THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR1501/17

In the matter between:

SUN INTERNATIONAL LIMITED

Applicant

and

SACCAWU obo REBECCA RAMERAFE **First Respondent**

NATIONAL COMMISSIONER OF

PERCY PATRICK MAKGOPELA **Second Respondent**

COMMISSIONER FOR CONCILIATION

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MEDIATION AND ARBITRATION **Third Respondent**

Heard: 12 February 2019

Judgment delivered: 26 February 2019

JUDGMENT

VAN NIEKERK J

[1] On 3 July 2017, the second respondent, to whom I shall refer as 'the arbitrator', made the following award:

> 66. I order the Respondent to compensate the Applicant/Complainant the difference between R 271 440-00 which is Mr Botha's current annual salary and R 143 455-00, which is the Applicant/Complainant current salary, which would be R127 985-00 once off payment. The figures in the difference in salaries are at the the disposal of the Respondent.
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> 67. The above mention amounts must be paid to the Applicant/Complainant on or before 05th of August 2017. Should the amount of compensation awarded not being paid at the prescribed date then it will accrue interests in terms of Section 143 (2) of the Labour Relations Act 66 of 1951 as amended, read with the Prescribed Rate of Interest Act.
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> 68. I order the Respondent to place the Applicant/Complainant on the same salary bracket of the position they (herself and Mr Botha) are presently occupying (Surveillance Auditor) and/or which they both occupied.
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> 69. I order the respondent to eliminate all forms of unfair salary disparity on its employees starting with the Applicant/Complainant dispute.

[2] The award followed an arbitration hearing at which the arbitrator recorded that he was required to decide:

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7.1 Whether or not the Respondent committed unfair discrimination based on Section 6 (1 and 4) of the EEA to the Applicant/Complainant by paying Mr Botha more than her, as the complainant is a black female employee and her comparator Mr Botha is a white male employee.

7.2 Whether or not there is unfair salary disparity between the Applicant/Complainant and her Comparator

[3] The material facts are apparent from the award. The first respondent (the employee) was employed by the applicant on 1 January 2008, as a guest services attendant. In 2014, the employee was engaged in the position of surveillance auditor. Her chosen comparator is a Mr Botha, employed in the same position in June 2016. It is not disputed that the employee and Botha have the same job descriptions, or that they do the same work on a daily basis, are graded at the same level, and report to the same surveillance shift manager.

[4] The employee testified that she earned less than Botha, who commenced employment with the applicant in June 2016. Her annual remuneration package is R 143 445; her comparator's package is R 271 440. In the employee's view, the differential in earnings amounts to unfair discrimination on the grounds of race and gender; specifically, that her comparator was paid a higher salary on account of the fact that he was white and male.

[5] The applicant's HR business partner testified on behalf of the applicant. She stated that the employee was appointed to the surveillance position during the course of a restructuring exercise, and that she received a 20% increase to bring her remuneration into the applicable salary band. (The employee's remuneration increase from R 103 383.33.) Botha was recruited from a security company. To match his existing remuneration (in the form of nett earnings), a total cost-to-company package was calculated at R260 000. At the time of his recruitment, Botha was earning some R200 000 per annum - the difference of R60 0000 was added to compensate for the applicant's requirement of compulsory membership of health care and retirement funds. Botha was recruited on the basis of his experience, skills and qualifications. He had been previously employed at various

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casinos (including a period of 10 years employment at Gold Reef City Casino), and thus had more experience than the employee, and had better qualifications (a PSIRA Grade A).

[6] The arbitrator's reasoning can be gleaned from the following passages in the award:

> 46. In regard of the case law Mr Botha would meet the principles laid. The `Applicant/Complainant accepted that Mr Botha's CV shows that he has experience in different fields. She contended that when Mr. Botha arrived in the department he did not have experience of that office. Ashvani testified that when Mr. Botha was employed in that position he was already earning more than the Applicant/Complainant. She testified that for them to keep him they had to increase the salary with R60 000-00. My concern would be, when Mr. Botha agreed to work in the position was he aware of the salary bands within that position? The question that I still have is, what made the management to put Mr. Botha at the R260 000-00 salary per annum? Was because they did not want to lose him due to his experience in security? Was that only because he came already earning in excess of R200,000-00 which was already above the Applicant's/Complainant's salary? It was my observation that Ashvani's evidence was tailor-made to speak to the Respondent's version. It has been undisputed that Mr. Botha's CV shows a foster of experience but the Applicant's/Complainant's representative argued well that, that experience is not of surveillance auditor, which I agree to. The challenge on the Respondent's party is that the alleged experiences for other positions not for surveillance audit.

[7] The arbitrator then went on to conclude:

> 48. Following the above principle, firstly I find that it is, course that there was differentiation in salary between Mr. Botha and the Applicant/Complainant. Secondly based on the below summarized facts I find the differentiation is not justifiable. It is not a dispute that the Applicant/Complainant worked as the surveillance auditor before Mr. Botha and she was appointed at the starting scale of R124 059-99.

