



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA6/ 2021

In the matter between:

TOYOTA SA MOTORS (PTY) LTD

Appellant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

LISA WILLIAMS DE BEER

Second Respondent

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA obo
KWANELE THWALA**

Third Respondent

Heard: 27 November 2022

Delivered: 14 February 2023

Coram: Waglay JP et Kathree-Setiloane, Savage AJJA

Summary:

Remedy – reinstatement not a competent remedy where expiry of employee's fixed-term contract precedes unfair dismissal finding of arbitrator. In the circumstances, arbitrator has no discretion to choose between the three remedies contemplated in section 193(1) of the LRA but is obliged to order payment of compensation in terms of section 193(1)(c) of the LRA.

Where reinstatement is not a competent remedy, section 193(2) of the LRA has no application and employer is not required to prove that reinstatement of the employee was not practicable in terms of section 193(2)(c) of the LRA.

JUDGMENT

KATHREE-SETILOANE AJA

- [1] This is an appeal against the whole of the judgment and order of the Labour Court (Cele J) in which it reviewed and set aside the arbitration award of the second respondent (arbitrator) dismissing Mr Kwanele Thwala (employee) and substituting it with an award reinstating him with retrospective effect.
- [2] The arbitration award was made under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The National Union of Metal of South Africa (Union) acts on behalf of the employee in the appeal.

Background

- [3] The employee worked for the appellant, Toyota SA Motors (Pty) Ltd (employer), since 21 March 2010 as a crane driver. He was employed on a three-month fixed-term contract. His contract was repeatedly renewed until his dismissal on 14 August 2015.
- [4] On 23 March 2015, the employer issued the employee with a final written warning relating to a charge of negligence. Within three months of receiving this final warning (11 June 2015), the employee was again involved in an incident involving negligence where he purportedly failed to check that the clamping device between the tool and the moving bolster on the crane was removed prior to lifting the tool. As a result, the employer charged him with negligence. On 18 June 2015, he was suspended and furnished with a notice to attend a disciplinary inquiry.

- [5] On 15 June 2015, three days before his suspension, the employee signed a further fixed-term contract commencing on 1 August 2015 and terminating on 31 October 2015. On 14 August 2015, after the disciplinary inquiry, the employee was dismissed. He unsuccessfully appealed against his dismissal.
- [6] The employee referred an unfair dismissal dispute to the CCMA. The conciliation failed and the dispute proceeded to arbitration. The arbitrator issued her award on 24 May 2018. She found that the employee's dismissal was substantively unfair as he was not negligent because the employer should not have expected him to check a clamp of which he had no knowledge.
- [7] The employee sought reinstatement with backpay. The arbitrator exercised her discretion against reinstating the employee. In doing so, she reasoned as follows:

'Buthelezi [witness for the employer] gave unchallenged evidence that he was the only one who handed out contracts, that he did not give any permanent contract to the [employee] and that the [employee] would in fact have not been eligible for permanent appointment at that time as he had a pending disciplinary hearing.

The [employee] has no signed permanent contract of employment and failed to call the shop steward to verify the circumstances in which the blank document was given to him. As such there is nothing before me to refute Buthelezi's version that it was a mistake for the [employee] to have the contract; that it was never issued to him and that there was no offer of employment for him. I am inclined to accept Buthelezi's version in this regard and find that the [employee] was never offered permanent employment or in fact permanently employed.

It must further be noted that the commencement date for the supposed permanent employment was 20 August 2015, however, the [employee] had already been dismissed on 14 August 2015. In the premises he could not possibly be said to have been a permanent employee at the time of his dismissal on 14 August as he was, at that point, still employed on a fixed term contract. Reinstatement as a permanent employee is thus not an option and, his fixed term contract has long since expired, I cannot order his return to work on that basis (i.e., on a fixed term contract).

