



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: **JS165/2016**

In the matter between:

MATLALA, JERRY

Applicant

and

G4S CASH SOLUTIONS (PTY) LTD

Respondent

Heard: 29 February 2024

Judgment: 15 April 2024

Summary: Employee unfairly dismissed by employer. Court orders reinstatement. Employer refuses to accept employee's tender of services. Employee pursues a contractual claim in terms of section 77(3) of the BCEA. Employee's recourse though is contempt proceedings. Action dismissed.

JUDGMENT

NORTON AJ

Introduction

1. Mr Matlala was employed by G4S Cash Solutions (Pty) Ltd (“G4S”) as a security officer. He was dismissed on 21 December 2010 following allegations of misconduct. Mr Matlala earned R7 500 per month at the time of his dismissal. Litigation ensued and Mr Matlala with the support of the South African Transport and Allied Workers Union (“SATAWU”), referred an unfair dismissal dispute to the National Bargaining Council for the Road Freight and Logistics Industry (the “Bargaining Council”). Mr Matlala succeeded, and on 11 June 2011 the Bargaining Council ordered his reinstatement to the date of dismissal.
2. As is the usual pattern the employer took the arbitration award on review to the Labour Court. This time the employer succeeded and the dispute went back to the Bargaining Council to be heard before a different commissioner.
3. At the second arbitration, Commissioner Tlhotlhemaje (as he was then), under the auspices of the Bargaining Council found the dismissal to be unfair and ordered reinstatement to the date of dismissal. Mr Matlala’s attorneys wrote to the employer to say that he would be reporting for duty on 30 April 2013. G4S replied that he was not to return as they were approaching the Labour Court to review and set aside the award.
4. Contrary to the previous occasion the employer’s review application was dismissed. Undeterred the employer approached Baloyi AJ for leave to appeal, but that too was dismissed.
5. The employer has persistently refused to accept Mr Matlala’s tender of services. On the 5 April 2016 he instituted a claim for payment of his arrear salary from May 2013 to March 2016, amounting to R262 500,00 plus interest.
6. Some eight years later, on 29 February 2024, the dispute was ventilated before me in a trial.¹ Both parties were legally represented.

¹ During that time the Labour Court (on 23 December 2016) issued a directive under Justice Prinsloo that the review was to be finalised before the trial could begin. Thereafter in September 2017 Baloyi AJ dismissed the employer’s review application. A year later in September 2018 he refused the employer’s leave to appeal. On 2 October 2020 the trial was postponed *sine die* at the employer’s initiative and with payment of R20 000 wasted costs. One of the purposes of the postponement was to enable the

Mr Matlala's claim

7. Mr Matlala brought his claim in terms of section 77(3) of the Basic Conditions of Employment Act, 1997 (the "BCEA") for breach of his employment contract.
8. Mr Matlala claims his arrear wages for May 2013 to April 2014: R90 000,00; from May 2014 to April 2015: R90 000,00 and from May 2015 to March 2016: R82 500,00. (In total R262 500,00) plus interest.
9. The logic of the claim commencing from May 2013 (and not the dismissal date of December 2010) appears to be that in April 2013, the second award was handed down in Mr Matlala's favour (and upheld on review by the Labour Court), and once again his tender of service was refused. The logic of the end of the claim date being March 2016, appears to be that that was the month the Statement of Claim was signed. Mr Matlala did not seek to expand the duration of his claim, despite the length of the litigation which ensued between the parties.

The trial

10. The trial was of short duration, just 2 – 3 hours.
11. Mr Matlala gave evidence at his trial and explained the background to the dispute and the quantification of the claim.
12. In cross examination he conceded that he was currently working at a company called Wispeco Aluminium (Pty) Ltd ("Wispeco") as a machine operator. He said he started working there in 2013 as a casual and became a permanent employee in November 2014. He said his salary varied from month to month depending on the shifts he worked. He was reluctant to reveal what he earned on average, but eventually agreed that he earned approximately R11 540,00 a month.

employer to amend his pleadings. In September 2022, Mr Mabaso the employee's legal representative requested re-enrolment on the trial roll. The matter was enrolled for trial on 29 February 2024.

