

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA15/21

In the matter between:

MAJOR-GENERAL SHADRACK SIBIYA

Appellant

and

SOUTH AFRICAN POLICE SERVICE

Respondent

Heard: 29 March 2022

Delivered: 12 May 2022

Coram: Phatshoane ADJP, Coppin JA et Phatudi AJA

JUDGMENT

COPPIN JA

[1] On 22 July 2020, the Labour Court (Mathebula AJ) (“the court *a quo*”) granted an order, *inter alia*: (a) declaring the appellant’s dismissal by the respondent (“SAPS”) on 31 August 2015, to have been procedurally and substantively unfair; (b) directing the SAPS to pay the appellant the equivalent of 12 months’ salary (at the (then) current rate applicable to Major Generals) as compensation within 15 days of the date of the order; and (c) to pay the appellant’s costs on an attorney and client scale.

[2] On petition by the appellant to this court, which was not opposed by the respondent, the appellant was granted leave to appeal against the court *a quo*’s order only to the extent that it declined to award the appellant the remedy of reinstatement, and having, instead, awarded him compensation. This is the appeal. The SAPS has also not opposed it.

[3] The appeal thus only turns on the question of the remedy, and in particular, on whether it was correct for the court *a quo* to award the appellant compensation

instead of ordering his reinstatement. The appellant wants to be reinstated and contends that it is the appropriate remedy, both, in terms of the law and fairness.

[4] The appellant was a career policeman. He joined the SAPS as a junior recruit in 1989 and progressed through the ranks. At the time of his dismissal on 31 August 2015, he held the rank of Major General and the position of the Gauteng Provincial Head of the Hawks (or the Directorate of Priority Crimes Investigation (“the DPCI”)).

[5] The decision to dismiss the appellant from the SAPS was essentially taken by Major-General Ntlemeza (“Ntlemeza”), at the time the (purported) acting national head of the Hawks and the appellant’s direct superior. This followed upon attempts by Ntlemeza to suspend the appellant and a disciplinary enquiry, in which the appellant had been charged with the alleged illegal rendition in 2010 of Zimbabwean criminal suspects to the Zimbabwean authorities.

[6] At his disciplinary enquiry, the appellant testified, *inter-alia*, that he had been the victim of a conspiracy to remove him from office, because of his attempts to prosecute the head of crime intelligence at the SAPS at the time, one Lt. Gen. Richard Mdluli (“Mdluli”), for fraud, corruption, money laundering, murder, kidnapping, and other offences. The appellant’s charging of Mdluli also generated public controversy and litigation. The National Prosecuting Authority (NPA) controversially withdrew those charges but the High Court set aside that decision and ordered the NPA to reinstate them. Mdluli was eventually found guilty on some of those charges in September 2019.

[7] Ntlemeza’s suspension of the appellant was set aside by the Gauteng High Court, which found, *inter-alia*, that the decision of Ntlemeza’s was taken in bad faith and that he was biased and dishonest in that regard. The Supreme Court of Appeal dismissed Ntlemeza’s petition for leave to appeal the High Court’s decision.

[8] Subsequently, Ntlemeza’s appointment as acting national head of the Hawks was also set aside by the Gauteng High Court and his efforts to appeal that decision were also unsuccessful.

[9] Turning specifically to the appellant's disciplinary enquiry that led to his dismissal – It is not necessary to relate any more detail concerning those charges for the purposes of this appeal. It is a matter of record. In addition to what is stated above concerning the charges of misconduct brought against the appellant relating to the alleged illegal rendition, the following would suffice concerning the disciplinary enquiry: No evidence of the alleged rendition was actually produced and the witnesses called by the SAPS gave contradictory evidence. SAPS also gave no explanation for the five-year delay between the alleged unlawful rendition and the charging of the appellant.

