

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA16/18

In the matter between:

MAGUMENI PHILIMON MATHEBULA

Appellant

and

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

First Respondent

SELLO NKURUMAH MOIMA NO

Second Respondent

**PROVINCIAL DEPARTMENT OF AGRICULTURE AND
RURAL DEVELOPMENT AND LAND
ADMINISTRATION**

Third Respondent

Heard: 5 September 2023

Delivered: 07 February 2024

Coram: Molahlehi ADJP, Smith AJA and Malindi AJA

Summary: Appeal against decision not to order reinstatement. Employee dismissed for gross-negligence. Commissioner in arbitration finding dismissal both procedurally and substantively fair. The Labour Court on review found the dismissal to be substantively unfair, but declined to order reinstatement. The Labour Court based its decision in refusing reinstatement on the statement that his dismissal was a conspiracy by the employer. This Court upheld the appeal and ordered the employee to be reinstated. This Court ordered reinstatement on

the basis that the employer presented no evidence as to why reinstatement was in the circumstance inappropriate.

JUDGMENT

MOLAHLEHI, ADJP

Introduction

[1] This appeal, with the leave of the Labour Court, is against the judgment and order of that Court (per Lagrange J) made on 24 January 2018, in which the arbitration award made by the General Public Service Sector Bargaining Council's (the GPSSBC) Commissioner was reviewed and set aside. The Commissioner's award was substituted with an order that the dismissal of the appellant was substantively and procedurally unfair, and the respondent was ordered to pay compensation to the appellant equivalent to six months' salary without reinstatement.

[2] At the beginning of the hearing, the appellant sought the reinstatement of the appeal following the delay in its prosecution and condonation for the late filing of the heads of argument. The other issue raised by the respondent was that the appellant failed to comply with the order made on 27 August 2019 directing him to file the missing part of the appeal record. Although the appellant did not file any condonation for not complying with the Court order, he proffered an explanation for such failure. In this regard, the respondent's Counsel conceded that the issue was limited to whether the appellant ought to have been reinstated, and thus, the issue of the missing parts of the appeal record was irrelevant. In other words, the appeal could be considered without the record. Having regard to the submissions made by both Counsel and the fact that the respondent suffered no prejudice, I excused the non-compliance with the Court order. This was informed more particularly by the fact that the appeal was limited only to the narrow issue of reinstatement.

[3] The other issue concerned the failure of the respondent to file the heads of argument timeously. In this regard, I found the explanation proffered for the late filing of the heads of argument to have been satisfactory and accordingly excused the non-compliance by the appellant.

[4] In light of the above and in the interest of justice, the non-compliance with the court order and the late filing of the heads of argument were excused. The appeal was also reinstated.

The background facts

[5] The material facts that gave rise to the dispute between the parties concerned the dismissal of the appellant, Mr Mathebula, by the third respondent, the Department of Agricultural and Rural Development and Land Administration (the respondent). The dismissal of the applicant was consequent to the charges that the respondent had proffered against him relating to the alleged wilful or negligent mismanagement of the State's finances. The applicant was, in this regard, accused of breach of section 42 of the Public Finance Management Act¹ (PFMA).

[6] The applicant, who was employed as Chief Director of Corporate Services, was, at the time of the commission of the alleged offences, acting as head of the department. He was, accordingly, the accounting officer in terms of section 38 of the PFMA.

[7] The other charges preferred against the appellant concerned the alleged failure to disclose a personal interest in various entities, including irregular transfer of the amount of R73 million to six entities. It was alleged that he also transferred the amount of R70 million to Mpumalanga Agricultural Development Corporation without the approval of the Department of Treasury.

¹ No. 1 of 1999.

[8] Aggrieved by the outcome of the disciplinary inquiry, the appellant referred the dispute concerning his alleged unfair dismissal to the GPSBC for arbitration.

The arbitration award

[9] The Commissioner found the dismissal of the appellant to be both procedurally and substantively fair, and accordingly, confirmed the dismissal.

The review

[10] The appellant disagreed with the outcome of the arbitration award and accordingly instituted review proceedings before the Labour Court.

