



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 667/2012

In the matter between

NTOMBIZODWA ZIQUBU

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER: T BOYCE

Second Respondent

AFGEN (PTY) LTD

Third Respondent

Heard: 28 July 2017

Delivered: 25 October 2017

Summary: The commissioner found that the employee's dismissal was substantively unfair as there were no fair reasons for dismissal but relied on same unproven charges to refuse reinstatement. The facts of the case did not

trigger section 193(a-d) and the commissioner thus did not have a discretion not to reinstate.

The Applicant reinstated with limited back pay. The commissioner accused of advising a party off the record not to testify-though that not proven, commissioners must not engage one party off the record in the arbitration hearing on the merits of the matter in the absence of the other party. That will constitute misconduct. Should there be an incident off the record that might taint the credibility of the proceedings such must be subsequently put on record or reported in one way or the other.

The CCMA and the Commissioner to be served with full pleadings even after their declaration that they will not oppose the review application.

JUDGMENT

MOLEBALOA AJ

Introduction

- [1] This is a review application launched in terms of Section 145 of the Labour Relations Act¹ (the LRA) to have the arbitration award issued under case: GAJB 29210-11 dated 20 February 2012 reviewed and set aside. The award was issued by the Second Respondent (the commissioner), acting under the auspices of the First Respondent, the Commission of Conciliation Mediation and Arbitration (the CCMA). The application is opposed.

Condonation applications

- [2] The review application was launched on time. However, the Third Respondent filed its answering affidavit outside the required time frame with condonation

¹ Act 66 of 1995 as amended.

application. The Applicant also delayed filing the replying affidavit and its opposition to the Third Respondent's condonation application and had to also file condonation application.

- [3] In the interest of justice all condonation applications were granted so as to deal with the main application for review. None of the parties suffered serious prejudice. The delays were condonable.

Background facts

- [4] The Applicant was employed by the Third Respondent as an Assistant Bookkeeper / Creditors since 29 November 2010.

- [5] On 19 December 2011 the Third Respondent charged the Applicant with the following charges²:

1. Trust Relationship broken;
2. Bringing company's name in disrepute;
3. Insubordination; used Afgen's resources for private use;
4. False accusations against management-at CCMA.

- [6] The chairperson of the disciplinary hearing did not find³ the Applicant guilty of charge 4 which involved allegations of false accusations against the Third Respondent's management. He however found the Applicant guilty of the rest of the charges. In relation to the charge of insubordination, the chairperson issued the Applicant with a final written warning. The chairperson then

² Page 283 of the record.

³ Page 313 of the record (disciplinary hearing outcome).

continued to dismiss the Applicant on the charges of broken trust relationship and bringing the company's name in disrepute. The dismissal took place on 16 January 2012.

- [7] Aggrieved by the outcome of the disciplinary hearing, the Applicant referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) a dispute of unfair labour practice against the final written warning issued for insubordination and also a dispute of unfair dismissal.
- [8] Before the Applicant could refer the above two disputes there was already a life dispute referred to under case number GAJB 29210-11 by the Applicant also relating to unfair labour practice involving benefits, training, work atmosphere and unfair discrimination.
- [9] The three disputes were consolidated. In the arbitration hearing and as it appears *ex facie* the award⁴, the Applicant decided to continue only with the unfair labour practice relating to final written warning and unfair dismissal disputes. The commissioner's award was therefore limited to only these two disputes. Nowhere in the review application does the Applicant seem to be persistent with the other unfair labour practice dispute. Conversely, this judgment is also limited to the two disputes as dealt with by the commissioner in his award.

The arbitration award

- [10] The commissioner found that the final written warning issued to the Applicant for alleged insubordination constituted an unfair labour practice. He then issued an order setting aside the final written warning.

⁴ Page 6 of the Record.

[11] In respect of the unfair dismissal dispute, the commissioner found that Third Respondent failed to prove fair reasons for dismissing the Applicant and ordered that the Applicant be compensated in the amount of R19 608.00 being the equivalent of 3 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. The rate was R6 536.00 per month. Nowhere in the review is application is the Applicant fighting the accuracy of this rate. The essence of the commissioner's award in respect of unfair dismissal dispute is that he acquitted the Applicant of all the three charges.

[12] In respect of reinstatement relief, the commissioner found that the continued employment would be intolerable. In his reasoning he indicated as follows on paragraph 4.4.1 of the award:

"Although the employee seeks reinstatement, I am of the view that the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable (vide Section 193 (2) of the Act. The employee, after all, had been issued with a final written warning for insubordination (i.e charge 3), and Unequivocal evidence of the employer's senior bookkeeper (Ms. Wostmann) was that the employee was rude and disrespectful, she did not respond to emails and she, in fact "totally bypassed her superior (Ms. Wostmann). In these circumstances, it is plain that a sound employment relationship is simply out of the question, and it is apparent that the only suitable remedy for the employee's unfair dismissal is an award of compensation".