It was never the employee's case that but for his dismissal, his fixed term contract would have been renewed and no evidence was led to prove any kind of legitimate expectation either. In the premises I am of the view that the only competent relief herein is compensation.¹

- [8] In considering whether, in terms of section 194 of the Labour Relations Act², it was just and equitable to limit the compensation to be awarded to the employee to the balance of his fixed-term contract (i.e. 2.5 months), the arbitrator considered the decision of this Court in *Jorgensen v I Kat Computing (Pty) Ltd and others*,³ where it held that compensation for an unfair dismissal (in that case) had to be limited to the balance of the employee's fixed-term contract. This Court accordingly reduced the amount of compensation which the employer was ordered to pay on the basis that *"there was no cause to award compensation more than the actual loss of income"*. Considering herself bound by that decision, the arbitrator awarded the employee compensation in an amount equivalent to the amount he would have earned for the remainder of his fixed-term contract (two and a half months) which was R37 325.20.

In the Labour Court

- [9] On 17 July 2018, the Union, acting on behalf of the employee, instituted a review application against the arbitration award, seeking that the compensation award be reviewed, set aside, and replaced with an order that the employee be reinstated with full retrospective effect.
- [10] The Labour Court reviewed and set aside the compensation award of the arbitrator and substituted it with an order that the employer *"reinstate the employee from the date of his dismissal with no loss of earning or benefits as if he was not dismissed"*. In making the order, the Labour Court reasoned that: *"it was the employee's suspension and subsequent dismissal that prevented him from being offered permanent employment and if there was any other reason, no evidence appears to have been led"*. The Labour Court stated that the only

¹ Judgment of the Labour Court at paras 21 - 24.

² Act 66 of 1995, as amended.

³ (2018) 39 ILJ 785 (LAC) at para 145.

exception from the provisions of section 193(2)⁴ of the LRA that could justify a failure to reinstate or re-employ the employee is under 193(2)(c) of the LRA and that the question is whether it was reasonably practicable for the employer to reinstate or re-employ the employee. The Labour Court concluded that the employer did not adduce any evidence to discharge its onus to prove that reinstatement was not practical.

[11] The appeal lies against the judgment and order of the Labour Court with leave of this Court.

The Appeal

[12] It is necessary at the outset to dispose of the employee's reliance, in its heads of argument in the appeal, on the provisions of section 186(1)(b)⁵ of the LRA in contending that he either had a reasonable expectation of the renewal of his fixed-term contract on the same or similar terms, alternatively employment on an indefinite basis. The employee neither alleged nor proved at the arbitration proceedings that he had any reasonable expectation as contemplated in section 186(1)(b) of the LRA. I am of the view that the arbitrator correctly concluded that *"it was never the [employee's] case that but for his dismissal, his fixed-term contract would have been renewed and no evidence was led to prove any kind of legitimate expectation either"*. During argument in the appeal, Counsel for the employee correctly disavowed any reliance on section 186(1)(b) of the LRA.

[13] The only defence advanced by the employee in the arbitration proceedings was that, prior to his dismissal, on 14 August 2015, he had become a permanent employee of the employer. He based this claim on a written employment contract

⁴ Section 193(2) provides:

'The 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.'

⁵ In terms of section 186(1)(b) of the LRA dismissal means, *inter alia*, that:

'(b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer –

- (i) To renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
- (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms or did not offer to retain the employee.'

produced by the Union which apparently bore the signature of the employer's Human Resources Manager, Mr Buthelezi. The contract was, however, not signed by the employee.

[14] Mr Buthelezi testified at the arbitration hearing on behalf of the employer. In essence, his testimony was that, in mid-2015, the employer had contemplated converting a number of employees on fixed-term contracts to permanent employment. However, the employer resolved to exclude all employees with pending disciplinary hearings from consideration for permanent employment. Although the Union had produced an employment contract with the employee's name on it that accorded with the template that the employer had used at the time, no such contract had been offered to the employee.