[11] Having considered the grounds of review, the Labour Court concluded that the dismissal of the appellant was both procedurally and substantively unfair. It accordingly ordered the respondent to pay the appellant compensation equivalent to six months but declined to reinstate him. In declining to grant reinstatement, it reasoned as follows:

"(55) While his finding of guilt must be set aside on these basis, I am not of the view that the applicant should be reinstated as a remedy for his substantively unfair dismissal. He himself testified without much evidentiary basis that he believed he was the victim of a conspiracy. It is difficult to see how the trust relationship between him and the department could persist in circumstances."

The issue on appeal

[12] The issue raised by the appellant before this Court is limited to the complaint that the Labour Court erred in not reinstating him following the finding that the dismissal was unfair.

[13] The essence of the appellant's case before this Court is that the Labour Court did not exercise its discretion properly in failing to order that he be reinstated as envisaged in section 193 (2) of the Labour Relations Act² (the LRA) subsequent to the finding that the dismissal was unfair.

[14] In terms of section 193 (2) of the LRA the primary remedy in a case of unfair dismissal is a reinstatement or reemployment unless:

- “(a) the employee does not wish to be reinstated or reemployment.
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.
- (c) it is reasonably practicable for the employer to reinstate or re-employ the employee.
- (d) the dismissal was unfair because the employer did not follow a fair procedure.”

[15] The decision whether to reinstate an employee whose dismissal was found to have been unfair involves an exercise of discretion by an arbitrator in terms of section 193 (1) and (2) of the LRA. The exercise of the discretion may be challenged on review, in which case the Labour Court is required to determine whether the arbitrator, in arriving at the decision as he or she did, took into account all the facts and the circumstances of the case. As stated in *Kemp t/a Centralmed v Rawlins*,³ the Court also has to determine whether the decision refusing reinstatement is judicially correct.

[16] The underlying consideration in determining whether to reinstate or compensate an employee in terms of section 193 (1) and (2) of the LRA and whether the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or not reasonably practical has to be underpinned by fairness based on all the circumstances of the case.⁴

² No. 66 of 1995, as amended.

³ (2009) 30 ILJ 2677 (LAC) at para 55 - 56.

⁴ See: *Kemp* (Ibid) at para 22 to 23 and *Dunwell Property Services CC v Sibande and others* (2012) 2 BLLR 131 (LAC).

[17] In *Booi v Amathole District Municipality and Others*,⁵ the Constitutional Court in dealing with the issue of reinstatement under section 193 of the LRA held that:

"[38] It is plain from this Court's jurisprudence that where a dismissal has been found to be substantively unfair, "reinstatement is the primary remedy" and, therefore, "[a] court or arbitrator must order the employer to reinstate or re-employ the employee unless one or more of the circumstances specified in section 193(2)(a) (d) exist, in which case compensation may be ordered depending on the nature of the dismissal."

[18] The Constitutional Court further held that⁶:

"[40] It is accordingly no surprise that the language, context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one. The term "intolerable" implies a level of unbearability and must surely require more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in section 193(2), which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal. And my approach to section 193(2)(b) is fortified by the jurisprudence of the Labour Appeal Court and the Labour Court, both of which have taken the view that the conclusion of intolerability should not easily be reached and that the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability."

[19] The burden is on the employer to provide the reason and evidence to show that it would be intolerable to grant the reinstatement to an employee. In *Booyesen v Safety and Security Sectoral Bargaining Council and Others*,⁷ the Labour Appeal Court (LAC) held that the threshold to show intolerability is high and cannot be satisfied by the

⁵ [2022] 1 BLLR 1 (CC) at para 38.

⁶ See: *Booi* (Ibid) at para 40.

⁷ [2021] 7 BLLR 659 (LAC) paragraph 12.

employer simply reproducing the evidence that was rejected as insufficient at the point of seeking to justify the dismissal.

[20] The required high threshold in showing intolerability has to be understood in the context of the value which, as stated in *Equity Aviation Services (Pty) Ltd v Commissioner of Conciliation, Mediation and Arbitration and Others*⁸ is to protect the security of employment as envisaged by the section 23 of the Constitution of the Republic of South Africa, 1996.

[21] In *Amalgamated Pharmaceutical Ltd v Grobler NO and Others*⁹ the Court held that it was grossly unfair to punish an employee with unemployment without finding him or her to be guilty of the wrongful conduct. According to the Labour Court, the unfairness in that regard cannot be ameliorated by compensation. In *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*,¹⁰ the Constitutional Court held that if the offence proffered against the employee did not justify dismissal, it was difficult to understand why it would at the same time provide a ground to prevent his reinstatement.