The review application

[13] Aggrieved primarily by the commissioner's refusal to reinstate her, the Applicant launched a review application citing numerous grounds. According to the Applicant, the commissioner committed the following irregularities:

- (i) failure to reinstate the Applicant;

- (ii) reliance on the written warning in not reinstating the Applicant;
- (iii) directing that the Applicant should not testify; and
- (iv) failure to order relief on unfair labour practice dispute.

Evaluation

[14] The essence of the Applicant's first two grounds of review relates to the commissioner's refusal to reinstate the Applicant. The test for review is settled. It is whether or not the decision reached by the commissioner is one that a reasonable decision maker could not reach⁵ and as expounded in subsequent cases.^{6,7}

[15] Section 193 of the LRA makes provision for remedies for unfair dismissals and unfair labour practices. It reads as follows:

- (1) "If the Labour court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the court or the arbitrator may-
 - (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
 - (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date no earlier than the date of dismissal; or
 - (c) order the employer to pay compensation to the employee.
- (2) The Labour court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

⁵ see *Sidumo and Another v Rustenburg Platinum Mines Limited and Others* 2008 (2) SA 24 (CC)

⁶ see *Andre Herholdt v Nedbank Limited*, (Congress of South African Trade Unions as *amicus curiae* [2013] 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (PTY) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC) and *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC)

⁷ [2015] 1 BLLR 50 (LAC).

- (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 re-instate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.”

[16] In the case of *Equity Aviation Services Pty Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁸ provided as follows:

“The ordinary meaning of the word “reinstatement” 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 the employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal...”

[17] In the case of *National Health and Allied Workers Union (NEHAWU) v University of Cape Town and Others*⁹ the court said the following about security of employment: “*Security of employment is a core value of the LRA...*”

[18] It is axiomatic from section 193 of the LRA and the *Equity Aviation and NEHAWU* cases *supra* that reinstatement is the primary remedy in unfair dismissal disputes and is aimed to secure employment for an employee who suffered the brunt of unfair dismissal.

⁸ 2009 (2) BCLR 111 (CC) at para 36.

⁹ 2003 (2) BCLR 154 (CC).

[19] In the case of *Maepe v Commission for Conciliation, Mediation and Arbitration and Another*¹⁰ the court said:

“Section 193(2) of the Act obliges-it uses the word “must”- the Labour Court or an arbitrator must order the employer to reinstate or re-employ the employee whose dismissal he had found to be unfair for lack of a fair reason or whose dismissal he had found to be automatically unfair, unless one or more of the situations set out in Section 193(2)(a)-(d) applies...

...

(16) What I have just said in the preceding paragraph means that if a case falls under one or other of the situations listed in section 193(2) (a)-(d), it is not competent for the Labour Court or an arbitrator to order reinstatement or re-employment. This is because section 193(2) makes provision as to when reinstatement or re-employment must be ordered and when it must not be ordered. In effect, it says that reinstatement or re-employment must be ordered in all cases except those listed in section 193(2)(a)-(d)...

[20] As elucidated further in the *Maepe* case, the court or a commissioner has no discretion not to reinstate when the provisions of section 193(2)(a)-(d) are not applicable.

[21] The commissioner in the matter *in casu* refused reinstatement because the provisions of section 193(2)(b), according to him, are applicable as the surrounding circumstances of the dismissal were such that a continued employment relationship would be intolerable. It is this conclusion which aggrieved the Applicant and which I have to determine whether is a decision a reasonable commissioner could have taken.

[22] Not all circumstances fall within the bands of Section 193(2)(b). In the *Maepe* case *supra* the court explained which circumstances fall within the parameters of section 193(2)(b) by indicating as follows:

¹⁰ (2008) 8 BLLR 723 (LAC) at par.13

“(14) ...The situation envisaged in par (b) is where the “circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable”. It is possible that in so far as the giving of false evidence under oath may have occurred in the disciplinary inquiry before the dismissal, it could be said that it is one of the circumstances surrounding the dismissal, particularly where it was one of the factors that were taken into account in making the decision to dismiss...”

[23] In the case of the *Sibeko v Xstata Coal South Africa and Others*¹¹ the court held as follows:

“Dealing first with section 193(2), it is clear from the *Maepe* judgment and more particularly paragraph (14) thereof, about when is permissible for a commissioner not to award reinstatement because “the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable”. As appears from that paragraph, the circumstances which can be taken into account are those which prevailed at the time of the dismissal and not thereafter.”

