THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR1380/19

In the matter between**:**

SIBANYE GOLD LIMITED **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

JONATHAN GRUSS *N.O* **Second Respondent**

ISRAEL HLOPHE **Third Respondent**

Heard: **29 July 2021 (via Zoom)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 23 August 2021.**

Summary: **Calculation of severance pay in terms section 41 of BCEA applies only to the minimum set therein – where parties agree to a higher amount, the section 41 is not applicable.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this application Applicant (Sibanye) seeks an order reviewing and setting aside the arbitration award issued by Second Respondent (Commissioner) under case number GAJB25639-17 dated 14 June 2019 under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) in terms of section 145 of the Labour Relations Act[1] (LRA). The Commissioner found, *inter alia,* that the calculation of the Third Respondent's (Mr Hlophe) acting allowance should have formed part of his remuneration for the purposes of calculating his severance and notice pay. He accordingly awarded Mr Hlophe notice pay in the amount of R15 5562.67 and severance pay in the amount of R63 266.40.

[2] Sibanye also seeks an order reinstating the review application which has since lapsed owing to the filing of the record of the CCMA proceedings outside of the 60 day period prescribed in terms of clause 11.2.2 of the Practice Manual of the Labour Court[2] (Practice Manual). The degree of lateness is 15 days. Mr Hlophe is not opposing the reinstatement application. I deem expedient to deal with this application without further ado. In my view, the relief sought should be granted as the delay is negligible and the explanation is reasonable.

[3] Even so, Mr Hlophe takes a point of law in his written submissions, contending that the review application is not properly before Court as Sibanye failed to apply for the date of the hearing within 6 months from the date of launching the review application in terms of section 145(5)[3] of the LRA. This point was not vigorously persisted with during oral submissions, prudently so. In terms of clause 11.2.7 of the Practice Manual, a reviewing party has 12 months from the date of the launch of the review application to attended to the filing of necessary papers and request a date. In the present instance, Sibanye was well within the

[1] Act 66 of 1995, as amended.
[2] This directive came into effect on 2 April 2013.
[3] Section 145(5) provides: 'Subject to the rules of the Labour Court, a party who brings an application under subsection (1) must apply for a date for the matter to be heard within six months of delivery of the application, and the Labour Court may, on good cause shown, condone a late application for a date for the matter to be heard.'

requisite period of 12 months when it requested the Registrar of this Court to allocate the matter.

[4] That takes me to the merits of the main application. Sibanye impugns the award on the basis of that the Commissioner misconceived the nature of the enquiry. Mr Hlophe is the only respondent defending the ward.

Pertinent facts

[5] The facts in this matter are preeminently common cause. On 2 June 2017, Mr Hlophe took up employment as a General Mine with Rand Uranium (Pty) Ltd, a subsidiary of Sibanye after he had been in the Employ of Ezulwini Mining (Pty) Ltd, another subsidiary of Sibanye, since 2013.

[6] On 28 June 2017, Mr Hlophe was appointed to act as a Shift Boss and was paid an acting allowance of R15 562.67. He was retrenched on 30 October 2017, having acted as a Shift Boss for about four months. It is clear from Mr Hlophe's appointment letter that his acting position was temporary and was never meant to be a permanent appointment; hence he was paid an acting allowance.

[7] Sibanye embarked on a section 189A of the LRA facilitated consultation process that led to Mr Hlophe's retrenchment. That consultation process culminated into the following retrenchment package:

7.1. Payment of a once off removal alliance of R5000.00;

7.2. Purchase of a company house at a discount price until 30 November 2017;

7.3. Two weeks' pay per completed years of service, calculated at the employee's' basic salary;

7.4. One Month notice pay; and

7.5. Training allowance of R5 500.00

[8] At the time of Mr Hlophe's retrenchment, he had eight years completed service with Sibanye and his basic salary, excluding the acting allowance, was

R17 553.33. His severance pay was accordingly calculated on the basis of his basic salary, and so was his notice pay.

[9] Displeased with the exclusion of his acting allowanace when his severance pay and notice pay were calculated, he referred a dispute to the CCMA, hence the impugned award.

Legal principles and application

[10] The review test is trite and well expounded in *Department of Education v Mofokeng & Others* Mofokeng,[4] referred to with approval in *Palluci Home Depot (Pty) Ltd v Herskowitz & Others,*[5] that:

> '…for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result'. Thus, as recognised in Mofokeng, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator 'must not misconceive the enquiry or undertake the enquiry in a misconceived manner', as this would not lead to a fair trial of the issues.'

[11] This matter turns on the interpretation of section 41(2) of the Basic Conditions of Employment Act[6] (BCEA) and whether or not is applicable in the present instance. Section 41(2) of the BCEA provides:

> 'An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements or whose contract of employment terminates … severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.'

[12] While section 35(1) provides that an employee's wage is calculated by reference to the number of hours the employee ordinarily works. The

[4] [2015] 1 BLLR 50 (LAC) paras 31 – 33
[5] (2015) 36 *ILJ* 1511 (LAC) at paras 15 – 16; see also *Aquarius Platinum (SA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2020] ZALAC 23; (2020) 41 ILJ 2059 (LAC); [2020] 11 BLLR 1071 (LAC) at para 10.
[6] Act 75 of 1997, as amended.

Ministerial Determination on Calculation of Employee's Remuneration[7] (Ministerial Determination) issued in terms of section 35(5)(a) of the BCEA is silent on the inclusion of the action allowance when calculating the severance pay.

