Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE LABOUR COURT OF SOUTH AFRICA,

DURBAN

Reportable

Case no: D 398/11

In the matter between:

RUMBA SAMUEL **Applicant**

and

OLD MUTUAL BANK **First Respondent**

COMMISSIONER JABULANI NGWANE **Second Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Third Respondent**

Heard: 1 March 2018

Judgment: 21 September 2018

JUDGMENT

GUSH, J

Introduction

[1] This is an application to review and set aside the arbitration award of the second respondent dated 7 April 2011, wherein he found that the dismissal of the applicant was unfair but ordered compensation in an amount equivalent to twelve months' salary.

Background

[2] The applicant was employed by the first respondent in its Durban offices on 15 October 1981. She had worked for the first respondent for close to 26 years holding various clerical positions. At the time of her dismissal the applicant worked in the reception area.

[3] The applicant was dismissed on 23 May 2007 for alleged acts of misconduct. The applicant dissatisfied with her dismissal referred a dispute to the third respondent who appointed the second respondent to arbitrate the dispute.

[4] Somewhat startlingly, the arbitration commenced on 18 October 2007 and continued for 28 days over a period of almost 4 years. The second respondent's award is dated 4 April 2011.

[5] In his award the second respondent found "on the overall evidence before me, the respondent has failed to prove on a balance of probabilities that the dismissal of the applicant was fair."[1] despite so finding the second respondent declined to reinstate the applicant and ordered that the first respondent pay the applicant compensation in an amount equivalent to 12 months' remuneration.

[1] Pleadings page 23 award at para 5.10.

[6] The second respondent under the heading "*Appropriate Remedy*" records that the applicant "prayed for reinstatement and the respondent opposed the reinstatement stating that it would in the circumstances not be appropriate" [my emphasis][2]. It is appropriate to quote in full, the second respondent's reasoning in concluding that reinstatement was not the appropriate remedy. He says:

> '6.2 S193(2) (b) [of the LRA] as amended, provides that: "the Labour Court or the arbitrator must require the employer to reinstate or reemploy the employee unless the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable"
>
> 6.3 The applicant herself conceded that the employment relationship between her and her managers Prem Naidoo and Barney Walker was intolerable.
>
> 6.4 Paul Rist testified that there were new systems in place which would take close to six months to train the applicant to catch up as she had been away from the operations for close to four years.
>
> 6.5 Zakhona Ncalane testified that the "war" between Prem Naidoo and the applicant would start again and affect the workplace if the applicant which returned to work.
>
> 6.6 Mbali Cele testified that she would not have the applicant in her branch as she was too difficult to instruct.
>
> 6.7 This evidence, which paints out to the surrounding circumstances, militates overwhelmingly against the considerations of reinstatement of the applicant. (sic)
>
> 6.8 Having observed the demeanour of the witnesses and the applicant's attitude towards Prem Naidoo and Barney Walker, the nature of interventions attempted by the respondent to improve the relationship between the parties, the longevity of the acrimonious relationship between the parties and the age of the applicant, I am satisfied that a reinstatement order would not be conducive to good workplace relations but would probably undermine whatever measures that might have been taken to sustain workplace harmony and might scratch open the wounds that might have healed by the distance between the disputants. (my emphasis)

[2] Pleadings page 23 award at para 6.1.

6.9 I therefore refused to reinstate the applicant and now consider the alternative remedy of compensation which I am satisfied is the most appropriate and just in the circumstances'.[3]

[7] It is apparent from the pleadings that the applicant was born on […] 1951, and was accordingly 56 years old when she was dismissed.

[8] In his award the second respondent records that it was common cause that the usual retirement age for employees of the first respondent is 61. The applicant does not take issue with this this conclusion in her founding affidavit. In her supplementary affidavit the applicant simply "point[s] out[4] that her retirement age is 65."[5] The retirement age is only placed in dispute in the applicant's replying affidavit. I am not satisfied that there is sufficient evidence in the record of the arbitration or the applicant's pleadings to gainsay the conclusion of the second respondent that it was common cause that the retirement age was 61. Accordingly, for the purposes of this judgment I am satisfied that the normal retirement age is 61.