[24] The commissioner’s reasons to refuse reinstatement are two folded: (1) The final written warning relating to insubordination and (2) relationship factor (rudeness, disrespectful behaviour towards her senior, Ms. Wostmann). According to the commissioner it is these factors that would have made continued employment relationship intolerable. I continue to deal with the two factors *ad seriatim*.

Final written warning (insubordination)

[25] The commissioner seems to be reprobating and approbating. He had already made a finding that the Third Respondent committed an unfair labour practice by issuing the Applicant a final written warning on insubordination. In dealing

¹¹ (JR2189/13) [2016] ZALCJHB 90; (2016) 37 ILJ 1230 (LC) (3 February 2016) at para 12.

with whether or not to reinstate the Applicant, he however accepted the very same warning he found to be unfair to refuse the Applicant reinstatement. He set the warning aside. There is therefore no warning to consider within the realms of section 193(2)(b) of the LRA. The commissioner had thus ostensibly misinterpreted and misapplied the provisions of section 193(2)(b). This irregularity is material. A reasonable commissioner could not have arrived at this decision.

Relationship factor (rudeness, disrespectful behaviour, by-passing senior and emails)

- [26] The commissioner relied also on the evidence of Ms. Wostmann to refuse the Applicant reinstatement. Ms. Wostmann came in as a witness to testify on trust relationship. It is important to highlight that the Applicant was specifically charged with breakdown of trust relationship as a distinct charge. Though an argument can be proffered that the charge was improperly titled because breakdown of a trust is more of a consequence flowing from misconduct than a charge itself, the bottom line is that evidence which according to Ms. Wostmann resulted in the breakdown of trust was adduced and considered by the commissioner when dealing with the charge. In *Potgieter v Tubatse Ferrochrome and others*¹² the court stated that “intolerability” addresses trust relationship issues between the employer and the employee. Hereunder is some of the evidence relating to the trust relationship charge Ms. Wostmann adduced:

“Commissioner: What do you know about that, Mrs. Wostmann? Do you know anything about that, that charge? What does that charge relate to? What did she do that amounted to her destroying the trust relationship?

....

¹² (2014) 35 ILJ 2419 (LAC) at para 37.

Ms. Wostmann: First of all as her supervisor, as her superior, there was no relationship between the two of us. She was supposed to report back to me which never happened. She did not follow procedure¹³

....

Ms Wostmann: ...She was told to give all the information she sent, all the contacts of the people she sent the e-mail to Mr Anderson, that he could personally apologise for his misconduct, which was not done¹⁴....

....

Ms. Wostmann: She gave no, she did not take me as a senior, she bypassed me totally. There was no relationship¹⁵..

...

Ms. Wostmann: As I said she did not respect me as her superior¹⁶

...

Ms. Wostmann: She did not report back to me the way it is in her contract.¹⁷

[27] Having considered the above evidence that was intended to proof charge 1 relating to the breakdown of trust relationship, the commissioner found that there were no valid reasons to dismiss, the essence of which is that he did not find that the Applicant was rude, disrespectful, or bypassing her senior. To me it is immaterial that the offences were presented under the breakdown of trust relationship charge. They were before the commissioner and found them not to be constituting valid reasons for the dismissal. I guess that the Third Respondent did not have problems with the commissioner's finding or approach otherwise it would have filed a cross-review. In summary it means the two charges the Third Respondent dismissed the Applicant for *viz* breakdown of trust relationship and bringing the company name in disrepute, were found by the commissioner not to be valid reasons for dismissing the Applicant. The commissioner is therefore guilty of the same sin, relying on evidence he rejected in refusing the Applicant reinstatement. This error is also material.

¹³ Page 171 of the record lines 14-17.

¹⁴ Page 173 of the record lines 18-21.

¹⁵ Page 177 of the record lines 19-20.

¹⁶ Page 178 of the record line 23.

¹⁷ Page 179 of the record lines 1-2.

[28] Even if I were to identify as insubordination some of the alleged offences Ms. Wostmann had testified about when dealing with the charge of the breakdown of trust relationship, the difficulty the Third Respondent faced will not go away. It would still mean that the commissioner dealt with them.

[29] If it were to be argued that they were new charges, as the Applicant wanted to argue, the new difficulty will arise as those charges would not have been put to the Applicant and thus would therefore not be the basis on which the Applicant was dismissed. In any event, employers should not be allowed to elect not to charge employees with incidents that they wear aware of with the hope that they will rely on them to frustrate the relief of reinstatement. Though the arbitration hearing is a hearing *de novo* it is however not a platform to introduce new charges under the guise that such is only intended to show that the employment relationship had become intolerable. In the case of *Meyers v National Commissioner of the South African Police Service and others*¹⁸ the court said in imposing the sanction that he did during the disciplinary hearing, commissioner Strydom had little or no regard to the mitigating factors. As observed by Ngilwana AJ in the Labour Court, he regarded as an aggravating factor what he described as an element of “insolence...impudence, cheekiness, disrespect and rudeness” which was an irrelevant consideration in that the appellant was not even charged with contravening regulation 20(s) which deals with insolence. In the case of the *Dikobe v Mouton N.O and Others*¹⁹ the LAC said the following:

“In argument on appeal, an allusion was made to certain rules about not taking bribes, behaving honestly and not consuming the employer’s stock and not being in possession of the employer’s property, which plainly the appellant must have known. However, as he was not charged with any of these felonies, reference to them is irrelevant”.