[13] Nonetheless, the Commissioner found that, for the purposes of calculating severance pay and notice pay, Mr Hlophe's remuneration should include the acting allowance, though none pensionable. He opined that since section 41 of the BCEA refers to remuneration and the Ministerial Determination did not include the acting allowance in the list of excluded payments, then it should be included when calculating the severance pay and notice pay. In these proceedings, Mr Hlophe's contention in support of the award is also structured along this line of reasoning.

[14] As correctly contended by Sibanye, this contention is untenable and was rejected in *SATU (obo Van As & Others) v Kohler Flexible Packaging (Cape) (a division of Kohler Packaging Ltd)*[8]. In *SATU*, the respondent retrenched the appellant employees and agreed to pay them severance pay equivalent to two weeks' remuneration per year of service. Subsequently, the appellant employees claimed that this amount should be calculated to include, not only their basic wages, but also a shift allowance. The Labour Appeal Court aptly stated:

> [17] In my view section 35(5) of the Act takes the matter no further. It does not expand on the definition of "remuneration" as contained in section 1 of the Act. If anything it curtails it.
>
> [18] Section 35(5) of the Act, in any event, expressly provides that it applies only to the calculation of severance pay in terms of section 41 of the Act. Section 41(2) of the Act deals with the minimum severance pay.
>
> [19] Mr Whyte conceded that there was no agreement as to whether the shift allowance should be included in the severance package or not. He, however, argued that the agreement that the employees would receive

[7] See: Calculation of Employee's remuneration has been published under Government Notice No. 691 in *Government Gazette* 24889 of 23 May, 2003.
[8] [2002] 7 BLLR 605 (LAC) (*SATU*).

"two weeks' " salary per completed year of service brings the agreement of retrenchment within the ambit of section 41(2) of the Act. Accordingly, he argued that the calculation of the severance pay had to be effected in accordance with section 35 of the Act.

[20] The effect of this argument is rather startling. If I have to accept this argument it will mean that if any employer ever had to express the amount of severance pay in multiples of "weeks", section 41(2) would find application, irrespective of whether the amount paid by means of a severance package exceeds the minimum stipulated for in section 41(2) of the Act, or not.

[21] The purpose of the legislation is clear. It creates a statutory minimum that has to be paid when an employee is dismissed for reasons based on the employer's operational requirements. The only logical interpretation that can be given to the words "at least" in section 41(2) of the Act is that it should mean "not less than". In my view the section is aimed at providing a safety net of a minimum of one week's pay per year of completed continuous service. Section 189(2)(c) of the Labour Relations Act 66 of 1995 requires parties to consult over severance pay. The aim of the consultation is to reach consensus. In the context of severance pay this can logically only mean consensus on the payment of more than the guaranteed statutory entitlement.'

[15] Likewise, in the present instance, Mr Hlophe's retrenchment package was a product of an agreement subsequent to a section 189A of the LRA consultation. It is apparent therefrom that severance pay and notice pay had to be calculated on the basis of the employee's basic salary. Absent an agreement concerning the inclusion of the acting allowance in the calculation of the agreed severance pay which is above the minimum set by the BCEA, Sibanye was not obliged to include the acting allowance. The Commissioner, obviously undertook the enquiry in a misconceived manner when he disregarded the binding agreement between the parties which evidently ousted the application of section 41 of the BCEA.

[16] Moreover, I agree with Sibanye that the case of *Telkom (Pty) Ltd v CCMA & others*[9], which the Commissioner hinged his findings upon, is distinguishable. What served before the court in that matter was the claim for the enforcement of the severance pay which was above the statutory minimum per the parties' agreement and not a question of entitlement.

[17] In sum, it is my view that the Commissioner misconstrued the nature of the enquiry and untenably concluded Mr Hlophe's severance pay and notice pay should be calculated to include his acting allowance.

Conclusion

[18] In all the circumstances, the part of the award that deals with the calculation Mr Hlophe's severance pay in terms of section 41 of the BCEA falls to be reviewed and set aside.

[19] I deem it superfluous to remit the matter back to the CCMA given the conclusion that I have arrived at above. Accordingly, the award stands to be reviewed and set aside to the extent that the Commissioner incorrectly found the acting allowance should be included when calculating Mr Hlophe's severance pay and notice pay in terms section 41 BCEA.

Costs

[20] I am disinclined to award costs against Mr Hlophe as the circumstances of this case dictate that each party pays its own costs.

[21] In the premises, I make the following order:

Order

1. The arbitration award issued by the Commissioner under case number GAJB25639-17 dated 14 June 2019 is reviewed and set aside, only to the extent that the Commissioner incorrectly found the acting allowance

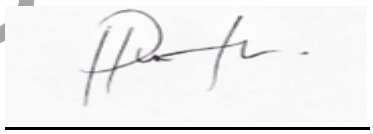
[9] [2004] 8 BLLR 844 (LC).

should be included when calculating Mr Hlophe's severance pay and notice pay in terms section 41 BCEA, and replaced with the following order:

'1. The method of calculating severance pay prescribed in the BCEA applies only to the calculation of severance pay payable in terms of the BCEA.

2. Mr Hlophe's claim is dismissed.'

2. There is no order as to costs.



` P. Nkutha-Nkontwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate M Van Ass
Instructed by:	Solomonholmes Attorneys
For the Fourth Respondent:	Advocate JP Prinsloo
Instructed by:	Mohale Incorporated