13. The employer's attorney Mr Crafford put to him that he had mitigated the loss of his arrear salary in its entirety. Mr Matlala did not give a clear response.
14. After Mr Matlala gave evidence, he closed his case and the employer called Izanne Matthysen who was the G4S Compensation and Benefits officer. She had access to payroll records and Mr Matlala's security screening information. She confirmed that Mr Matlala had been employed by Wispeco since 2013. Mr Matlala's attorney, Mr Mabaso elected not to cross examine her.

Legal issues

15. Mr Mabaso raised two issues in his Heads of Argument:
 - 15.1. The employer did not amend its Statement of Response to include the defence that Mr Matlala had worked at Wispeco - and had therefore mitigated his damages entirely - and therefore this defence is inadmissible.
 - 15.2. The reinstatement order revived the contract of employment and Mr Matlala, is entitled to payment of his arrear wages, as he tendered his services, but the tender was refused.
16. Mr Crafford raised two issues in his Heads of Argument:
 - 16.1. Mr Matlala had entirely mitigated his loss of earnings from G4S and was not entitled to the quantum of the claim.
 - 16.2. Mr Matlala is not entitled to the remuneration claimed because he wasn't reinstated by the employer; and
17. Although approached from different angles by the parties there are in essence two issues before me:
 - 17.1. The status of the employer's pleadings and the defence of mitigation; and
 - 17.2. The reinstatement order, Mr Matlala's recourse and the cogency of his claim.

The status of the employer's pleadings and the defence of mitigation

18. On 6 February 2020, the Honourable Justice Phehane postponed the trial, which was due to commence that day in order for the employer to amend its Statement of Response and to enable the parties to discuss settlement. On the same day, Mr Crafford wrote to Mr Mabaso explaining (amongst other matters) that,

“it has come to our attention that your client has been employed by Wispeco Aluminium (Pty) Ltd as a machine operator from 2013 to date hereof. His current remuneration to our understanding excluding overtime benefits and bonuses is R11 540.00, well in excess of that he was earning at G4S, and therefore he has mitigated his alleged damages in total.”

This letter formed part of the employer's bundle served and filed on 7 February 2020. There could be no doubt what the employer's defence to Mr Matlala's claim would entail.

19. The employer never amended its pleadings. I understood during the trial from Mr Mabaso that Mr Crafford was required to do so, to introduce the defence of the Wispeco employment. Mr Mabaso argued that the employer's original defence in 2016 was simply that the employer was awaiting the outcome of the review. Mr Crafford argued that it wasn't necessary to amend his pleadings.

20. In paragraph 11 of the Statement of Claim the employee's pleading reads,

“The Company has failed and or refused to pay the employee the arrear salaries ... (amounting to) R262 500.00 plus interest...”.

21. The employer responds at paragraph 16 (with respect to paragraph 11) as follows,

“The content of this paragraph is denied and the Applicant is put to the proof thereof. The Respondent denies that he is indebted to the Applicant in the amount of R262 500,00 or any amount at all.”

22. Mr Mabaso, concludes on this point in His Heads of Argument with, “...*the defence should be disregarded, and the defence that should be considered is the one contained in the Statement of Response.*”²
23. It is true that Mr Mabaso could reasonably have anticipated the employer’s defence, but it was also quite reasonable for him to expect his opponent to comply with the Labour Court rules. It is inexplicable why Mr Crafford did not amend his Statement of Response, noting particularly that Justice Phehane had ordered him to do so, and the postponement was allowed for that purpose.
24. The Labour Court rules require a respondent to set out “*a clear and concise statement of material facts in chronological order*”, as well as a “*a clear and concise statement of the legal issues that arise from the material facts...*”³ The Statement of Response was simply a bare denial, which does not square with the requirement of setting out the material facts (of Mr Matlala’s employment with Wispeco) and legal issues (such as mitigation) which arise from those facts
25. In *Banking Insurance Finance & Assurance Workers Union on behalf of Tsotetsi v Old Mutual Insurance Ltd*⁴ the Honourable Justice Prinsloo on the issue of pleadings (and pre trial minutes) writes, “*It is trite that this court and the parties are bound by the pleadings...and this court cannot and should not go beyond the issues it is required to determine.*” Justice Prinsloo then refers to Jacob & Goldrein for emphasis as follows,