[15] According to Mr Buthelezi, before a permanent employment contract is concluded with an employee, an offer of permanent employment is made to the employee. The employee is then called to the Human Resources Department where the employee and a Human Resources representative would sign the contract. The employer had not made an offer of permanent employment to the employee, nor did it request him to sign a permanent employment contract. Mr Buthelezi concluded his evidence by stating that no permanent contract was concluded between the employer and the employee prior to his dismissal.

[16] The employee testified that he had received the permanent contract from Mr Nthobo Khumalo, a Union Shop Steward, but that he had not signed it. The employee was constrained to concede, under cross-examination, that he did not sign the employment contract because the employer had not made an offer of permanent employment to him due to his pending disciplinary hearing.

[17] On the basis of the evidence led at the arbitration hearing, the arbitrator correctly found that no permanent contract of employment had been concluded between the parties, as the employer had never made an offer of permanent employment to the employee prior to his dismissal. The Labour Court agreed with the arbitrator's assessment of the evidence and held as follows:

'The Commissioner had a legal obligation to assess the probabilities in this matter. She was better positioned to do so as she was steeped in the trial of

the issues serving before her. She found that the evidence of the employer, through Mr Buthelezi, was more probable than that of the [employee] about whether a blank employment contract was offered to the [employee] by the company. Mr Buthelezi denied giving the form to the [employee]. This is true as the [employee] said he received it from a shop steward. The truthfulness of the source of the form depended on the evidence of the shop steward. It was for the [employee] to bring the shop steward as his witness. He did not do so. The evidential assessment of the Commissioner here is on the spot.'

[18] A further factor that the Labour Court considered in agreeing with the arbitrator's assessment of the evidence, is that it was unlikely that the employer could offer permanent employment to an employee whom it had just suspended based on a serious charge of misconduct. The Labour Court accordingly concluded that it was the employee's suspension and subsequent dismissal that prevented him from being offered permanent employment.

[19] Although the Labour Court arrived at this conclusion, it nevertheless held that the employer failed to adduce evidence to discharge the onus which it bore to prove that it was not reasonably practical to reinstate the employee in terms of section 193(2)(c) of the LRA and that the arbitrator committed a misdirection by placing this onus on the employee. It held that the consideration of reinstatement came into play when the arbitrator found the employee's dismissal to be substantively unfair and not when the permanent contract of employment was offered to the employee. As a result, the Labour Court concluded that the arbitrator misunderstood the nature of the inquiry in determining if reinstatement was an appropriate remedy.

[20] In terms of section 193(1) of the LRA, an arbitrator has a discretion to either order the employer to reinstate, re-employ or compensate an employee whose dismissal is found to be unfair. The employee in this appeal challenges the discretion exercised by the arbitrator in terms of section 193(1) of the LRA to order the employer to pay him compensation instead of reinstating him. In the ordinary course, when dealing, on review, with a challenge to the exercise of an arbitrator's discretion in terms of section 193(1) of the LRA, the Labour Court is required to consider if the arbitrator properly took into account all the facts and

circumstances in coming to its decision, and that the decision arrived at is judicially correct.⁶

[21] Integral to the exercise of the arbitrator's discretion in terms of section 193(1) of the LRA in deciding whether to reinstate, re-employ or compensate the employee, is the nature of the employment contract and whether it is extant when an employee's dismissal is found to be unfair. The remedy of reinstatement is confined to the situation where, at the date of the finding that the dismissal is unfair, the original employment contract is still in existence. However, where the employee is employed on a fixed-term contract, the expiry of which precedes the unfair dismissal finding, as in this dispute, then reinstatement or re-employment are not legally permissible remedies.⁷ In the circumstances, the arbitrator no longer has a discretion to choose between the three remedies contemplated in section 193(1) of the LRA but is obliged in law to order the employer to pay the employee compensation in terms of section 193(1)(c) of the LRA.