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Before the Applicant/Complainant was placed in that position she was earning R103 383-33 as the GSA at Slots. Mr. Botha that was appointed at the scale of R260,000-00, which seemed to be the highest scale in that position. Testified that because Mr. Botha was already earning in excess of R200,000-00 when they interviewed him. She further testified that if they offered in the same salary or release, he would not have accepted their offer. She testified that the increase is R200,000-00 to R60,000-00. The reason for the R60,000-00 was at Mr. Botha should be able to cover medical aid in provident fund. I find that not to be fair, rational and justifiable reason to increase Mr. Botha a salary. The question would be, why they thought of employing a person already earning in excess of the starting scale of that particular position. At the time the Applicant/Complainant was earning R137 409-00.The Applicant/Complainant testified that she wants to enjoy her work and not working in the same office with an employee who learns from more than her without any justification. She testified that Mr. Botha as an experience in security industry but not in the surveillance audit position. It is my view on the assessment of the Applicant's/Complainant's evidence that she feels that her dignity was somehow impaired as a female person.

And

51 the question would be, why the Applicant/Complainant is not paid the same like Mr. Botha? The only possible answer from the evidence it would be, when Mr. both it was employed he was already earning more than what the Applicant/Complainant in. Further on, as he was earning in excess of R200,000-00 the Respondent want to keep them as Ashvani testified that if they have said they pay him R200,000-00 or less Mr. Botha it would not have agreed to work for the Respondent. The Respondent's view that Mr. Botha has more experience is not correct because the experience they referred to is off the security industry general not of a position of surveillance auditor. In the whole CV of Mr. Botha of these experiences captured there is no where it showed he worked in the position of surveillance auditor. Whereas it is not disputed

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that, the Applicant worked for over one year and four months alone in that office and to doing the work of surveillance auditor…

54 it should be noted that the Applicant's/Complainant's dispute relied on the fact that Mr. Botha are is a white male employee who is paid far more than her. My view is that in addition to the two grounds the Respondent wanted to use experience as the shield of differentiation in salary which you find it to be capricious in this circumstances… Taking into consideration of the evidence presented before me, I am satisfied that the Respondent failed to establish that the discrimination was fair and it did not fill on direct and distant grounds.

56 I find on the balance of probability that, the Respondent's conduct complained of is not rational; such conduct amounts to the discrimination; and that discrimination is unfair. Often assessing the whole circumstances and the evidence presented before me, I find the Applicant's/Complainant's vision to be more probable than that of the Respondent in all respect…. I find the Respondent's actions of paying Mr. Botha that enormous amount of money to be highly unfair only because he was already earning in excess of R200,000-00 at the time of his interview. The question would be, what if Mr. Botha a would have it at the level of the Applicant/Complainant. My view is that, they have done all to ensure that they keep them and pay more salary but the problem is he does same work like the Applicant/Complainant. I could not find the reason to differentiate on the payment of the two employees.

58 Considering all what the parties presented before me, I am of the view that there was a huge wage disparity that occurred and/or there was unfair wage discrimination that the Respondent committed, which needs to be rectified. I find that there is an unjustifiable, irrational and unfair salary disparity between the Applicant/Complainant; I therefore find that the Respondent failed to discharge the owners in terms of section 11 [1 of the employment equity act 47 of 2013, as amended.

[8] Given that the applicant has chosen to seek a review of the award (rather than exercise its right of appeal in terms of s 10(8) of the EEA) the test to be applied is

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one that entitles this court to intervene if and only if the commissioner's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. The *locus classicus* remains *Mofokeng*, where the LAC said the following

> [30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…
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> [32] …Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.
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> [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable

> result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

[9] In coming to the conclusions that he did, the arbitrator made a number of errors. His analysis of the evidence and reference to not entirely relevant authorities displays a lack of understanding of some of the basic principles that underpin the EEA;'s regulation of the right to equal pay.

[10] The award lacks coherence, and comprises a series of often random observations More particularly, to the extent that the arbitrator considered that it was for the employee to establish and prove on a balance of probability that the applicant's conduct was not rational and amounted to unfair discrimination, this overlooks the provisions of s 11 of the EEA. That section makes clear that if unfair discrimination is alleged on a specified ground listed in s 6 (1) (which it was in the present instance), the employer against whom the allegation is made must prove, on a balance of probabilities, that the discrimination did not take place or that any discrimination was rational and not unfair, or is otherwise justifiable. The applicant was thus obliged to discharge the onus to prove the absence of any discrimination and to justify any discrimination found to exist. Secondly, the arbitrator fails to distinguish between the various categories of 'work of equal value' established by Regulation 4 of the Employment Equity Regulations of 2014. Although the regulation establishes a broad umbrella of 'work of equal value', the regulation recognises three discrete categories. The

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first is one in which the employee performs the same work of the comparator, i.e. where the work is identical or interchangeable. The second is where the work is substantially the same, or sufficiently similar that the employees concerned can 'reasonably be considered to be performing the same job'. The third is an equal value claim proper, where the employee performs work of the same value as the work of the comparator employee engaged 'in a different job' (own emphasis), if the employees' respective occupations are accorded the same value in accordance with the methodology prescribed by the regulation. The looseness of the language of the regulation is regrettable, but the three discrete categories that regulation 4 establishes are conceptually different. Commissioners must respect and apply that difference.

