is ordered to pay the applicant compensation equivalent to 6 months' remuneration calculated at his rate of remuneration on the date of dismissal;

    3.4 The first respondent is ordered to pay the compensation as per paragraph 5 of this order to applicant within one month after delivery of this judgment.

    3.5 The first respondent is ordered to provide the post-retirement medical benefit to applicant, effective from date of his dismissal for operational requirements;

3.6 The first respondent is entitled to set off the amount that was paid to the applicant in respect of the aforesaid benefit;4.7There is no order as to costs.

4. The appellant is ordered to pay the first respondent's costs in respect of this appeal.

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Davis JA

Coppin JA and Molefe AJA concur.

APPEARANCES:

FOR THE APPELLANT:	Adv Boda SC Instructed by Norton Rose Fulbright South Africa Inc
FOR THE FIRST RESPONDENT:	Adv Leslie Instructed by Malcolm Lyons & Brivik Inc.