

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 988/01

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

DANIEL RAMATSETSE

Second Applicant

and

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

First Respondent

ERIC PHINDELA N.O

Second Respondent

LEBOWA PLATINUM MINES LTD

Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. The first applicant, the National Union of Mineworkers (the union) brought on behalf of its member, the second applicant, an application to review an arbitration award made by the second respondent (the commissioner). The review application was also accompanied with an application for condonation. The commissioner had found that the second applicant's dismissal was not for a fair reason and awarded him compensation instead of reinstatement. The applicants contended that the commissioner should have reinstated the second applicant instead of awarding compensation.
2. Both applications were initially opposed by the third respondent. The third respondent did not challenge the commissioner's finding that it had failed to show that there was a

valid reason for the dismissal of the second applicant. On the day when the matter was argued in Court, the third respondent's opposition was confined to the application for condonation. Mr Myburgh who appeared for the third respondent conceded that should condonation be granted that the commissioner's finding in awarding the second applicant compensation instead of reinstatement is irrational and therefore reviewable. The concession was made as a result of the Supreme Court of Appeal judgment in the matter of *Rustenburg Platinum Mines Ltd v CCMA and others* [2006] SCA 115 (RSA). It was further contended that the remaining issue apart from condonation would be whether this Court should substitute the order made by the commissioner or refer it to the CCMA to consider the issue about the back pay since the second applicant was dismissed on 8 September 2000 and it was not clear whether he had found alternative employment.

The condonation application

3. The commissioner issued an arbitration award on 7 May 2001. The award was received by the second applicants's representatives on 15 May 2001. The review application should have been filed on 26 June 2001. It was only filed on 7 August 2001. The delay is about six weeks which is not a lengthy one.
4. The explanation for the delay is set out fully in the founding affidavit. The second applicant was assisted by a Mr Seth Marodi an official or employee of the union. The unfair dismissal dispute was referred timeously to the first respondent (the CCMA). After the arbitration hearing the applicant contacted the union office on an ongoing basis, enquiring if the arbitration award was received. He was advised at some time that Marodi was on leave and when he returned from leave to work, he would be advised whether the award was received. He was advised to try to contact the union office once

every two weeks. Eventually on 1 June 2001 the second applicant was informed by Marodi that the award was received and that he was only awarded compensation. The second applicant immediately made an appointment for consultation with Marodi to discuss the award. At the consultation that took place on 7 June 2001 the second applicant informed Marodi that he was not happy with the award, because he remained unemployed ever since his dismissal, and would like to be reinstated, as requested at the CCMA. Marodi in response explained to him the union procedures which had to be followed before filing a review application. The procedure is that a copy of the arbitration award had to be sent to the chief legal adviser at the union's head office, who would after perusal of the said award give a recommendation to consult with attorneys for legal advice.

5. On 12 June 2004 Marodi caused a copy of the award to be sent to the union's head office by registered mail. It was only on 22 June 2001 that a call was received from head office, authorizing that the matter be referred to attorneys for legal advice. Marodi then immediately contacted the applicants' attorneys of record to discuss the arbitration award. He was advised to send a copy of the award by telefax for their attention whereafter a written opinion would be furnished by 29 June 2001. A detailed opinion was furnished to Marodi on 29 June 2001. He then discussed the opinion with the chief legal adviser and a decision was taken to review the arbitration award. The second applicant who was unemployed and as a result, moved from one place to the other, seeking employment. It was very difficult for Marodi to get hold of him to communicate the decision taken by the chief legal adviser. On the other hand it was also costly for the second applicant who is unemployed constantly to call the union office enquiring about the progress. The second applicant eventually managed to contact Marodi on 20 July

2001, enquiring whether a decision was taken to have the award reviewed. He was informed of the attorneys opinion, and that a decision was taken to review the award. Marodi further informed the second applicant that he would contact the attorneys to make an appointment for consultation.

6. A consultation took place with the attorneys on 7 August 2001. The second applicant was advised that the review application was late and that an application for condonation had to be made. He is a lay person and as such was not familiar with the provisions of the Labour Relations Act 66 of 1995 (the Act). He was not aware that the law imposed time frames within which review applications had to be made to this Court. It was not mentioned to him during the interaction with the union of the need to file a review application within six weeks of receipt of the award. He only became aware of the time frames during the consultation with the attorneys on 7 August 2001.
7. I have considered the third respondent's response to the explanation tendered. It is clear from the response that the third respondent was really focussing on why certain things were not done earlier than they were done. I am satisfied that although the explanation may be criticised in some minor respects that an adequate explanation has been tendered.
8. The prospects of success are so overwhelming in favour of the second applicant that even if the explanation for the delay might be criticised that condonation should be granted. This is also so in the light of the concessions made on behalf of the third respondent referred to in paragraph 2 above. I will deal with the issue of prospects of success when I deal with the review application.

