

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1223/21

In the matter between:

VICTORIA SIBONGILE MALAPANE

Applicant

And

**NTT MOTOR INVESTMENTS (PTY) LTD
NTT TOYOTA HOEDSPRUIT**

Respondent

Heard: 14/06/2023

Delivered: 11/03/2024

Summary: Principles of backpay restated. Held: (1) The employer is liable to backpay with interest the reinstated employee who was unfairly dismissed. (2) There is no order as to costs.

JUDGMENT

SETHENE, AJ

Introduction

“The ordinary meaning of the word “reinstate” is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers’ employment by restoring the employment contract. Differently put, if employees are reinstated they resume

*employment on the same terms and conditions that prevailed at the time of their dismissal...*¹

[1] This court, in its daily legislative mandate of dispensing justice within the employment environment, reviews, sets aside, confirms and/or rejects arbitration awards premised on unfair dismissals of employees, both in the public and private sectors. Routinely, once this court confirms that an employee's dismissal was either procedurally or substantively unfair (or both) and the said employee must be reinstated, the next cardinal question is whether or not the reinstatement would be accompanied by backpay to restore the employee's status *quo ante*. This is the central question this court is called upon to determine in this application.

[2] However, with brutal frankness, this is a dispute that should not have found itself in court as the bone of contention between the parties is trite law as evinced in the quotation cited above from the judgment of the apex court. Notwithstanding the case law from the apex court, the respondent in this case has elected to raise defences that are untenable in law and at worse, indicative of the respondent who has misconstrued the applicant's case. A properly drafted and researched advisory memorandum to the respondent would have ensured that this court is afforded time to attend to disputes that warrant development of labour law jurisprudence.

[3] At the same time, the applicant too has clay feet. The applicant pleads with this court to order payment of backpay and further to order the employer to do the calculations on how much the applicant is entitled to. Essentially, the applicant pleads with this court to order the employer to pay her arrears salary and effectively assume the duties ordinarily assigned to persons in the finance and human resources divisions of the employer. That is not the duty of this court and an advisory memorandum to the applicant would have said that much. Having said that, I am in concert with the approach adopted by my brother Mr Justice Moshwana in the *Department of Public Works v the General Public Service Sector Bargaining Council*²

¹ *Equity Aviation Services (Pty) Ltd V Commission for Conciliation Mediation and Arbitration and Others* [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC) at para 36.

² JR 1483/18 (5 March 2021) at para 19.

when he held as follows in respect of the proper interpretation of the backpay following his scholarly interpretation of the decision of the apex court³ on the issue of backpay:

“Of momentousness, a commissioner or a judge cannot order payment of back-pay, which is simply arrears wages. According to the first judgment an employee may only claim backpay once an employee is physically taken back by an employer...”

[4] Be that as it may, I find that at times it is apt that a litigant must know from the beginning of the judgment that it has either won or lost the legal battle.

Salient background facts

[5] The employment relationship between Ms Victoria Sibongile Malapane (the employee) and NTT Motor Investments (Pty) Ltd (the employer) commenced on 12 October 2015, and the employee was duly employed as Financial and Insurance Manager.

[6] On 10 February 2017, the employee was alleged to have committed “*gross negligence and/or gross dereliction of duty and/or bringing the company’s name into disrepute*”. Following due process, the employee was charged and dismissed on 28 February 2017.

[7] Aggrieved by the sanction of dismissal, the employee approached the Dispute Resolution Centre. Mr Jacques Verhoef (Mr Verhoef), who was the appointed commissioner to arbitrate the dispute of unfair dismissal between the employee and employer, rendered his arbitration award on 28 March 2018. Mr Verhoef, in the arbitration award, found that the dismissal of the employee was substantively unfair, and thereby ordered the employee’s reinstatement on terms and conditions no less favourable to her than those that existed and governed the employment relationship prior to the employee’s dismissal. Consequently, the employer was ordered to

³ *National Union of Mine Workers of South Africa obo Fohlisa and Others v Hendor Mining Supplies, A Division of Marschalk Beleggings (Pty) Ltd (Hendor)* [2017] 6 BLLR 539 (CC); (2017) 38 ILJ 1560 (CC).

retrospectively remunerate the employee's salary from the period of her dismissal up to the period of her reinstatement (28 February 2017 to 28 March 2018).

[8] On 1 April 2018, the employee reported for duty as per the arbitration award and was informed she should not report for duty as the employer was taking the arbitration award to this court for review.

[9] Evidently, the employer was dissatisfied with the arbitration award and approached this court to have the said arbitration award reviewed and set aside in terms of section 145(1)⁴ of the Labour Relations Act⁵ (the LRA), as amended.

[10] On 22 October 2020, this court heard the employer's review application with my brother Mr Justice Tlhotlhemaje presiding, who duly handed down a judgment on 12 March 2021, effectively dismissing the employer's review application.