[10] Despite the glaring deficiencies in the case of SAPS against the appellant at the disciplinary enquiry, which Ntlemeza (effectively) subjected the appellant to, and despite the appellant's protestations of innocence, he was found guilty of the alleged illegal rendition and his dismissal was recommended. Ntlemeza himself decided to dismiss the appellant. The appellant's internal appeal against his dismissal to the, then, National Commissioner of the SAPS, General Phiyega, was also unsuccessful, not because it lacked merit, but because it was contended that the appellant had no such right to appeal.

[11] Following his dismissal, the appellant referred an unfair dismissal dispute to the Safety and Security Bargaining Council. At the arbitration, and acting on the proposal of the arbitrator, the parties agreed that the arbitration should not proceed in the bargaining council but that an application be lodged with the Director of the Commission for Conciliation, Mediation and Arbitration ("the CCMA") to refer the dispute directly to the Labour Court for resolution, as contemplated in section 191(6) of the Labour Relations Act ("LRA"). This was done successfully and a ruling to the effect that the matter was to be resolved in the Labour Court was made by the arbitrator on 19 December 2016.

[12] Before the hearing in the court *a quo*, the parties agreed at the pre-trial conference, *inter-alia*, that subject to the approval of the court, the evidence given in the disciplinary enquiry should be admitted and accepted as evidence for the purposes of the trial in the Labour Court, subject to each party's right to call further oral evidence if he/it so wished. This agreement was approved by the court *a quo*

which ordered that the transcribed record of the evidence at the disciplinary enquiry should be deemed to be evidence before the court *a quo*. That turned out to be the only (oral) evidence before the court *a quo* as neither of the parties elected to present further oral evidence.

[13] Consequently, the hearing in the court *a quo* was based on the transcript of the oral evidence given at the disciplinary enquiry, and documents that the parties had relied on in the enquiry and in the proceedings before the bargaining council. Only certain, relevant, documents of those produced there have been included in the appeal record before this court.

[14] The court *a quo* found that the delay in charging the appellant had been unreasonable and unexplained; that Ntlemenza had acted in bad faith in relation to the appellant and that the rejection of the appellant's appeal by the National Commissioner of the SAPS was wrong and procedurally unfair.

[15] In addition, the court *a quo* held that the appellant's dismissal had been substantively unfair; that there had never been a case against him and that the charges against him were trumped up. The court *a quo*, *inter alia*, held concerning the appellant and his dismissal: "A career policeman who rose through the ranks to Deputy National Commissioner has left the Police Service in this case. Dismissed without valid and fair reason(s) by the acting head whose character has been found wanting by the courts. There can be no worse humiliation."

[16] Despite finding the appellant's dismissal to have been both procedurally and substantively unfair, the court *a quo* did not require the appellant's reinstatement and, instead, ordered the SAPS to compensate him as aforesaid. The court *a quo* appears to have come to that resolution for two reasons, namely, firstly, because in his statement of claim the appellant only sought compensation as relief and not reinstatement; and, secondly, because the court *a quo*, seemingly, accepted a submission made by the counsel for the SAPS that the post that the appellant had occupied at the time of his dismissal had since been filled and that it was consequently impossible to reinstate the appellant to that position.

Argument on appeal

[17] The appellant's counsel submitted that the court *a quo* erred in not reinstating the appellant, in particular in circumstances where it had completely vindicated the appellant, had found that he was innocent and had been victimised by officials who lacked integrity, had acted in a high-handed manner and in bad faith, and that those individuals had since been removed, so that nothing stood in the way of reinstating the appellant. Further, that there was no evidence at all that a continued employment relationship between the appellant and the SAPS would be intolerable.

[18] Counsel for the appellant further argued that the appellant did not originally seek reinstatement in his statement of claim, because at the time the SAPS was still under the command of those individuals who were responsible for his dismissal, but that he never abandoned, or waived, his right to seek reinstatement. Following the removal of those individuals and new appointments to the command of the SAPS, the appellant did indicate that he was seeking reinstatement. This was also stated in the pre-trial minute and the practice note in the proceedings before the court *a quo* and it was regularised by an oral application for the amendment of his statement of claim in the proceedings before the court *a quo* to include a claim for reinstatement.