“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basis rules of pleadings...For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is

² Heads of Argument at paragraph 23

³ Refer to Rule 6 (1)9b) read with rule 6(3)(b)

⁴ (2022) 43 ILJ 1369 (LC)

not part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings..."⁵

26. Noting the peremptory stand regarding strict adherence to pleadings as set out in jurisprudence and the requirements of Rule 6 in the Labour Court Rules, I am inclined to ignore the evidence pertaining to Mr Matlala's employment with Wispeco during the period applicable to his claim for arrear wages. Mr Crafford did not amend his pleadings as he should have, and therefore the employer should not enjoy an undue benefit in this regard. That disposes of the first issue. I now turn to the second.

The reinstatement order, Mr Matlala's recourse and the cogency of his claim.

27. It is common cause that the arbitrator ordered reinstatement, that Mr Matlala tendered his services, and that G4S turned him away. The question that arises is whether G4S is obligated to remunerate Mr Matlala for his lost wages from the date of G4S's refusal of his tender of service? "Yes" says Mr Mabaso. "No" says Mr Crafford. We examine the weight of their differing views below.
28. Mr Mabaso relies on *Coca Cola v Van Wyk*⁶, a 2015 LAC decision in which the court found that an employee whose dismissal was assessed to be unfair by the CCMA was entitled to institute a contractual claim from the date of the award which ordered reinstatement (September 2004), to the date of implementation of that award (February 2009), and thereafter, once quantified, to execute by way of a writ.⁷

⁵ Paragraph 4

⁶ (2015) 36 ILJ 2013 (LAC)

⁷ For clarity, the relevant dates are as follows: Mr Van Wyk, the employee was dismissed for incapacity in June 2003. He referred an unfair dismissal dispute to the CCMA. He was successful and the CCMA ordered reinstatement (with backpay to the date of dismissal of an amount of R33 507.00). The CCMA's arbitration award was made in August 2004. The employer proceeded to take the award on review, which they subsequently lost, as did an application for leave to appeal, and a petition to the LAC. These processes, which brought the employer no relief came to an end in July 2008. In February 2009 the Registrar issued a writ for Van Wyk's salary for the period from September 2004 – February 2009, amounting to R164, 489.00. In March 2009 the employer reinstated Van Wyk.

29. The court held that:

[16] The effect of a reinstatement order, therefore, is to revive the contract of employment which was terminated by a dismissal. On the date on which the reinstatement order is made, the commissioner may order that the reinstatement be effective from the date of the order or retrospectively from any date not earlier than the date of dismissal... This begs the question, what remedy, if any, does the employee have to claim the money due to him/her for the period between the date of the award and the actual implementation thereof.

[17] The money paid to an unfairly dismissed employee consequent to a retrospective reinstatement order is not compensation. Compensation and backpay may only be granted in the alternative and are mutually exclusive. The backpay ordered by the commissioner can therefore only refer to the period between the date of dismissal and the date of the order and does not entitle an employee, without more, to remuneration between the date of the award and the actual date of the implementation. The Labour Relations Act 66 of 1995 (LRA) does not cater for such relief.

[18] 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.

[19] Since the LRA does not cater for relief between the date of the award and the date of implementation, how then should a reinstated employee recover that money if he tendered his services during that period....