The Award

[9] It is important to take into account that this matter eventually was argued before this Court in 2018 some 11 years after the dismissal. The matter has been plagued by inordinate delays.

[10] It is barely conceivable that an arbitration should be allowed to take place over a period of almost 4 years. These delays were in no small measure due to the respondent leading the evidence of 8 witnesses and the applicant 17 witnesses including herself.

[11] The delays in the matter being concluded extended to the applicant's application to review the award. The referral of the award to this Court was made timeously. The review application was filed on 16 May 2011 but

[3] Pleadings page 23 of the award at para 6.
[4] Pleadings page 17 award at para 3.5.2.
[5] Pleadings page 30 at para 24.

thereafter the extensive delay by the applicant in filing the record led to the applicant's review application being archived.

[12] The applicant only applied to this Court for the file to be retrieved some 4 years later, in 2015, which application was unsuccessful. The applicant then appealed against the refusal of this decision, which appeal was heard on 25 August 2016. On 25 January 2017, the Labour Appeal Court upheld the appeal and granted the applicant leave to proceed with the review application. The parties then agreed as to the procedure and time limits for the filing of the requisite pleadings and the matter was enrolled to be heard in March 2018.

The Grounds of Review

[13] The essence of the review is simple. The applicant is dissatisfied with the decision of the second respondent not to grant her reinstatement but on the strength of his interpretation of the provisions of section 193(2) of the Labour Relations Act[6] (LRA), to order compensation. The first respondent in turn opposed the applicant's review and argued that the decision of the second respondent was reasonable and "is not tainted by any reviewable defect."[7]

[14] The first respondent in addition argued that the relief sought by the applicant namely reinstatement, was not competent on the basis that by time the review application was heard, the applicant had past the retirement age. The essence of the first respondent's argument was that as the applicant had passed the retirement age, she was in effect seeking compensation. The effect of reinstatement was that the applicant would receive compensation in excess of the statutory limit on compensation provided for in the LRA, viz. 12 months salary.

[15] The difficulty with the respondent's argument is simply this:

[6] Act 66 of 1995 as amended.
[7] Pleadings page 44 at para 26.

15.1 At the time of her dismissal, the applicant had not reached retirement age, nor had the applicant reached retirement age at the time the arbitration was concluded.

15.2 The issue therefore relating to whether or not the applicant was entitled to reinstatement was alive at the time the award was handed down. If the second respondent had ordered reinstatement, the applicant could have recommenced her employment.

15.3 This Court is asked to review the second respondent's award and in particular the second respondent's decision not to order reinstatement. If the second respondent's decision not to award reinstatement is reviewable it needs to be substituted with the correct decision.

15.4 If at the time the decision of the second respondent is reviewed and set aside and substituted with reinstatement, the applicant has passed the normal retirement age, it should not and I believe does render the effect of the reinstatement order incompetent.

15.5 To find that such an order in such circumstances is incompetent would simply serve to prejudice the rights of employees who are dismissed shortly before their retirement or in circumstances where a review application is delayed beyond the employees retirement age. This is not an outcome contemplated by the LRA and most certainly such an outcome would be unfair.

15.5 It is an inherent risk faced by employers in labour litigation where a final decision is deferred whilst the litigation is ongoing. It is for this reason that the act specifically provides for an exception to the obligation of the court to reinstate unless the provisions of section 193(2) are met.

15.6 When a dismissal is found to be unfair the only circumstances in terms of which the court or an arbitrator may order compensation as opposed to reinstatement are those set out in section 193(2).