[19] In the minutes of the pre-trial conference held on 31 July 2018 in the chambers of the appellant's previous counsel and attended by representatives of both the appellant and the SAPS, it is recorded in paragraph 7 under the heading "Relief Claimed" that the applicant (i.e. the appellant) seeks "(a) reinstatement; (b) payment of his full salary and benefits backdated to 31 August 2015, being the date of dismissal; (c) alternatively, compensation in the maximum amount under the LRA; (d) costs." It is further recorded there that the applicant (i.e. the appellant) "intends to amend [his] statement of case to provide for reinstatement which is being sought." It is also recorded that the respondent seeks "dismissal of the claim with costs". In paragraph 6 of the said minute, it had also been recorded that one of the issues that the court *a quo* was to decide, if it found that the dismissal was unfair, was "what the appropriate remedy should be."

[20] In the “Applicant’s Practice Note” submitted on behalf of the appellant in the proceedings in the court *a quo*, it is clearly stated that the appellant’s “reinstatement, alternatively, compensation” would be sought as relief.

Discussion

[21] In terms of section 193 (2) of the LRA, “[t]he Labour Court or the 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; or (d) the dismissal is unfair only because the employer did not follow a fair procedure.”

[22] The reasons for not requiring the appellant’s reinstatement and only granting him compensation are also stated in the court *a quo*’s judgment in respect of the appellant’s application for leave to appeal in that forum to be the following: “In the statement of claim the applicant prayed for compensation. It is common cause that the position has since been filled by the first respondent. Only at a later stage during the hearing did counsel raise the issue of reinstatement. Clearly, this was an afterthought and nowhere did it feature in the papers. In litigation, parties are bound by the formulation of the case in the pleadings. The position was eloquently set out by...”

[23] The validity of those findings of the court *a quo* shall be discussed later. At this juncture it is necessary to consider, with reference to section 193(2) of the LRA, on what bases the court *a quo* did not order reinstatement, and whether they are possibly contemplated in section 193(2)(a) and (c) of the LRA. Subsection 193(1)(d) was clearly of no application because the court *a quo* found that the appellant’s dismissal was, both, procedurally and substantively unfair. Subsection 193(1)(b) could also not have been applicable at all because there were no circumstances (and no evidence led) to the effect that the continued employment relationship between the SAPS and the appellant would be intolerable. On the contrary, the court *a quo* in its findings completely vindicated the appellant and found him to have been

an innocent victim of officials, who acted in bad faith and lacked integrity. Those individuals had been removed and there were no circumstances which would have rendered a continued employment relationship between the appellant and SAPS intolerable.

[24] Regarding the applicability of subsection 193(2)(a), the court *a quo* could not have found that the appellant did not want or wish to be reinstated. Such a finding would have been patently wrong. The court *a quo* seemed to be of the view that the appellant was bound by the prayer for compensation in his statement of claim and could not change his mind and seek reinstatement at the hearing. It appears that the court *a quo* did not give any more attention to the application to amend the statement of case for that very reason. This approach was also patently wrong.

[25] In coming to that conclusion the court *a quo* either ignored or overlooked the recording in the parties' pre-trial minute and the statement in the practice note that the appellant was indeed seeking reinstatement. The pre-trial conference was held on 31 July 2018 and the hearing took place on 23 August 2019 and 20 September 2020, more than a year, or two years later. Adequate notice that the appellant would be seeking reinstatement, as stipulated in the minute of that conference, was most certainly given and SAPS was not taken by surprise. The filing of the practice note reinforced that notice, *inter alia*, concerning the relief that would be sought.

[26] More concerning, is the fact that an amendment that was moved to regularise the position, is not mentioned in the main judgment, or in the judgment in respect of the application for leave to appeal.