[24] ... if the employee, after the reinstatement order and during the time that the employer exercises its review and appeal remedies to exhaustion, tenders his/her labour he/she does so in terms of the employment contract. He/she is therefore entitled to payment in terms of the contract of employment. The claim is therefore a contractual one,

wherein the employee would have to set out sufficient facts to justify the right or entitlement to judicial redress. The employee would inter alia have to prove that the contract of employment is extant; that he/she tendered his/her labour in terms thereof; and that the employer refuses or is unwilling to pay him/her in terms of that contract...

30. The nub of the *Coca Cola* case, may be summarised as follows: An employee has a contractual claim for wages owing to him / her arising from a reinstatement order - which revives the contract of employment - calculated from the date of the order until the time the employer (usually reluctantly after failed review and appeal proceedings) accepts the employee's tender of service.
31. Mr Mabaso argues that the view expressed in *Coca Cola* finds support in *Mobile Telephone Networks (Pty) Ltd v Pillay*.⁸ (In that case the LAC found that employees transferred by way of a section 197 were entitled to their salaries from the date of transfer – December 2010 – to April 2015 when MTN finally agreed to accept the employees into their service, despite years of litigation and legal objection.)
32. The authority's cited by the Applicant both have factual scenarios in which the employees contracts of employment are deemed to continue. In *Coca Cola* the case involved reinstatement following an unfair dismissal, and in MTN the employees transferred seamlessly in the context of a section 197 from the old employer to the new employer.
33. The situation in the case before this court though is materially distinguishable in that the employer G4S never accepted Mr Matlala back into employment despite an order of reinstatement. The effect of this factual scenario is that Mr Matlala's remedy is not to pursue a breach of contract claim in terms of section 77(3) of the BCEA, but to pursue a contempt of court application. The relevant

⁸ (2019) 40 ILJ 2011 (LAC)

case authority in this regard is *Kubeka & others v Ni-Da Transport (Pty) Ltd*.⁹ We discuss this case in some detail below.

34. SATAWU members were dismissed in 2008 after a strike. The dismissal was found to be procedurally and substantively unfair and the Honourable Judge Gush ordered their reinstatement. The employer sought leave to appeal to the LAC, and when that was unsuccessful they petitioned the LAC, which followed a similar fate. The employer then petitioned the SCA and finally lodged an application for leave to appeal to the Constitutional Court. Both applications were dismissed. Gush J's order became enforceable when the appeals process was exhausted in November 2014.
35. The employees then referred a claim under section 77(3) of the BCEA for arrear wages. The matter was heard in the Labour Court before the Honourable Whitcher in May 2017. The employees were unsuccessful and appealed to the LAC. Murphy AJA writing for that court states:

[10] In a considered judgement, the Labour Court dismissed the appellants claim on the grounds that they had followed the wrong legal process to obtain redress for the failure of the respondent to comply with its obligation to reinstate them. It held that, when the ruling of the SCA in effect exhausted all appeal options on 18 November 2014, the appellants ought to have launched contempt proceedings seeking retrospective reinstatement rather than contractual claim for arrear wages in terms of s 77(3) of the BCEA. In reaching its decision, the Labour Court applied the reasoning of the constitutional court in National Union of Metalworkers SA on behalf of Fohlisa & Others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd (Hendor). It concluded, in paragraph 8 of the judgement:

'Backpay is only contractually owing upon the full restoration of the employment contract. This required more than a tender of services by the unfairly dismissed employees. The employer

⁹ (2021) 42 ILJ 499 (LAC)

should also have accepted those employees back into its employ. If the employer failed to do so, the correct legal path was to have forced it to restore the contract of employment by means of contempt proceedings... the judgement ordering reinstatement does not in and of itself reinstate the contract of employment; rather, it is an order directing the employer to accept those services. If the employer fails to do so, the remedy is to bring contempt proceedings to compel the employer to do so.'

