IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG]

Reportable

Case no: JA 41/2018

In the matter between:

RONÈ BESTER (SCOTT)	**Appellant**
	(Third Respondent in court *a quo*)

and

In re:

SMALL ENTERPRISE FINANCE AGENCY SOC LTD	**Applicant**
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
L NOWOSENENTZ N.O.	**Second Respondent**
RONÈ BESTER (SCOTT)	**Third Respondent**

Held: **20 November 2019**

Delivered: **11 December 2019**

Summary: The employee was dismissed for misconduct. The CCMA held she was both substantively and procedurally unfairly dismissed. She was awarded compensation equivalent to 8 months. On review, the compensation reduced because she had tendered her resignation before the dismissal which the review court wrongly held to have been voluntary.

The appeal by the employee was solely against the alteration of the quantum of the compensation. Held on appeal that there were no proper grounds to interfere with the discretion of the arbitrator. *Kemp v Rawlins* Applied. Labour Court judgment set aside and award restored.

Costs: the employee/ appellant appeared in person in the review hearing and in the appeal and was unassisted by a Trade Union. Her circumstances justified a consideration of a costs order in her favour.

Costs to which she would be entitled included her disbursements. Further, as the employee/ appellant was an admitted legal practitioner she would in principle be entitled to the costs of her own expertise being applied to the litigation. The quantification of the quantum of costs was best left to the taxing master. *Knoll v Van Druten* applied.

Coram: Sutherland JA, Murphy and Kathree Setiloane AJJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The appellant, an advocate, who was the head of legal services of the respondent, was dismissed by the respondent for absenteeism and "insolence". In a subsequent arbitration the dismissal was held to have been both substantively and procedurally unfair. Compensation of the equivalent of eight months' salary was awarded.

[2] The respondent sought a review. The Labour Court upheld the award of an unfair dismissal. However, the Labour Court held that eight months' compensation was too much on the grounds that the appellant had resigned and was, for that reason, entitled to no more than the equivalent of the balance of her notice period, ie one month.

[3] On appeal, the sole issue is the appropriateness of the quantum of compensation; ie, was it just and equitable in the circumstances. Section 194(1) of the Labour Relations Acts 66 of 1995 (LRA) regulates that class of decisions.[1] The enquiry proceeds on the premise of the correctness of the arbitrators's findings that an unfair dismissal occurred; findings which were confirmed in the review proceedings. The approach in terms of the quantum issue is that as set out by Zondo JP in *Kemp t/a Centralmed v Rawlins*[2]

> '….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 incorrect approach.'

[4] The critical passage in the judgment *a quo* on the question of compensation is at [17]:

> 'In the result, I am not persuaded that the findings made by the Second Respondent in respect of the fairness of the [appellant's] dismissal were unreasonable. Nevertheless,

[1] Section 194(1):
The compensation awarded to an *employee* whose *dismissal* is found to be unfair either because the employer did not prove that the reason for *dismissal* was a fair reason relating to the employee's conduct or capacity or the employer's *operational requirements* or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of *remuneration* on the date of *dismissal*.
[2] (2009) 30 ILJ 2677 (LAC) at para 55.

based on the common cause facts, the amount of compensation that was awarded to the [appellant] was unreasonable and cannot be sustained. Since the Third Respondent had resigned, the maximum amount of compensation which she should have been awarded was the balance of her notice period. The [respondent] accepted that a period of one month could be taken into account in this regard. The awarding of compensation beyond the date when the [appellant] had elected to voluntarily relinquish her employment with the Applicant, seems illogical. To reiterate, she had not referred a constructive dismissal dispute.'

The crucial facts

[5] The relevant background is thus:

5.1 The appellant had been employed in an organisation that was later taken over by the respondent. Her services were transferred in terms of section 197 of the LRA along with that organisation as a going concern. Under the new regime, one, Maboa was seconded to the business unit so transferred, now part of the respondent. His role was not fully explained, but it suffices to say that he *de facto* participated in the executive management structure and was the appellant's senior but not, apparently (so it was found in the arbitration proceedings) obviously her line manager. Almost at once the appellant and Maboa clashed. This resulted in the appellant experiencing significant discomfort.

5.2 The particular details of the rift are not, in the light of the award's undisturbed finding, necessary to traverse for the purposes of this judgment.

5.3 The appellant was the only witness and so there was no rebuttal of her evidence of the events. Her unhappiness with the attitude of Maboa towards her was expressed. It seems likely that an email sent by the appellant on 2 May to the CEO, whilst she was on leave, heavily criticising Maboa's treatment of her and soliciting the CEO's intervention, lest she feels obliged to "…elect to embark upon [steps] to protect [her] rights", plainly a veiled threat, heralded the beginning of the final chapter of the events that led to her dismissal.