[27] Although one of the grounds on which leave to appeal was sought by the appellant specifically raises the issue of the amendment, the court *a quo* did not deal with that issue at all. In its judgment in respect of the appellant's application for leave to appeal, the court *a quo* merely mentions having rejected the appellant's counsel's referral to reinstatement for being an afterthought, which did not feature in the papers. This was hardly adequate because it is effectively alleged by the appellant, in his application for leave to appeal, that even though the appellant's counsel applied for an amendment of the pleadings as foreshadowed in the pre-trial minute,

and even though the amendment had not been objected to and SAPS would not be prejudiced by it, the court had failed to deal with the amendment. This surely required a specific response from the court *a quo*.

[28] There is nothing in the rules of the Labour Court that precludes an oral amendment of a pleading, or that prescribes the manner and the time within which the application for amendment is to be brought. In terms of the Uniform Rules applicable to trial proceedings in the High Court, amendments may be granted at any stage of the proceedings, but before judgment, on such terms as to costs and otherwise as the court may consider appropriate¹. Thus, amendments to pleadings may, for example, be granted before and after close of pleadings, during the hearing of the evidence, after the evidence has been given, and even during or after the closing argument, but not after judgment.

[29] Even though the grant or refusal of the amendment was a matter within the discretion of the court *a quo*, it was a discretion that had to be exercised judicially in light of all the facts and circumstances of the matter before it.² Our courts have frequently allowed amendments, unless they are *mala fide*, or cannot be granted without irremediably prejudicing the other party.³

[30] This court has held in *SA Breweries (Pty) Ltd v Louw*,⁴ with reference to the facts in that matter, *inter alia*, that the case pleaded cannot be changed or expanded by the terms of a pre-trial minute, and that the change can only be affected by the necessary amendment to the pleading, but it has also accepted recently in *Trellicor*⁵, in line with old and established authority, that ‘the importance of pleadings should not be unduly magnified’.⁶

¹ See Uniform Rule 28(10) and, *inter alia*, *Steenkamp v Steenkamp* 1962 (3) SA 949 (O)

² See, *inter alia*, *Caxton Ltd & others v Reeve Forman (Pty) Ltd & another* 1990 (3) SA 547 (A) at 565 F-G.

³ See, *inter alia*, for a classic formulation of the approach: *Moolman v Estate Moolman & another* 1927 CPD 27 at 29.

⁴ [2017] ZALAC 63; (2018) 39 ILJ 189 (LAC) para 8.

⁵ *Trellicor (Pty) Ltd t/a Trelidor v National Union of Metalworkers of SA (NUMSA) obo Mondli Ngwalane & others* (DA12/20) [2022] ZALAC 5 (10 February 2022) (“*Trellicor*”) para 38.

⁶ See also *Shill v Milner* 1937 AD 101 at 105 referring to what was held in *Robinson v Randfontein Estates GM Co. Ltd* 1921 AD 168 at 243.

[31] In substantiation of that principle, this court further accepted in *Trellicor* that while the object of pleadings is to define the issues; and while parties are to be kept strictly to their pleadings where any departure would cause prejudice, or prevent full inquiry, the court has a wide discretion within those limits, since “pleadings are made for the court, not the court for the pleadings”⁷. It also accepted⁸ that our courts have decided issues not specifically pleaded where the parties have widened the issues to include those not pleaded, and have even decided such issues where no amendment had been sought to regularise the position where there was no prejudice (i.e. which would ordinarily arise if those unpleaded issues were not fully canvassed at the trial).

[32] In this instance, the appellant had notified the SAPS in good time that he would be seeking reinstatement as primary relief and that he would apply at the hearing for the amendment of his statement of case to regularise the pleadings. Nowhere is it recorded that the SAPS had objected or had claimed that it was prejudiced by that approach. The issue of reinstatement was sufficiently canvassed at the hearing and the respondent even contended that- the reinstatement of the appellant was not possible because the position he held at the time of his dismissal had already been filled.

