THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA 146/21

In the matter between:

JOHANNESBURG ROAD AGENCY **Appellant**

and

LUFUNO KENNEDY MAKHARI **Respondent**

Heard: 27 March 2024
Delivered: 16 October 2024
Coram: Molahlehi AJP, Savage ADJP and Jolwana AJA

JUDGMENT

MOLAHLEHI, AJP

Introduction

[1] This appeal, which is with the leave of this Court, is against the judgment of the Labour Court made on 15 September 2021. That Court reviewed and set aside

the arbitration award made by the third respondent, the commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA). It further substituted the commissioner's arbitration award with an order reinstating the first respondent (employee) retrospectively to the date of his dismissal, "*less the compensation awarded by the third respondent*".

Background facts

[2] The initial relationship between the parties arose from the employee's placement as an IT field technician with the appellant. The contract between the appellant and the labour broker ended in February 2015. Towards the end of their placement, the employee and his colleagues were informed by their manager, Mr Hlapolosa, that the positions they occupied were soon to be made permanent.

[3] Following the above announcement, the appellant embarked on a recruitment process facilitated by a third party. The employee and others were interviewed and appointed to their respective positions. The employee signed his employment contract on 22 May 2015 and commenced work on 8 June 2015. After three months, the appellant required him to sign a new three-month fixed-term contract. The employee refused to sign the new contract. Despite the concerted efforts by the appellant, he persisted with his refusal to sign the new fixed-term contract.

[4] Having failed to persuade the employee to sign the second contract, the appellant convened further interviews for the same position that the employee occupied. The employee agreed to participate in the second interview, understanding that this would resolve the impasse about the alleged error in the signed permanent contract.

[5] While awaiting the outcome of the second interview, the respondent received a letter informing him that his contract expired on 30 September 2015 and that he should immediately cease his duties with the appellant. The appellant terminated the contract based on the amended contract, which the respondent refused to sign.

[6] In addition to the provisions of the amended contract, the appellant contended that the respondent was aware that the contract was for a fixed-term period because he and his colleagues were informed during the interview that the contract was for a fixed-term period.

[7] Aggrieved by the dismissal, the employee referred an alleged unfair dismissal dispute to the CCMA.

[8] The employee's dismissal dispute was heard twice before the CCMA. In the first hearing, which took place in March 2016, the employee was unsuccessful and accordingly launched a review application. He partially succeeded in the review in that the Labour Court reviewed and remitted the matter for a fresh hearing before a different commissioner of the CCMA. He regarded the second arbitration award held in February 2020 as a partial success, as the commissioner ordered that he be compensated but not reinstated. He challenged the arbitration award to the extent that no provision was made for reinstatement.

The arbitration award

[9] As indicated earlier, the commissioner found the employee's dismissal unfair. He found that the employee was permanently appointed to the position he occupied before his dismissal and directed that he be compensated for seven months, consequent to the unfair dismissal. Concerning the reinstatement relief, he found that the post the employee occupied had been frozen, and thus, according to him, the reinstatement would be inappropriate.

In the Labour Court

[10] The employee disagreed with the commissioner’s decision not to grant reinstatement relief and thus launched a review application in the Labour Court. The first issue that faced the Labour Court concerned the incomplete record placed before it. It, however, found that the absence of a complete record was, for the reasons set out below, not a bar from proceeding with the determination of the review:

'4.1. No issue was raised in the third respondent's opposing papers regarding the state of the record.

4.2. In terms of Rule 7A (6) the applicant must furnish the Registrar and each of the other parties with a copy of the record or portion of the record as the case may be…

4.3. The issue to be determined by this court is limited to whether the second respondent's decision to award a relief of compensation is reviewable.

4.4. There is no cross-review in the challenge of the finding that the dismissal is unfair.'

[11] The two reasons that influenced the Labour Court in proceeding with the hearing despite the incomplete record of the arbitration proceedings were that such an approach would not prejudice either of the parties and that expedition dictated the finality of the matter. It reasoned as follows in paragraph [5] of its judgment:

'When considering the above four factors, I find no reason to call for further record as nothing is placed before this Court to suggest any prejudice is to be suffered by either party. Furthermore, this is an ancient dispute that deserve(s) finality. I therefore proceed with determination of the matter with the record as it is.'

[12] Concerning the merits, the Labour Court noted that the respondent's pleadings were not a model of clarity regarding the issue of reinstatement. It noted that the respondent did not "*express any wish not to be reinstated*". The Labour Court criticised the approach adopted by the commissioner in finding the freezing of the posts that the employee occupied before his dismissal was a hindrance to a reinstatement relief. It found that the commissioner failed to apply his mind to the issue of the freezing of the position as he determined the issue based on a misconception of the nature of the employee's employment contract. He treated the employee's employment contract concerning the remedy for unfair dismissal to be arising from a fixed-term contract when, in fact, it was for an indefinite period. This is contrary to the finding that the employee's employment contract was indefinite.