5.4 After returning to the office on 21 May, she posed questions to staff in the Human Resources Department about the logistics of a resignation. She says that she envisioned an amicable break from the respondent. She expressed a contemplation of a relocation to the Cape. Perhaps not coincidentally, that very day she was suspended pending a disciplinary enquiry.

5.5 Initially, the suspension was on full pay. Then her salary was stopped without further notice. This was axiomatically an insult, and no less, a cause of distress. She submitted a letter of resignation on 4 September after her salary had been stopped. She expressed herself thus:

"Herewith my notice of resignation with effect from 5 September 2014."

5.6 The respondent refused to accept a resignation on those terms. It insisted that a notice period be served to the end of September. It seems that the appellant acquiesced in this decision. Self-evidently, the resignation could only putatively become effective at the end of the notice period.[3]

5.7 A disciplinary enquiry proceeded, in her absence whilst she was ill, and concluded she was guilty of the two offences and deserved to be dismissed. This dismissal took effect before the end of the notice period.

5.8 The appellant responded to the dismissal by referring a dispute about it to the Commission for Conciliation, Mediation and Arbitration (CCMA). In the arbitration that followed, it was held that several examples of unfairness were manifest. The charges about absenteeism did not specify dates and the dates in question emerged only in cross-examination. Only one of several dates of allegedly unexplained absences were not rebutted by the appellant. The insolence charge was bald of detail. Ultimately the finding was that her conduct was not insubordinate but was rather her standing up for herself.

[3] Because of the appellant did not persist with an 'immediate' termination, the jurisprudential issue of whether an employer can discipline an employee after a resignation did not arise. See: *Naidoo and Another v Standard Bank SA Ltd and Another* (2019) 40 ILJ 2589 (LC)

5.9 After concluding that the restoration of the relationship was inappropriate as contemplated in section 193 of the LRA, the arbitrator awarded her compensation, reasoning thus:

> 'The Respondent submitted that the remedy of reinstatement is not appropriate. This is so. The Applicant had already tendered her resignation and was serving her notice period at the time of her hearing. The Applicant is currently unemployed and lives in the Western Cape. Although reinstatement is the primary remedy for unfair dismissal, section 193(2) of the LRA provides limitations of which two are applicable. Firstly, where the circumstances of the dismissal are such that a continued employment relationship would be intolerable and secondly where it is not reasonable practicable. In view of the unresolved grievances and the tendered resignation of the Applicant, it is hard to understand how she can contemplate returning to the workplace. The relationship of trust was at mutual low ebb. It is neither desirable not practicable for her to be reinstated. She is entitled to compensation. Factors taken into account are the length of service, that she is unemployed and the hostile and summary manner in which the Respondent treated her. Her grievances and concerns were not attended to and no progressive disciplinary action was followed. The only record of her remuneration is her letter of appointment date 18 October 2012 and compensation is based on this as the best evidence at hand. She is awarded 8 months compensation calculated as follows:
> R756 000 ÷ 12 = R63 000 x 8 = R504 000."

Evaluation

[6] The elephant in the controversy is what should be done, if anything, about the tendered resignation as a factor, supposedly relevant, to the quantum of compensation and as to whether it was just and equitable in the circumstances.

[7] As a matter of principle, it must be asked, if the clear finding in the arbitration was that the employment of the appellant was terminated by a *dismissal*, what room is there to factor into the computation of compensation the fact of a tendered resignation? The

premise of a compensation award is to give recognition to an unfair act on the part of the employer, whose decision it was to dismiss and did so unfairly. Compensation in terms of section 194 of the LRA serves purposes broader than mere patrimonial damages, as the express allusion the award of compensation being just and equitable.

[8] On the facts, it has been established that the appellant contemplated a resignation. On the facts, her deteriorating relationship with Maboa, which she experienced as abusive and debilitating, was the context within which that idea was formulated. On the facts, the decision to exit such an environment cannot meaningfully or even usefully be construed as "voluntary" even if, self-evidently, she took the initiative to tender a resignation. On the facts, the actual resignation, as distinct from the contemplation thereof, was prompted by the stoppage of her salary. Moreover, on the facts, the resignation, intended to be immediate, was rejected. The appellant acquiesced in the rejection. Thus, she remained in service at the critical moment when she was dismissed.

[9] The critical enquiry had to address the tender of the resignation in the context in which it had been tendered. The appellant's unrebutted evidence is that she did so in response to the predicament in which she found herself. Once it is plain that the resignation was not voluntary, if the fact thereof is to be weighed as a factor relevant to the quantum of compensation, then the whole of the circumstances must be taken into account. In my view, the resignation in this context, is irrelevant to the computation of the compensation. Once the termination was caused by a dismissal the resignation plays no further practical role.