[22] The arbitrator in this appeal found the dismissal of the employee to be substantively unfair and ordered the employer to pay compensation to the employee as provided for in section 193(1)(c) of the LRA. In making this order, the arbitrator took into consideration that at the point of the employee's dismissal on 14 August 2015, he was not a permanent employee but was on a fixed-term contract which would terminate some two and a half months later on 31 October 2015. She was also mindful of the fact that when she found the employee's dismissal to be substantively unfair, his fixed-term contract had already expired and that, in the circumstances, she was legally precluded from ordering the employer to reinstate the employee.

[23] Concerning the quantum of compensation awarded, the arbitrator ordered the employer to pay the employee compensation limited to the balance of his fixed-term contract as it was equivalent to the employee's actual loss of income.⁸ This

⁶ *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC) at paras 55 - 56.

⁷ This dispute falls within the category of cases discussed by Zondo J (as he then was) in his dissenting opinion in *Toyota SA Motors (Pty) Ltd v CCMA and Others* (2016) 37 ILJ 313 (CC) at para 145; *Tshongweni v Ekurhuleni Metropolitan Municipality* (2010) 31 ILJ 3027 (LC).

⁸ *Jorgensen v I Kat Computing (Pty) Ltd and others* supra at para 145.

was just and equitable as contemplated in section 194 of the LRA. Notably, the employee does not appeal the quantum of compensation awarded to him.

[24] Significantly, because reinstatement on the facts of this case is not a competent remedy, section 193(2) of the LRA has no application. Thus, contrary to the finding of the Labour Court, the employer was not required to prove that reinstatement of the employee was not practicable in terms of section 193(2)(c) of the LRA.

[25] The Labour Court reviewed and set aside the compensation order of the arbitrator and replaced it with, *inter alia*, an order that the employer reinstate the employee with full retrospective effect, on the basis that, but for the disciplinary process, the employer would have offered the employee permanent employment. The Labour Court erred in making this order as it was not established on the evidence that, but for the disciplinary process, the employee would have been offered permanent employment. Nor was it the employer's case that, but for his dismissal, the fixed-term contract would have been renewed or converted into a permanent contract. What the Labour Court ignored was that, at the time of his dismissal, the employee remained on a fixed-term which terminated two and a half months later.

[26] The Labour Court's reinstatement order sought to create a permanent contract of employment between the employer and employee when no such contract existed. Since reinstatement involves the original contract of employment, which in this case was one of limited duration that had terminated by the effluxion of time, it was legally impermissible for the Labour Court to create a new contract through ordering reinstatement.⁹

Costs

[27] I consider it fair and just not to order costs in the appeal and the review.

Conclusion

⁹ J Grogan, 'Dismissal Discrimination and Unfair Labour Practices' (Juta 2005) at p 499 cited in *Tshongweni v Ekurhuleni Metropolitan Municipality* (2010) 31 ILJ 3027 (LAC) at para 23.

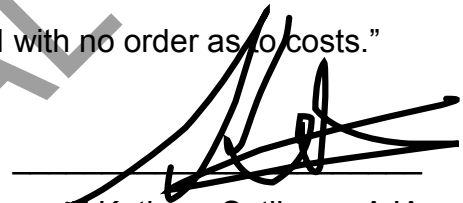
[28] For all these reasons, the appeal succeeds.

[29] In the result, it is ordered that:

Order

1. The appeal is upheld with no order as to costs.
2. The award of the arbitrator is confirmed.
3. The order of the Labour Court is set aside and replaced with the following order:

“1. The application for review is dismissed with no order as to costs.”


F Kathree-Setiloane AJA

Waglay JP and Savage AJA concur.

APPEARANCES:

For the Appellant: Mr PHN Schumann
Instructed by Cox Yeats Attorneys

For the Respondent: Mr B Pillemer SC
Instructed by Purdon & Munsamy Attorneys