[13] The respondent, relying on the decision of the Constitutional Court in Hendor, contends that a reinstatement order does not restore the contract of employment. It is only restored when, pursuant to the reinstatement order, the employees return to work, tender their services and the employer accepts the tender. This construction, it argues, is confirmed by the wording of s 193(1)(a) of the Labour Relations Act (the LRA) which provides that if the Labour Court or an arbitrator appointed in terms of the LRA finds that a dismissal is unfair, the court or the arbitrator may 'order the employer to reinstate the employee' from any date not earlier than the date of dismissal. This wording,.. makes it clear that the order of the court does not reinstate an employee. It is the agreement of the employer to accept the tender of services that restores the contract, not the order of the court.

[14] ...There can be no legal basis for any contractual claim for arrear wages until such a time as the contract is restored by the agreement of the employer to accept the tender of the employees in respect of future services. Rights to backpay flowing from the reinstatement order can only arise once the contract is restored. Prior to the employer agreeing to restore the contract pursuant to an order to do so, there is no contract in existence and thus no juridical basis for a claim for arrear wages.

[31] While the judges of the Constitutional Court in Hendor disagreed about the nature of the debt arising from a reinstatement order and the reason for non-prescription, they were unanimous about the governing principle that the contracts of employment of unfairly dismissed

employees are terminated by a dismissal and revive only when they tender their services pursuant to a reinstatement order and the tender is accepted by the employer. The judges also agreed that a reinstatement order is an order ad fuctum praestandum – an order to do something (as opposed to an order ad pecuniam solvendam, an order to pay something) which must be enforced through contempt proceedings.

[35] The decision of the Constitutional Court in Hendor therefore leaves little doubt that a reinstatement order does not restore the contract of employment and reinstate the unfairly dismissed employees. Rather, it is a court order directing the employees to tender their services and the employer to accept that tender. If the employee fails to tender his or her services or the employer refuses to accept the tender, there is no restoration of the employment contract. If the employer fails to accept the tender of services in accordance with the terms of the order, the employee's remedy is to bring contempt proceedings to compel the employer to accept the tender of services and thereby to implement the court order.

36. The nub of the *Kubeka* and *Hendor* decisions may be summarised as follows: After an unfair dismissal, in which the employees are reinstated by virtue of a judgment and court order, those employees have a contempt claim against their employer if the employer refuses to accept them back into employment. The court order does not in and of itself revive the contract of employment; that contract may only be revived if the employees tender their services, and the employer accepts their tender. Expressed plainly, if an employer accepts the tender of service, but refuses to pay the employee from the date of the reinstatement order to the date of the employer's acceptance of service then the employee has a contractual claim envisaged in section 77(3) of the BCEA. If the employer refuses to accept the employee back into service, then the employee's recourse is contempt proceedings.

Discussion and analysis

37. Mr Matlala has claimed R262 500.00 plus interest from G4S for breach of contract by refusing to accept him back into employment despite a court order of reinstatement.
38. G4S has two defences to the claim: Firstly that Mr Matlala has fully mitigated this loss by way of his employment with another employer being Wispeco. Secondly that, in any event, Mr Matlala has followed the wrong legal route to enforce his claim. The route of a contractual claim by virtue of section 77(3) of the BCEA only applies in situations in which the employer has accepted the employee back into employment and the contract of employment revives as indicated in the *Coca Cola* matter. This is not the factual situation before the court, because G4S never accepted Mr Matlala back into service and the analysis arising from the *Kubeka* and *Hendor* cases apply. In short Mr Matlala should have proceeded by way of contempt proceedings and not by way of a section 77(3) claim to enforce the order of reinstatement.
39. I have already found that G4S may not rely on the mitigation defence of Wispeco because the employer never amended their Statement of Response to cater for such a defence.
40. The employer's defence regarding the correct legal channel to enforce the reinstatement order does though succeed, as Mr Matlala followed a contractual claim, when he should have followed contempt processes.
41. Accordingly, I make the following order:

Order

42. The Applicant's action is dismissed.
43. There is no order as to costs.

D Norton

Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr Mabaso

Mabaso Inc. Attorneys

For the Respondent: Mr Crafford

Crafford Attorneys