[13] Based on the above analysis, the Labour Court correctly found that the commissioner's decision failed to satisfy the standard required of an arbitration

award. For this reason, it found that the arbitration award should be reviewed, set aside, and substituted with a reinstatement order.

[14] The perusal of the judgment clearly shows that the Labour Court understood the employee's case as seeking reinstatement. It correctly adopted the general principle that labour "*matters are not merely decided based on their form but substance*". It found that the commissioner's conclusion that the reinstatement was inappropriate because the position had been frozen fell short of the reasonable standard required of the arbitration award. For this reason, the Labour Court reviewed and set aside the arbitration award regarding the relief of reinstatement. It substituted the commissioner's award with an order to reinstate the employee into his previous position.

The issues before this Court

[15] The appellant criticised the Labour Court's decision on various grounds in this appeal. The first ground of appeal concerns the Labour Court's approach in substituting the commissioner's decision of non-reinstatement after finding that the dismissal was unfair and awarding only compensation.

[16] The essence of the appellant's contention concerning the above ground of appeal is that the Labour Court was not entitled to interfere with the commissioner's decision not to reinstate the employee upon finding that the dismissal was unfair.

[17] The second ground of appeal concerns the allegation that the employee failed to state the grounds of review as required by the provisions of section 145 of the LRA. In this regard, the appellant contended that the employee failed to provide the basis for challenging the arbitration award, particularly concerning the commissioner's failure to reinstate him.

[18] The third ground of appeal concerns the complaint that the Labour Court failed to appreciate the consequence of the employee's failure to provide a complete record for the review. In other words, the Labour Court should not have entertained the review application in the face of an incomplete record.

[19] The fourth complaint is that the Labour Court misconceived and ignored the relevance of the freezing of the post by the appellant. In other words, the freezing of the post constituted a bar to the relief of reinstatement of the employee.

[20] Before this Court, the appellant argued that, in addition to freezing the post, the employee did not qualify for the position as advertised. This included the contention that the employee, like all applicants, was informed by Mr Hlapolosa that the employment was for a fixed term of three months.

Discussion

[21] The main issue in this appeal is whether the Labour Court was correct in reviewing the commissioner's decision, which limited the employee's relief to compensation.

[22] Although the appellant did not pursue the issue of the incomplete record during the argument in this Court, it seems appropriate to deal with it as raised in the heads of argument and do so before dealing with the main issue on appeal.

[23] It is trite that in a review application, an applicant has a duty to ensure that a proper and complete record is placed before the Labour Court to assist it in exercising its powers under section 145 of the Labour Relations Act[1] (LRA). As a general rule, the Labour Court may, when faced with an incomplete record, either dismiss the application or remit the matter to the CCMA or bargaining council for a hearing afresh. This means the Labour Court has discretion, which it can exercise when dealing with a review application involving an incomplete record. In that situation, it can either strike the matter off the roll, dismiss it, or direct that it be remitted to the CCMA or bargaining council for a hearing afresh.

[24] The essential question to answer in determining whether to dismiss a review application for want of the record depends on the missing portion's materiality

[1] Act 66 of 1995, as amended. See: *South African Social Security Agency v Hartley and others* [2023] ZALCJHB 50; (2023) 44 ILJ 1334 (LC).

concerning the dispute's determination. In other words, whether the Labour Court can deal with the review application in the absence of the missing portion of the record depends on whether such missing portion is material to the determination of the dispute.

[25] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*,[2] this Court held that:

> 'Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court 'is in as good a position' as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination by a court of review of whether to remit the matter to the CCMA for reconsideration to substitute its own decision for that of the commissioner.'

[26] In the present matter, it is clear that the Labour Court cannot be faulted for proceeding to determine the matter despite the incomplete record of the arbitration proceedings before it. The approach the Labour Court adopted accords with established case law, and in that respect, this ground of appeal stands to fail.

[27] I now deal with the main issue for determining this matter. The issue is limited to whether the Labour Court correctly reviewed and set aside the commissioner's arbitration award denying the employee the reinstatement remedy.

[28] It is trite that the issue of reinstatement is the primary remedy in cases of unfair dismissal and unfair labour practice and is governed by the provisions of section 193 (2) of the LRA. The exceptions to the general rule that reinstatement is

[2] [2014] ZALAC 81; (2015) 36 ILJ 1511 (LAC).

the primary remedy in cases of unfair dismissal and unfair labour practice are the following:

> '(a) the employee does not wish to be reinstated or employment.
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.
>
> (c) it is not reasonably impractical for the employer to reinstate or re-employ the employee.
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[29] Section 193 (1) and (2) of the LRA provides the CCMA, Bargaining Council or the Labour Court with the discretion whether to order the reinstatement or re-employment of an employee who has been unfairly dismissed. The exercise of discretion by either the commissioner of the CCMA or the Bargaining Council not to order reinstatement in an unfair dismissal or unfair labour practice case may be challenged on review before the Labour Court, as was the case in the present matter.