[16] The issue to be decided in this matter therefore is whether the second respondent's decision to order compensation as opposed to reinstatement is reviewable. In this matter the relevant two issues that the second respondent had to consider were whether the circumstances surrounding the dismissal were such that "a continued employment relationship would be intolerable" and /or whether is was not "reasonably practicable" for the first respondent to reinstate or reemploy the applicant.

[17] In assessing the second respondent's decision not to reinstate but award compensation it is necessary to have regard to the second respondent's reasons.

[18] The first issue concerns the second respondent's conclusions regarding the charges of alleged misconduct levelled at the applicant by the first respondent and the evidence the first respondent adduced in support thereof at the arbitration and the second respondent's conclusion regarding the fairness of the applicant's dismissal.

[19] In this regard the second respondent's reasons for deciding that the dismissal was unfair are clearly set out in his analysis of the evidence and arguments: He says the following:

> '1. There was substantial evidence before me that the charges against the applicant were preferred immediately after the applicant had lodged "another grievance against Prem Naidoo;
>
> Further the numerous charges – nine 9 charges and there alternatives- show that these allegations happened in the atmosphere of chronis and serious acrimony between [the applicant] Prem Naidoo and Barney Walker.
>
> 2. The chairperson of the disciplinary hearing made a finding of guilty on only four charges.
>
> 3. He [the chairperson of the disciplinary hearing] failed to come to this hearing to substantiate his findings and his decision to dismiss the applicant.

4. S192(2) LRA 66/95, as amended, places the onus to prove the fairness of the dismissal on the employer. The employer has failed to discharge this onus.
5. Prem Naidoo who was the "main item" from day one of this arbitration up to the conclusion of the evidence, attended the arbitration proceedings religiously and she heard all accusations that were levelled against her by some of the applicant's witnesses and by the applicant herself but she decided not to "bat an eyelid". She sat so quietly like a statue.
6. No reasons were advancedfor her reluctance to offer her testimony or to defend herself from the "vicious character assassination" by the applicant who testified that Prem and Pam Fixen consumed alcohol in the office during office hours, that she demanded birthday gifts from her subordinates and that she took bribes and backhand from employees.
7. …
8. It is therefore my finding that:

a. The respondent's failure to tender evidence on the appropriateness of the sanction of dismissal imposed on an employee with twenty-six years of service;
b. Even before his imposition of the sanction, the chairperson failed to testify how he "waded" through nine charges and the alternatives and made findings of guilty on only four charges;
c. It is probable that Prem's failure to testify would confirm the applicant's perception that the charges were "trumped up" by Prem in order to get rid of her since they had a bad relationship; …'[8] (my emphasis)
d. On the overall evidence before me the respondent has failed to prove on a balance of probabilities that the dismissal of the applicant based on the four charges she was found guilty on was fair.

[20] The first respondent has not applied to review the conclusions of the second respondent as set out above.

[8] Pleadings page 22 of the award at para 5.

[21] Having established that the dismissal was unfair and probably based on "trumped up charges" the second respondent declined to order reinstatement but awarded compensation.

[22] The second respondent's decision not to order reinstatement appears to be based on three considerations: the first relates to the applicant's evidence that her relationship with Naidoo and Walker was intolerable; the second relates to the first respondent's evidence that the applicant would require training to catch up as she had been away from the operations for close to four years and the third is that "a reinstatement order would not be conducive to good workplace relations but would probably undermine whatever measures that might have been taken to sustain workplace harmony and might scratch open the wounds that might have healed by the distance between the disputants."[9]

[23] I now turn to deal with each of the reasons herein below:

19.1 Re-employment with the first respondent cannot be equated with re-employment with "Naidoo and Walker". This is particularly so in the light of the second respondent's conclusion that it was probable that Naidoo had trumped up the charges against the applicant in order that she be dismissed. There was no credible evidence led to suggest that the first respondent would not be able to have placed the applicant elsewhere within the organization.