[33] The court *a quo* was wrong in not finding that the appellant wanted to be reinstated, as contemplated in section 193(2)(a) of the LRA, and in not granting the amendment which was sought, or alternatively, in not finding that the parties had widened the issues as pleaded to include the issue of reinstatement. The court *a quo* was not justified in such circumstances to assume that the appellant did not wish to be reinstated (or re-employed) in the SAPS. Before, at the time of and during the trial, there could have been no doubt that the appellant wished to be reinstated.

[34] Turning to the applicability of section 193(2)(c) of the LRA – the court apparently accepted the argument by counsel for the SAPS that the position the appellant held at the time of his dismissal “has long been filled and [that] it will be impossible to reinstate” him to that position. This argument was not backed up by

⁷ See *Trellicor* (above) para 39.

⁸ *Ibid.*

any evidence. The mere statement from the bar by counsel was hardly sufficient, but SAPS clearly deliberately chose to confine itself to submissions, even though it had ample opportunity to produce evidence. In any event, the mere fact that the position had already been filled could not serve as a legally acceptable bar to the appellant's reinstatement.

[35] This court has held⁹ that the object of section 193 (2)(c) is to exceptionally permit the employer relief where it is not practically feasible to reinstate. The phrase "not reasonably practicable" in the section was held to be a reference to the concept of feasibility. Something is not feasible if it is beyond possibility. In *Woolworths*,¹⁰ the Constitutional Court quoted with approval what this court had held in *Xstrata*, namely, that "[i]t was thus evident that the term 'not reasonably practicable' means more than mere inconvenience and requires evidence of a compelling operational burden."

[36] Here there was no evidence at all to show that it was "not reasonably practicable", in the sense discussed above, to reinstate (or re-employ) the appellant in the SAPS. The SAPS is a vast organisation, with multiple positions for officers with the rank of Major-General, which is the rank the appellant held at the time of his dismissal. The appellant, in the course of his long career in the SAPS, had undoubtedly been deployed in various areas of police operations and management, further negating any notion that his reinstatement (or re-employment) would be impossible. The fact that the position he occupied at the time of his dismissal, namely that of Provincial Head of the Hawks, had since been filled, is no reason for refusing him reinstatement into the SAPS, as he may be re-assigned following a proper and fair procedure to a post at the same rank and level as that he held at the time of his dismissal.

[37] The fact that the SAPS has not opposed this appeal, despite being fully aware of the issues in this appeal and the appellant's wish to be reinstated in the SAPS, further underscores his argument that there is no legitimate bar to his reinstatement.

⁹ See *Xstrata SA (Ltd) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers obo Masha & others* (2016) 37 ILJ 2313 (LAC) para 11.

¹⁰ *South African Commercial, Catering and Allied Workers' Union and Others v Woolworths (Pty) Limited* [2018] ZACC 44; (2019) 40 ILJ 87 (CC) ("*Woolworths*") para 49.

The fact that some time has elapsed from the date of dismissal should also not constitute a bar to his reinstatement.¹¹

[38] In terms of section 193(1) of the LRA, the court or the arbitrator may – (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal; (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; and, in the alternative (c) order the employer to pay compensation to the employee.

[39] The appellant's dismissal was both procedurally and substantively unfair, meaning that there was no fair reason for his dismissal and that the procedure, culminating in this dismissal, was unfair. He was not at fault at all, while the SAPS (his employer), through the senior officers it employed then (and who were mentioned earlier), was wholly at fault in dismissing him. There has been no suggestion or contention that the appellant had been dilatory in his pursuit to vindicate his rights. Accordingly, there is no reason why his reinstatement should not have been ordered to be retrospective to the date of his dismissal. Of course, subject to a limitation on the amount of backpay payable to him as discussed later in this judgment.