[22] In *Fidelity Cash Management Services, v Commissioner for Conciliation, Mediation and Arbitration and Others*,¹¹ this Court held that:

"(32) It is an elementary principle of not only our labour law . . . but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for the dismissal which the employer gave at the time of the dismissal." ¹²

[23] The essence of the above is that if an employee who is entitled to reinstatement is alleged to have committed other offences subsequent to the charges proffered

⁸ 2009 (1) SA 390 (CC) at para 59.

⁹ (2004) 25 ILJ 523 (LC) paragraph 13.

¹⁰ 2010 (5) BCLR 422 (CC).

¹¹ [2008] 3 BLLR 197 (LAC) at para 32.

¹² See also: *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* 2001 (4) SA 1038 (LAC) at para 100.

against him or her, the employer can address those (offences) after reinstating him or her.

[24] The test for determining whether the remedy of reinstatement is appropriate is objective. It is not, as stated in *Engine Petroleum Ltd v CCMA and others*,¹³ subjective.

Discussions

[25] The finding that the dismissal of the appellant in the present matter was unfair was not challenged by the respondent, and thus, to deny him reinstatement in the circumstances amounted to benefiting the respondent and undermining the fundamental right to fair labour practice as envisaged in the Constitution and legislated as such in the LRA.

[26] It is clear that in deciding the issue of the relief, the Labour Court, in the present matter, based its decision on the evidence of the appellant that his dismissal was nothing but a conspiracy to get rid of him. It is further apparent that the allegation of conspiracy made by the appellant was not substantiated nor tested during the arbitration hearing. The statement made by the appellant was nothing more than that certain people employed by the respondent wanted to get rid of him. The statement, which seems nothing more than a perception, was made with no reference to any specific person in the employ of the respondent. It was a general statement made towards a huge government department, which makes it difficult to see how this could have affected the trust relationship between the parties. It is a statement made clearly in the context where the appellant attempted to provide an understanding as to why the unsustainable charges could have been formulated against him.

[27] As alluded to earlier, there was no evidence to test the statement's veracity. Put in another way, the appellant was denied the opportunity to present evidence as to why

¹³ (2007) 28 ILJ 1507 [LAC] at para 84.

he should be entitled to reinstatement in light of his conspiracy statement, nor did the employer substantiate why reinstatement was inappropriate in the circumstances.

[28] The essence of the unfairness in the context of the present matter arises from the fact the appellant was not appraised in the arbitration proceedings of the case he had to meet regarding the intolerability that impacted the reinstatement. The other element of unfairness arises from the Labour Court's interpretation of the statement about conspiracy. In my view, the approach adopted by the Labour Court in dealing with the issue of reinstatement ignored the facts and the circumstances of this case. In this regard it is apparent that paragraph (a) of section 193(2) does not find application because the appellant did express a wish not to be reinstated. Furthermore, there is no evidence to objectively determine the requirements of paragraphs (b) and (c). It is also clear that paragraph (d) does not apply.

[29] In my view, the Labour Court erred in making its decision as it did concerning the legal principles discussed above. For this reason, the appeal has to succeed.

[30] The question that remains for consideration is whether the order to reinstate the appellant should be retrospective to the date of the dismissal. As indicated earlier, there was a delay in the prosecution of the matter on the part of the appellant. Although I accepted that it was his attorney and not he that was to blame for the delay, it would be unfair to burden the respondent with compensation for that period.

[31] In the circumstances, the following order is made:

Order

1. The appeal is upheld.
2. The order of the Labour Court is set aside and substituted with the following:

- i. The respondent is ordered to reinstate the applicant retrospectively with effect from the date of his dismissal on the same terms and conditions that pertained at the time of his dismissal.
- ii. In calculating the value of the compensation, the period from 27 August 2019 to the date of this judgment shall be excluded.

E. Molahlehi

Acting Deputy Judge President of the Labour Appeal Court

Smith AJA and Malindi AJA concur.

Appearances:

For the Appellant:	Adv G Rautenbach SC
Instructed by:	Rudolph Botha Attorneys
For the Respondent:	Adv Sibeko
Instructed by:	Lumula KB Attorneys