9. The application for the late filing of the review application stands to be granted.

The review application

10. The second issue before this Court is whether the commissioner in awarding the second applicant compensation as opposed to reinstatement should be reviewed. Section 193 of the Act deals with remedies for unfair dismissals and unfair labour practice. Section 193(2) reads as follows:

§(2) 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.*

11. The provisions of section 193(2) of the Act are clear. They are couched in peremptory terms and do not provide this Court or an arbitrator with any discretion. Where an employee does not seek to be reinstated or the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or it is not reasonably practicable for the employer to reinstate the employee or the dismissal is only found to be not for a fair reason, the Court or arbitrator must reinstate the employee. Evidence must be led by the employer to prove that the circumstances surrounding the

dismissal are such that a continued employment relationship would be intolerable or that it is not reasonably practicable for the employer to reinstate the employee.

12. The commissioner dealt with the provisions of section 193(2) of the Act and said the following:

In this matter the employee has prayed for reinstatement and I have found that the dismissal was substantively unfair. Although the employer placed no evidence before me indicating that it would be unreasonable to expect it to reinstate, the employee has testified that he is perceived as a bad guy and the relationship between the employer and the Union is bad. He is a member of the Union. I do not deem this to be a case where reinstatement would be appropriate remedy. I consider compensation equal to the employee's nine months remuneration to be appropriate relief in the circumstances of this case.

13. I have perused the record of the arbitration proceedings and could not find any evidence that proved that the exceptions contained in section 193(2) of the Act were met. The commissioner appears to have introduced a fifth requirement in considering whether reinstatement should or should not be ordered namely that because the second applicant was perceived as a bad person and the relationship between the employer and the union was bad, he should not be reinstated. The commissioner acknowledged that the second applicant sought reinstatement but misapplied the legal principles relating to an extent that it is unreasonable and has resulted in a gross irregularity in the conduct of the proceedings. His decision not to grant reinstatement is not justifiable in the light of the facts available to him when he made the decision. The commissioner should have found that none of the exceptions referred to in section 193(2) of the Act existed and should

have reinstated the second applicant. I have already referred to the concession made on behalf of the third respondent.

14. The third respondent made a tender that subject to whether condonation was going to be granted that the second applicant be reinstated with effect from 1 October 2006 with back pay limited to 12 months remuneration at the rate of pay that he would have received as at 8 September 2000. The tender was rejected by the applicants who sought that the second applicant be reinstated from the date of his dismissal.
15. Once a court or arbitrator has decided to reinstate an employee, the court or arbitrator has a discretion in terms of section 193(1)(a) of the Act to reinstate the employee from any date not earlier than the date of dismissal. A court or arbitrator in fixing the date of reinstatement must take into account factors like whether the employee had found alternative employment, whether there were any delays in referring the dispute to the CCMA etc. In the application for condonation, the second applicant stated that he was unemployed since the date of his dismissal. This was not contradicted by the third respondent. It is not necessary for this Court to decide what the second applicant did since the review application was filed with this Court. The crucial period is the date when the award was issued by the commissioner. This Court is correcting an award that the commissioner made. There is no reason why the reinstatement should be from the date of his dismissal which was 8 September 2000. The award was issued on 7 May 2001 which was eight months after his dismissal. The commissioner should have ordered the second applicant's reinstatement. The back pay would not have exceeded 12 months. The third respondent did not file a counter review application dealing with the issue of back pay.

16. The commissioner's award relating to compensation stands to be reviewed and set aside and replaced with an order that the second applicant is reinstated from date of his dismissal.

17. There is no reason why costs should not follow the result.

18. In the circumstances I make the following order:

18.1 The commissioner's finding in awarding the second applicant nine months compensation is reviewed and set aside and is substituted with an order that the third respondent is to reinstate the second applicant from the date of his dismissal.

18.2 The third respondent is to pay the costs of the application.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS : H VAN DER RIET SC INSTRUCTED BY
CHEADLE THOMPSON AND HAYSOM INC

FOR THIRD RESPONDENT : AT MYBURGH INSTRUCTED LEPPAN
BEECH INC

DATE OF HEARING : 28 SEPTEMBER 2006

DATE OF JUDGMENT : 8 NOVEMBER 2006