19.2 It is pertinent to emphasize that the second respondent concluded that the second respondent had, despite the availability of witnesses, failed to prove that the applicant was guilty of misconduct, particularly that the second respondent concluded that it was probable that the charges were "trumped up". That being so it is unreasonable to conclude that the "circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable". If that were so an employer could in order to ensure that an employee is not reinstated itself create the" circumstances surrounding the dismissal" to justify a decision not to reinstate. In this matter the applicant specifically sought

[9] Pleadings page 23 of the award at para 6.8.

reinstatement. The prejudice to the applicant if she if not reinstated is substantial particular in the light of her length of service and proximity to retirement.

19.3 The effect of the second respondent refusing reinstatement and awarding compensation, given his findings, is to punish the applicant for having been unfairly dismissed for alleged misconduct ("probably trumped up") that the first respondent was not prepared to prove;

19.4 Evidence that the applicant would require training given her lengthy absence from work does not support the contention that it is not reasonably practicable for the applicant to have been reinstated or that a continued employment relationship would be intolerable. In fact, by giving evidence that the applicant would have required training suggests that it was indeed reasonably practicable for her to be reinstated.

19.5 The second respondent did not conclude that a continued relationship is "intolerable" but found that reinstatement would "not be conducive to good workplace relations" and accordingly awards compensation. It is not possible to equate the two. By doing so the second respondent in justifying his decision not to reinstate commits a reviewable irregularity and misconduct.

[24] In *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers obo Masha and Others*[10] the Labour Appeal Court referred to the decision in *Mediterranean Textile Mills* (*Pty*) *Ltd v SACTWU and others* and held:

> '… reinstatement is the primary remedy under the LRA and involves placing an employee back in employment as if the dismissal had never occurred. If the exceptions to the remedy of reinstatement do not apply, the Labour Court and arbitrators only have a discretion with regard to the extent to which reinstatement should be made retrospective.'[11]

[10] [2017] 4 BLLR 384 (LAC).
[11] Page 337 at para 8.

[25] As far as the delay in the finalisation of a matter is concerned the court held:

> '… it is not rational to use the lapse of time between Masha's dismissal and the arbitration to deny her the primary remedy of reinstatement. If that was a relevant factor, an employer could avoid reinstatement by merely delaying the completion of the arbitration.'

[26] I am acutely aware of the inordinate delay between the referral of the dispute to arbitration and the finalization of that arbitration. It was available to the first respondent to argue that as a result thereof, should reinstatement be ordered that reinstatement should be from a later date and not the date of dismissal. This was not argued.

[27] The Labour Appeal Court in the *Xstrata*[12] matter then considered what reasonably practicable meant:

> 'The object of section 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee's job no longer exists, or the employer is facing liquidation, relocation or the like. The term "not reasonably practicable" in section 193(2)(c) does not equate with "practical", as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility.'

[28] I am satisfied that the second respondent's analysis, understanding and application of the provisions of section 193(2) of the LRA and the consequential decision not to reinstate but to award compensation constitutes a defect in the award as provided for in section 145 of the LRA. As such the award of compensation falls to be reviewed and set aside.

[29] There is no reason in law or in fairness why in this matter costs should not follow the result.

[12] Id n. 11 at para 11.

[30] In the circumstances and for the reasons set out above I make the following order:

Order

1. The second respondents award in so far as he refused to reinstate the applicant is reviewed and set aside;
2. The first respondent's dismissal of the applicant was substantively unfair;
3. The first respondent is ordered to reinstate the applicant on the same terms and conditions as prevailed at the time of her dismissal;
4. As the applicant has reached retirement age the reinstatement is for the period 23 May 2007 to 31 August 2012 the date upon which she would have retired had she not been dismissed;
5. The first respondent is ordered to pay the applicants costs.

_____

D H Gush

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate C Todd

Instructed by: Bowman Gilfillan Attorneys

For the respondent: Advocate T Seery

Instructed by: Jay Reddy Attorneys