

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JA104/2020

In the matter between:

**SINENHLANHLA PRECIOUS MTHETHWA**

**Applicant**

and

**COMMISSION FOR CONCILIATION, MEDIATION**

**First Respondent**

**AND ARBITRATION**

**COMMISSIONER NATASHA MONI**

**Second Respondent**

**MOTOR INDUSTRY BARGAINING COUNCIL**

**Third Respondent**

**Heard: 01 March 2022**

**Delivered: 10 May 2022.**

**Coram: Coppin JA, Tokota et Phatudi AJJA**

**JUDGMENT**

PHATUDI AJA

Introduction

[1] This appeal, with the leave of the Labour Court, is against the Judgment and Order of that Court (Yeates AJ) delivered on 14 November 2019, in which the appellant's application seeking to review and set aside the second respondent's award, ("the arbitrator") was dismissed. The appeal is opposed by the third respondent.

Factual Background

[2] The appellant commenced her employment with the third respondent on 24 March 2014, as a Client Service Representative, until her dismissal on 26 July 2017, at a time when she occupied the position as a Returns Processor, Randburg Branch.

2.1 On 05 July 2017, an altercation ensued at the workplace between the appellant and one Ms Martina Malebana (“Malebana”) in the Manager’s kitchen, where she allegedly held the latter by her clothes and poked her in the face, threatening to assault her.

2.2 There was another altercation on the same day between the appellant and one Zandile Kwabe (“Kwabe”) after the appellant accused Kwabe of trying to “steal her man”.

2.3 Following these incidents, all three employees, that is the appellant, Malebane and Kwabe were charged with various acts of misconduct. Insofar as it may be material for present purposes, charges against the appellant ranged from assault, intimidation and harassment, insults and bringing the company name into disrepute, to unauthorised absence from duty.

[3] Appearing in person before the disciplinary hearing on 20 July 2017, the appellant, pleaded guilty to all the charges preferred against her. She was, in consequence of her guilty plea, dismissed on 26 July 2017. Malebana and Kwabe were, however, given final written warnings. Displeased with the sanction imposed, the appellant approached the Commission for Conciliation, Mediation and Arbitration (“CCMA”) for intervention, alleging that she was unfairly dismissed.

### Arbitration

[4] It appears from the record that in 2015, the appellant had been charged with, *inter alia*, making (degrading insults) towards her superior, Mapalo Tsatsimpe, who for some strange reasons, turned out to be the person who presided over the disciplinary enquiry that led to the appellant’s dismissal on 02 June 2015, but for the third respondent’s intervention, through Tom Mkhwanazi, the appellant was granted a “conditional reprieve” from dismissal. She was, in addition, placed on a final written warning, effective for 12 months, demoted to a back office position and required to submit to an anger management process.

[5] Having analysed the evidence before her, the second respondent (Commissioner) found that the appellant's dismissal was both procedurally and substantially unfair.

[6] The Commissioner, in spite of the amended remedy sought, (namely, reinstatement) decided to award the appellant a maximum compensation of 12 months' salary, which translated to R150 000.00 (R12500 X 12) payable within 14 days of receipt of the award.

[7] Aggrieved because her reinstatement was not ordered, the appellant launched an application in the Court *a quo* seeking an order reviewing and setting aside the award.

The Parties' submissions in *the court a quo*:

[8] The appellant, submitted, amongst other things, that the commissioner did not exercise her discretion properly, regard being had to the provisions of section 193(1) of the Labour Relations Act (the LRA)<sup>1</sup>, by failing, after finding that the dismissal was procedurally and substantively unfair, to award the primary remedy of reinstatement. She also submitted that the Court *a quo* erred in fact and in law by failing to consider that in terms of the said section, reinstatement was the appropriate primary remedy in the circumstances.

[9] The appellant, in terms of her amended statement, had sought reinstatement if it was to be found that her dismissal was both procedurally and substantively unfair. Properly interpreted, where the employee wishes to be re-instated or re-employed, section 193 requires the Labour Court or an arbitrator, after finding that an employee's dismissal is substantively unfair, to order the reinstatement or re-employment, unless where there are circumstances surrounding the dismissal that would make a continued employment relationship intolerable, or it would not be reasonably impracticable to

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<sup>1</sup> Act 66 of 1995, as amended.

reinstate or re-employ the employee, in which case, then compensation would be appropriate, in lieu of reinstatement or re-employment.

[10] The appellant submitted further that in the instant case however, no evidence had been adduced before the Commissioner that her reinstatement or re-employment would render a continued employment relationship intolerable within the ambit of section 193 (2) (b) of the LRA. or reasonably impracticable, as envisaged in section 193 (2) (c).