[11] The present case concerned a dispute where it was common cause that the employees were performing the same work, i.e. the first category referred to above. There was no need therefore for the arbitrator to make reference to the concept of equal pay for work of equal value (proper), or to refer to the authorities that concern that issue.

[12] The regulations are clear as to how this enquiry ought to be undertaken. The arbitrator was required to determine whether the work was of equal value (it was admitted to be so, in the form of the same or similar work), whether there was a difference in remuneration (this was admitted) and whether the difference constituted unfair discrimination, applying s 11 of the Act. The applicant had denied any act of unfair discrimination and as I have indicated, it therefore bore the onus to establish, on a balance of probabilities, that the difference in remuneration between the employee and Botha was not the difference of race and gender, or that it was rational and not unfair, or otherwise justifiable. The case before him was one in which the applicant, in effect, sought to assert a 'market related forces' defence to the claim of discrimination (i.e. that it had recruited Botha on the remuneration package it did because that was what he demanded and what the market justified), and to raise the 'justifiability factors' of qualifications and experience in the event that the primary defence failed. There

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is no proper evaluation of the evidence under the rubric established by s 6 (4) read with s 11. What the arbitrator did to justify the conclusion he reached was to reject the evidence of the applicant's single witness, in its entirety, on the basis that she 'tailored' her evidence to suit the applicant's case. There is no basis for this conclusion. The witness's evidence was an account of Botha's recruitment, an explanation as to how the remuneration package that was offered to him was calculated, and a justification for the differences between that package and that paid to the employee.

[13] As I have indicated, the justification offered by the applicant for the differential in pay was that it was required to match Botha's existing nett pay to recruit him, and that Botha's higher qualifications and experience (in comparison to the employee) attracted a premium. There is no analysis to support the arbitrator's rejection of the first justification - he merely suggests that it was unfair to pay Botha the package that he was offered. There are authorities that address what amounted to a 'market forces' defence to the employee's claim but the arbitrator considered none of them, nor did he make any reference to the principles that they establish. (See, for example, the rejection of the 'I paid him more because he asked for more' and 'I paid her less because she was willing to come for less' defences in *Clay Cross (Quarry Services Ltd v Fletcher* [1979] ICR 47.) Regulation 7 sets out the factors that might serve to justify a differentiation in income – seniority, length of service and qualifications are among them. The arbitrator effectively ignored the factors of seniority and qualification, and regarded experience as a criterion to be limited to the job in which the employee and Botha were currently engaged. In other words, he disregarded entirely Botha's work history and experience and was prepared only to regard as relevant his experience in the position of surveillance auditor. The evidence disclosed that Botha's work experience in security extended over more than 30 years, as opposed to the employee's much more limited work experience in the same sector. Further, as I have indicated, it would appear that Botha's qualifications are considerably better than those of the employee. There ought to have been a proper scrutiny and analysis of this aspect of the applicant's defence. In short:

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the differential in Botha's and the employee's respective incomes is not insignificant, but this was not reason in itself to find a lack of rationality, fairness or other ground of justifiability. What was required of the arbitrator was to undertake the analysis required by regulation 7 (2) on the basis of all of the evidence, and to determine properly whether the applicant had made out a case of rationality, fairness or other justifiability in respect of the admitted differential in income. This he failed to do, and thus committed a material error of law.

[14] Finally, turning to the last paragraph of the arbitrator's award (that the applicant '*eliminate all forms of salary disparity on its employees staring with the Applicant/Complainant dispute'*), there is simply no legal basis for such an order. The arbitrator merely records (in paragraph 63 of the award) that he considers such an award 'appropriate'. Commissioners tasked with the determination of unfair discrimination disputes ought to appreciate and respect the limits of their powers of intervention. The arbitrator's sweeping order potentially affects all of the applicant's employees (and there must be thousands of them), and is simply incomprehensible. The union's representative in these proceedings conceded as much, and did not seek to defend that part of the arbitration award.

[15] For the above reasons, the arbitrator's award stands to be set aside on the basis that in making the order he did, he both failed to appreciate the nature of the enquiry before him and exceeded his powers. It is not necessary for me in these circumstances to determine whether despite the reviewable irregularities committed by the arbitrator, the award is nonetheless capable of being salvaged on the basis that the result is reasonable. It also follows that the parties ought properly to be afforded a rehearing before a different commissioner. Finally, the interests of the law and fairness dictate that each party be responsible for its own costs.

I make the following order:

1. The award issued by the second respondent under case number NWRB 413-17 on 3 July 2017, is reviewed and set aside.

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2. The dispute is remitted to the third respondent, for a re-rehearing before a commissioner other than the second respondent.
3. There is no order as to costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr S Jamieson, Cliffe Dekker Hofmeyr

For the first respondent: Union official

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