[40] In *Equity Aviation*,¹² the Constitutional Court held that the ordinary meaning of the word "reinstate" is "to put the employee back into the same job or position [that] he or she occupied before the dismissal, on the same terms and conditions." This means that an employee who is reinstated is to resume his or her employment on the same terms and conditions which applied at the time of his or her dismissal. In this matter, counsel for the appellant has proposed an order that would not unduly fetter the discretion of the National Commissioner to deploy the appellant. The wording is unobjectionable and there is no reason not to make the order in the terms largely proposed by the appellant, with appropriate adjustments regarding backpay and the actual reinstatement in light of the appellant's employment elsewhere since his dismissal.

¹¹ See, *inter alia*, *Woolworths* para 47.

¹² *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* [2008] ZACC 16; 2009 (1) Sa 390 (CC) para 36. See also *Woolworths* (above) paras 43-46.

[41] In reply to a query from this court regarding the appellant's earnings since his dismissal by the SAPS on 31 August 2015, the appellant filed an explanatory affidavit and supplementary submissions dealing with that aspect.

[42] In summary, the appellant received his last salary from the SAPS on 31 August 2015. He was unemployed from then until 8 November 2016 (a period of about 14 months and 8 days). From 8 November 2016 he was employed by the City of Johannesburg Metropolitan Municipality (COJ) on more favourable terms. He is still employed at COJ, but wishes to be reinstated at the SAPS.

[43] It is understandable that the appellant could not remain unemployed for long after his dismissal by the SAPS. He had to earn a living. That fact cannot prevent his reinstatement at the SAPS if it is his choice and he tenders his services to the SAPS. In fairness, however, taking all the relevant factors into account, including the extent of the retrospectivity and appellant's earnings since his dismissal, the amount of backpay should be limited to the period he was unemployed immediately after his dismissal by the SAPS¹³.

[44] While the appeal must succeed, given the facts and circumstances of this matter, a costs order in respect of the appeal is not warranted.

[45] In the result, the following is ordered:

45.1 The appeal is upheld in respect of the remedy;

45.2 Paragraph 57.2 of the court *a quo*'s order is set aside and is replaced with the following:

"57.2.1 The first respondent is to forthwith, but subject to subparagraphs below, reinstate the applicant as Major General in the South African Police Service ("SAPS"), and at its election either (i) in the same post he occupied at the time of his dismissal, or (ii) in

¹³ See *Equity Aviation Services* (above) para 31; and compare *Mediterranean Textile Mills (Pty) Ltd v SA Clothing & Textile Workers Union & Others* (2012) 33 ILJ 160 (LAC); see also, *NUMSA v Edelweiss Glass & Aluminium* (2010) 31 ILJ 139 (LC).

such other post as the National Commissioner considers appropriate, but on the same rank and level as applied to the post the applicant occupied at the time of his dismissal.

57.2.2 The said reinstatement, which is subject to paragraph 57.2.3, shall be effective from the date of the applicant's dismissal from the SAPS, on condition that the applicant shall only be entitled to backpay of 14 months and 8 days (i.e. for the period 1 September 2015 to 8 November 2016);

57.2.3. If the applicant wishes to be reinstated in terms of subparagraphs 57.2.1 and 57.2. 3 of this order, he shall give written notice of that fact to the respondent no later than 1 July 2022 and in that notice tender his services. The amount of backpay due to him shall be paid to him within 2 months from the date he recommences employment with the SAPS in terms of this order of reinstatement;

57.2.4 If the applicant does not give notice as contemplated in paragraph 57.2.3 of this order he shall only be entitled to the payment of compensation as ordered by the Labour Court, namely, the equivalent of 12 months' salary (at the rate applicable to Major-Generals at the time of his dismissal)."

45.3 There is no costs order in respect of the appeal.

P Coppin
Judge of the Labour Appeal Court

Phatshoane ADJP and Phatudi AJA concur in the judgment of Coppin JA

APPEARANCES:

FOR THE APPELLANT:	Adv WP Bekker Instructed by Da Silva Attorneys
FOR THE RESPONDENT:	No appearance.