10.1 The foregoing observation is, in my opinion, reinforced by the following excerpt from *Booi v Amathole District Municipality & Others*<sup>2</sup>

‘It is accordingly no surprise that the language, content and purpose of s 193 (2) (b) dictate that the bar of intolerability is a high one. The term ‘intolerability’ 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 reinstatement injunction in s 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 s 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.**’ (emphasis added).

10.2 Counsel for the respondent, Mr Schoeman, on the contrary, submitted, relying considerably upon the reasoning of the second respondent (commissioner) that:

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<sup>2</sup> (2022) 43 ILJ 91 (CC); [2021] ZACC 36 (19 October 2021), per Khampepe ADCJ (Unanimous decision) at para 40.

“I think that the applicant’s tenure would be unsafe and insecure should she be retrospectively reinstated”, as the basis of opposition to the review application. He could, however, not enlarge further on this aspect.

[11] The view I take of the matter, therefore is that the Commissioner in the instant matter, had utterly failed to meet the threshold laid down in *Booi’s case*. This, clearly was a conclusion no reasonable decision-maker could reach.<sup>3</sup> In other words, there was no “rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at”

[12] The Court *a quo* correctly found that “the exact basis of the second respondent’s contention that the applicant’s tenure would be unsafe and insecure should she be retrospectively reinstated, is not explained.”

[13] Furthermore, the Court *a quo* found, correctly so, in my view, that “in the absence of the second respondent further elaborating on the factors she considered for not granting the applicant reinstatement, this Court is left in the unenviable position to guess what the second respondent may have meant where in the arbitration award she said:

‘In my observation of the various role players in this matter, I think that the applicant’s tenure would be unsafe and insecure should she be retrospectively reinstated.’.

[14] Additionally, the Court *a quo*, again, correctly observed that “there is little indication whether the possibilities of the situation make reinstatement inappropriate or may be potentially futile to the parties working relationship. Here, intolerability at the workplace should not be confused with mere incompatibility between the employer and employee.

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<sup>3</sup> *Carephone (Pty) Ltd v Marcus N.O & Others* 1999 (3) SA 304 (LAC) at para : [37]

[15] Regard being had to the foregoing emphatic observation made by the court *a quo*, I am even more inclined to agree with the appellant that absent evidence of the circumstances surrounding her dismissal, a continued employment relationship would be intolerable as envisaged in section 193(2)(b) of the LRA, the conclusion or decision reached to the contrary would, to my mind, be that no reasonable commissioner would have arrived at.

[16] The observation made in paragraph [15] above is further reinforced by the somewhat imperative wording of section 193(2) of the LRA which states that:

'Section 193(2)

The Labour Court or arbitrator must require the employer to reinstate or re-employ the employee unless-

- (a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) It is not reasonably practicable for the employer to reinstate or re-employ the employee
- (d) -----

[17] The word “must” in section 193(2) should be interpreted to import a peremptory meaning as to when the Labour Court or arbitrator is obliged to either reinstate or re-employ a dismissed employee. The arbitrator’s discretion is, therefore, fettered if none of the factors enlisted in subsection (2) of section 193(a)-(d) is absent. In other words, in that event, reinstatement or re-employment is obligatory to be ordered against a finding of unfair dismissal. In this instance, none of the factors listed in section 193 (2) (a) to (c) were established against the appellant.

[18] The foregoing interpretation is, in my view, in harmony with the decision in this Court of *South African Municipal Worker's Union and Another v Ethekwini Municipality and Others*<sup>4</sup>,

[19] In the present instance, it cannot be that the finding by the commissioner that the respondent (employer) failed to address the relationship of trust, and whether it was tethered or broken, and yet the commissioner still decided not to grant the primary remedy sought, qualify as a reasonable finding, a decision-maker could reach. There must, of course, be plausible reasons anchored on reasonable grounds for the departure.

[20] Applying the principles espoused in *SAMWU v Ethekwini Municipality* above, I am of the view that having found the dismissal substantively unfair, the arbitrator was to consider whether the peremptory reinstatement should not be awarded in light of the particular circumstances of the matter as envisaged in section 193(1) and (2) of the LRA. The enquiry should have required that the appellant's retrospective reinstatement as the primary remedy, and an evaluation of the prevailing circumstances, for instance, whether evidence adduced on the trust relationship suggests a severed working relationship between the parties, should have been assessed.

[21] Despite finding that, there is no indication on the evidence whether the possibilities of rendering reinstatement inappropriate or may be potentially futile, the Court *a quo* failed to order reinstatement as sought. This was erroneous.

[22] This observation emerges out of the salutary finding by the Court below that:

'[41] taking into consideration the factors enunciated above, it emerges on the face of it that many of the factors appear in favour of the applicant's reinstatement.'

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<sup>4</sup> [2019] 1 BLLR 46 (LAC), paras [16] – [18].