[30] In considering the review, the Labour Court will determine whether the commissioner, in exercising his or her discretion, considered all the facts and circumstances of the case. It will, in essence, determine whether the decision refusing reinstatement is judicially correct. [3]

[31] The consideration of whether reinstatement, reemployment or compensation in the context of a finding of unfair dismissal is underpinned by fairness to both parties.[4]

[32] The leading case on the approach to adopt when dealing with the issue of the remedy in cases involving unfair dismissal is the Constitutional Court case of *Booi v*

[3] *Kemp t/a Centralmed v Rawlins* [2009] ZALAC 8; (2009) 30 ILJ 2677 (LAC) at paras 55 - 56.
[4] See: *Dunwell Property Services CC v Sibande and Others* [2011] ZALAC 20; [2012] 2 BLLR 131 (LAC) at para 31.

Amathole District Municipality and Others.[5] The Constitutional Court, in dealing with the issue of reinstatement in that case under section 193 of the LRA held that:

> 'It is plain from this Court's jurisprudence that where a dismissal has been found to be substantively unfair, "reinstatement is the primary remedy" and, therefore, "[a] court or arbitrator must order the employer to reinstate or re-employ the employee unless one or more of the circumstances specified in section 193(2)(a) (d) exist, in which case compensation may be ordered depending on the nature of the dismissal."'[6]

[33] The Constitutional Court further held that:

> 'It is accordingly no surprise that the language, context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one. The term "intolerable" 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 the reinstatement injunction in section 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 section 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.'[7]

[34] The burden is on the employer to provide the reason and evidence why the primary remedy of reinstatement in an unfair dismissal should not apply. It is also important to note that the test for determining whether the remedy of reinstatement is appropriate is objective and not subjective.[8]

[35] As indicated earlier, the appellant did not challenge the finding that the employee's dismissal in the present matter was unfair. The commissioner denied the

---

[5] [2021] ZACC 36, (2022) 43 ILJ 91 (CC).
[6] Id at para 38.
[7] Id at para 40.
[8] *Engen Petroleum Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 5; (2007) 28 ILJ 1507 (LAC) at para 84.

employee the primary remedy based on the contention that the post occupied by the employee before his dismissal had been frozen.

[36] In my view, the allegations that the appellant relied on in seeking to oppose the employee's reinstatement were unsustainable. They are irrelevant to the outcome of the main dispute –the unfair dismissal.

[37] There is no evidence that the employee did not wish to be reinstated in terms of section 193 (2) (a) of the LRA. Similarly, there is no evidence that any of the conditions in subsection (2) finds application in this matter.

[38] The appellant's case before the commissioner was that the employee's reinstatement was inappropriate because the nature of his employment contract was for a fixed term which was subsequently frozen. This is unsustainable because the commissioner rejected the appellant's contention that the contract was for three months. As alluded to earlier, the appellant never challenged the finding that the employment contract was for an indefinite period. The well-established principle of our law is that a contract is valid and enforceable until rescinded or set aside.

[39] I agree with the Labour Court that the commissioner misconceived the nature of the employment contract when determining the relief sought by the employee. To emphasise, the employment contract was based on an indefinite employment contract, and thus, even on the appellant’s version, the post could not have been frozen for that reason.

[40] Similarly, the contention that Mr Hlapolosa informed the employee that the interview was intended to find temporary workers does not assist the appellant's case. The factor the commissioner ought to have considered in determining the remedy under section 193 of the LRA was that the dismissal arose from an indefinite contract of employment between the parties.

[41] The other aspect of the appellant’s case is that the indefinite employment contract was concluded on the mistaken belief that it was for a fixed term period. However, it is unclear what the nature of the mistake was. Is it a unilateral mistake or

a mutual mistake? Be that as it may, the issue before the Labour Court was not about the enforceability or invalidity of the employment contract.

[42] In light of the above, I agree with the Labour Court that there are no practical reasons why the primary remedy provided in section 193 of the LRA should not apply in the present matter. In implementing the reinstatement, an account should be taken of the one year and six months when the employee worked at another employer, Aspen Pharmacare.

[43] In the circumstances, the following order is made:

Order

1. The appeal is dismissed with no order as to costs.
2. The order of the Labour Court dated 15 September 2021 is upheld.
3. In calculating the backpay due to the respondent, the appellant is entitled to exclude the period the respondent was employed with Aspen Pharmacare being, 20 June 2018 to 20 October 2020.

E Molahlehi
Acting Judge President of
The Labour and Labour
Appeal Courts

Savage ADJP and Jolwana AJA concur.

APPEARANCES:
For the Appellant: Adv N Seme
Instructed by: Nchupetsang Attorneys
For the Respondent: Self represented