[11] It appears that the employer did not appeal the judgment or its orders but complied and duly reinstated the employee on 1 April 2021, and further advanced to the employee an amount of R200 200.00, as determined in the arbitration award.

[12] During the employer's institution of its review application, being the period from 28 March 2018 to 1 May 2021, the latter date being the date on which the employer implemented the arbitration award, the employer has refused to pay the employee her salary on the following grounds:

12.1 Reinstatement order makes no obligation to pay the salary;

⁴ **"145. Review of arbitration awards**

- (1) *Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-*
- (a) *within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or*
 - (b) *if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence."*

⁵ Act 66 of 1995.

- 12.2 Interest can only be levied once the damages amount is ascertainable;
- 12.3 During the period the review application was lodged, the operation of the arbitration award was suspended as the security was provided;
- 12.4 There is no evidence that the employee suffered any damages; and
- 12.5 During the period in question, the employee allegedly had secured a position at one of its dealers.

[13] In the conspectus of the salient background facts referred to above, this court is called upon to determine whether or not the employee is entitled to payment of her salary during the period the employer instituted review proceedings until the implementation of the award. In this regard, if the court finds in favour of the employee, I am urged to find that the employee is entitled to interests.

Evaluation, Analysis and the Law

[14] Following the judgment of this court dismissing the employer's review application on 12 March 2021, the employee reported for duty on 1 April 2021, and the employee was duly reinstated and compensated for an amount of R200 200.00. This amount was in compliance with the arbitration award and it was calculated for a period from 28 February 2017 to 28 March 2018. The said amount was the equivalent of thirteen (13) months' salary (R15 400.00 X 13= R200 200.00). The reinstatement of the employee and the payment of the said amount denote that the employer was implementing the arbitration award and paying back or remunerating the employee for the period the employee did not render service at the behest of the employer. As the apex court stated in *Equity Aviation*⁶:

"...Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal..."

[15] The date of the judgment of this court was 12 March 2021. The employer was therefore obliged in law to remunerate the employee from the date of the implementation date of the award being effective from 28 March 2018 to 30 April

⁶ Footnote 1 at para 36.

2021. In *Coca Cola Sabco (Pty) Ltd v Van Wyk*⁷, the Labour Appeal Court (the LAC) held as follows:

“Ordinarily, an employer that complies with an order of retrospective reinstatement and backpay would not only pay the backpay but also the remuneration that the employee was entitled to between the date of the order and the implementation date, if the employee tendered his services during that period.”

[16] One of the defences tendered by the respondent is that during the period of the review application, the employee was employed in one of its dealerships and thereby rendering services. The employee’s response to this aspect is that her duties were solely to relieve her colleagues who were unable to attend to their duties from time to time and she was remunerated less salary to her substantive position.

[17] Having dealt with the issue of backpay, I must now answer the question of whether the employee is entitled to interest. In terms of section 143(2) of the LRA, the following is stated:

“(2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the award provides otherwise.”

[18] In the arbitration award, at paragraph 70, it is clearly stated that the amount payable to the employee shall earn interest as contemplated in section 143(2) of the LRA.

[19] The issue of interest is also instructive as per the decision of the apex court. In *Hendor*⁸, the apex court held that backpay attracts interest and should be calculated according on applicable different dates. (See *Top v Top Reizen CC* (2002) 27 ILJ 1948 (LAC).

⁷ [2015] 8 BLLR 774 (LAC) at para 18.

⁸ *National Union of Mine Workers of South Africa obo Fohlisa and Others v Hendor Mining Supplies, A Division of Marschalk Beleggings (Pty) Ltd* [2017] 6 BLLR 539 (CC); (2017) 38 ILJ 1560 (CC).

Conclusion

[20] As stated above, this dispute ought to have been resolved and finalised in chambers through a comprehensive advisory memorandum to both the applicant and the respondent. As laypersons place their utmost reliance on their legal practitioners, it is understandable that at times a client can only be satisfied if a court confirms what the legal practitioner intimated during a series of consultations.

[21] Understand: legal research is one of the fundamental occupational exercises that should not escape the central daily routine of a lawyer. Without conducting extensive legal research in preparation for legal intercourse, a lawyer's path is guaranteed to be littered with legal storms.

[22] In the result, the following order is made:

Order

1. The application succeeds;
2. The NTT Motor Investments (Pty) Ltd is liable to pay Ms Victoria Sibongile Malapane her salary for the period between 1 April 2018 to 31 March 2021, including interest calculated at the prescribe rate; and
3. There is no order as to costs.

SMANGA SETHENE

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv DD Mosoma
Instructed by: JM Modiba Attorneys

For the First Respondent: Adv DJ Groenewald
Instructed by: Serfontein Viljoen & Swart Attorneys