[23] The learned Acting Judge went on to enumerate such factors, correctly so, in my view, as follows:

‘(a) the applicant sought reinstatement as the primary remedy;

(a) The nature and extent of the misconduct, when viewed in the context of the inconsistent treatment of the applicant juxtaposed against the final written warnings of Malebana and Kwabe;

(b) The fact that the dismissal had been found to have been substantively unfair due to inconsistency;

(c) The lack of evidence supporting a conclusion that the trust relationship has been severed.’

These factors should, in my view, have prevailed in the arbitrator’s award but were simply erroneously overlooked.

[24] As opposed to the above-named factors, the Court *a quo*, however, found at paragraph [42] of the judgment factors that *inter alia* militated against reinstatement.

‘a. She was already on a final written warning.’

[25] This finding, being one of the factors that discounted against reinstatement is, in my view, factually incorrect. The arbitrator indicated that according to the evidence, a final written warning issued by Mr Tom Mkhwanazi, (third respondent’s Secretary General at the time) remained valid for twelve (12) months from 02 June 2015. Subsequent infractions by the appellant were clearly committed around July 2017. To that end, I find that the Court *a quo*’s reasoning against reinstatement was premised on erroneous facts, since there was no final written warning at the time, which was still valid and thus enforceable.

[26] It is a trite principle that the arbitrator is obliged to probe any factor which is relevant and or adverse to reinstatement if the finding was that the dismissal was both procedurally and substantively unfair<sup>5</sup>.

[27] Put differently, the LRA permits any of the three remedies set forth in section 193(1) to be afforded to an unfairly dismissed employee, such as the appellant. These remedies are legislatively designed to safeguard the employee's security of tenure at the workplace. See also, *Equity Aviation Service (Pty) Ltd v CCMA & Others*<sup>6</sup>.

[28] In *casu*, the Court *a quo*, therefore, erred in awarding compensation in circumstances where the factors envisaged in section 193(a)(b) and (c) of the LRA, were not established by the evidence and on a balance of probabilities. Moreover, the arbitrator did not, in deviating from the primary relief sought, furnish reasons for granting the remedy not pleaded by the appellant. He, instead, applied his "thinking", which is subjective, in holding that "the applicant's tenure would be unsafe and insecure", should the appellant be reinstated.

[29] Significantly, this conclusion unfortunately, actuated the Court *a quo* to find that it is "clear that an order for reinstatement would not necessarily have the desired effect of safeguarding the employee's security of employment, the reasons she (arbitrator) observed". From the foregoing, it follows that the Court below did not apply its independent assessment of the circumstances set out in section 193(2)(b) and (c) of the LRA.

[30] This is a clear irregularity this Court is, at large to disturb and, therefore, set aside.

[31] I must mention, in addition, that there was no cross-review filed on behalf of the third respondent demonstrating, on the facts, that the appellant's re-instatement or re-

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<sup>5</sup> *DHL Supply Chain (Pty) Ltd & Others v National Bargaining Council for the Road Freight Industry & Others* [2014] 9 BLLR 860 (LAC).

<sup>6</sup> 2009 (2) BLLR 111 (CC), 2009 (1) SA 390 (CC).

employment would create an intolerable toxic working relationship at the workplace, nor that it would not be reasonably impracticable.

[33] For that, the Court *a quo* should have found that the award in the circumstances of the case, was not reasonable. Furthermore, the award “must be fair to both parties affected by the decision<sup>7</sup>. *In casu*, the award was not justified in relation to the reasons given for it.

### Costs

[34] There remains the question of costs. It is trite that in civil matters costs should follow the cause. However, in Labour matters, the norm is not always applied, except upon considerations of law, fairness, and justice being shown. For that, fairness dictates, in my view, that there will be no order as to costs.

[35] For all of the foregoing considerations, the appeal ought to succeed. In consequence, the following order will be issued:

(1) The appeal is upheld.

(2) The Order of the Court *a quo* is set aside and is substituted with the following order:

“2.1 The arbitration award is set aside and replaced with an award that:

the applicant is reinstated retrospectively to her position from the date of dismissal (26 July 2017) with all terms and conditions and benefits no less favourable than prior to her dismissal.”

(d) There is no order as to costs.

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<sup>7</sup> *BMD Knitting Mills (Pty) Ltd v SA Textile Workers Union* [2001] 7 BLLR 705 (LAC), per Davis AJA.

M.G Phatudi  
Acting Judge of the Labour Appeal Court

I concur

Coppin JA

Tokota AJA

APPEARANCES:

FOR THE APPELLANT:

In person (Ms Precious Mthethwa)

FOR THE THIRD RESPONDENT:

Adv Johan Schoeman

Instructed by

Wolnuter Attorneys, Johannesburg