[10] Allusions were made to the fact that the appellant did not prosecute a case of constructive dismissal based on an involuntary resignation. This criticism is misconceived and taking it into account was an error by the arbitrator. She was dismissed in the conventional sense; the rationale for her termination was not the fact of her tendered resignation, induced by alleged intolerable conditions, but rather dismissal for misconduct. True enough, had she not been dismissed, she could have alleged a constructive dismissal based on her perspective of the circumstances.

However, as things turned out she did not need to do so. Accordingly, the elephant is in truth merely a red herring.

[11] The arbitrator took into account:

11.1 her six years of service,

11.2 her unemployed status and its duration,

11.3 The failure of the respondent to resort to progressive discipline; a consideration that stemmed from the rebuke that the dismissal was unfair.

11.4 The unfair (procedural) treatment of the appellant, as found by the arbitrator.

11.5 The failure to address the appellant's grievances (a duplication of the notion of unfair treatment).

[12] The absence of a consideration of the involuntary tender of a resignation as a factor in the computation, which, as found in our judgment to be irrelevant, does not disturb the coherence of the evaluation by the arbitrator.

[13] The Labour Court, curiously, subordinated its perspective wholly to the fact of a tendered resignation which approach was inappropriately narrow and, in any event, misdirected. The argument advanced in support of the Labour Court's view before us, as I understand the contention, is that the appellant could have no material interest in her job beyond her notice period, given the tendered resignation. Thus, on that premise, there ought to be a cap on any compensation order commensurate with that material interest. In our view, this is not the way to construe the purpose or effect of a compensation order in terms of section 193. The contention seems to assume that her "positive interest", (ie, the value to the aggrieved party, had the contract not been breached) in the job is the defining consideration, as if this were a straightforward contractual dispute. That premise is inappropriate in the paradigm regulated by sections 193 and 194 of the LRA. Apart from the questions of fact about the character of the tendered resignation not being freely made and the break in logic between awarding a sum in compensation for a dismissal which *ipso facto* rendered the

tendered resignation irrelevant, the function of sections 193 and 194 is not to yield a quantum based on the concept of positive interest, but rather is premised on the broader consideration of fairness, having weighed the circumstances holistically.

[14] The rationale offered in the judgment *a quo* fails to reveal a ground for appropriate interference. The Labour Court's finding of impropriety, based on the notion that the resignation was voluntary, seems to be the font of the error. If a collateral finding was necessary on that point, it could only have been to the contrary; ie the tendered resignation was not freely made but induced by the conduct of the respondent in stopping her salary. Moreover, the judgment ignores the significance of the fact that the cause of the termination was a dismissal that was unfair and that there has to be consequences for that conduct; the very purpose for which section 193 and 194 have been enacted.

Conclusions on the main issue

[15] In my view, the award is free from criticism and must stand.

Costs

[16] The appellant seeks a costs order. The question falls to be decided with reference to law and equity.[4] As an individual, bearing her own costs without the help of a Trade Union, it is appropriate to give consideration thereto, even though the usual approach is that costs do not simply follow the result. It seems to us that fairness dictates that she be granted costs in the review and in the appeal because of the burden such costs would be on an individual. Moreover, the appellant is a single parent with three children.

[4] *Zungu v Premier, Kwa-Zulu Natal* (2018) 39 ILJ 523 (CC) at [23] – [26]

[17] In defending the award in the review proceedings and in prosecuting the appeal, the appellant has represented herself. To the extent that she has incurred legal costs, she can recover them, including, in principle, the value of her own legal expertise, as an legal practitioner, devoted to the case.[5] It is unnecessary to specify what these costs might include. Thus, the appropriate costs order is one that is subject to taxation in the absence of an agreement between the parties about a sum.

The order

(1) The appeal is upheld.

(2) The award of 9 September 2015 is confirmed.

(3) The sum awarded shall be paid in full within 10 days of the date of this judgment to an account nominated by the appellant.

(4) The respondent shall bear any costs that are taxable that arise from the review proceedings and the appeal proceedings and pay such sum within not less than 15 days of the taxation master's decision or of an agreement between the parties as to the sum to be paid.

_____

Sutherland JA

_____

[55] See: *Knoll v Van Druten* 1953 (4) SA 145 (T) at 147 E – 148C.

Kathree-Setiloane AJA

_____

Murphy AJA

APPEARANCES:

FOR THE APPELLANT:	Appeared in person
FOR THE RESPONDENT:	Adv WR Mokare SC; with him M K Mathipa
	Instructed by Werksmans.