¹⁸ (2013) 34 ILJ 1729 (SCA).

¹⁹ [2016] 9 BLLR 902 (LAC); (2016) 37 ILJ 2285 (LAC) at para14.

- [30] Ms. Wostmann said the Applicant was given a verbal warning for insubordination. This does not help the Third Respondent's case either as according to the progressive discipline the Third Respondent identified itself with, it would not move from verbal warning to dismissal without providing convincing reasons. Either way, the Third Respondent's difficulties presented by the award remained.
- [31] It is axiomatic that the reasons the commissioner relied upon are unreasonable. The issues of disrespect, rudeness, etc were testified to by Ms. Wostmann under charge 1 which dealt with trust relationship. The commissioner did not find the Applicant guilty of this charge. If this charges are seen as new, they were never put to the Applicant.
- [32] Having established that the commissioner's reliance of the above two grounds was unreasonable, it can be safely concluded that the provisions of section 193(2)(b) of the LRA were not triggered into operation.
- [33] In the *Potgieter* case *supra* the court stated that "impracticability" generally addresses unfairness in terms of operational or similar grounds. In *casu*, there is no evidence that covers this leg.
- [34] In the *Dikobe*²⁰ case *supra* the court had the following to say with regard to the remedy:

"Reinstatement has been sought and must be granted. An argument was advanced to suggest that the lapse of time militates against such an order. The factor alone is of no relevance. In the absence of evidence to demonstrate intolerability or impracticality as contemplated by section 193(2) of the Labour Relations Act 66 of 1995, no lawful reason exists not to order reinstatement. Axiomatically, where an employee is exonerate from

²⁰ At para 27.

misconduct, no factual basis can exist to find an argument that the trust relationship is compromised.”

[35] Taken advise from *Dikobe* case *supra* I also do not perceive the lapse of time to militate against the order of reinstatement. As the *Equity Aviation* case *supra* indicated, a court or an arbitrator has no choice not to reinstate if none of the provisions of section 193(2)(a)-(d) are applicable.

[36] I am mindful also of the fact that the Third Respondent might have employed somebody in the position of the Applicant. This also is not a hindrance to reinstatement. In the case of *Manyaka Van de Wetering Engineering (Pty) Ltd*²¹ the court said the fact that the dismissed employee’s position has been filled by a new employee does not even constitute a valid ground to render reinstatement.

[37] I am satisfied that there is enough evidence before me to deal with this matter and not to remit it to the CCMA. What I am called to do is to come up with a fair remedy in terms of section 193. I am aware also that retrospectivity should not be equated with compensation. Whereas compensation is limited in terms of section 194 of the LRA, retrospectivity can be up to the date of dismissal²². The extent of retrospectivity is a discretionary exercise. In the *Equity Aviation* case *supra* at par.48 the court that it is trite law that the power to grant a remedy in section 193 is by its nature discretionary and that the discretion must be exercised judicially by a court that enjoys that unfettered discretion.

[38] In the case of *David Themba v Mintroad Sawmills (Pty) Ltd*²³ the court said the following about retrospectivity:

²¹ (1997) 11 BLLR 1458 (CC).

²² See: *Republican Press Pty Ltd v CEPPWAWU and Others* (2007) 11 BLLR 1001 (SCA).

²³ [2015] 2 BLLR 174 (LC) at para 23.

“When it comes to retrospectivity of reinstatement, this is however, ...a completely different issues. Reinstatement is not necessarily coupled with retrospectivity and is not a sine qua non of it. Retrospectivity of reinstatement is a separate discretion that must be exercised by the arbitrator or the judge when deciding to award reinstatement. Retrospectivity in simple terms relates to what is commonly known as back pay and constitutes what the arbitrator or judge expects an employer to pay the employee for the time the employee has been languishing without remuneration as a result of the employee’s unfair dismissal...”

- [39] The court further said in the *David Themba* case²⁴ that the exercise of the discretion as to the extent of retrospectivity is firmly founded in the concept of what it is fair to both parties. .
- [40] In the *Mediterranean Textile Mills Pty Ltd v SA Clothing and Textile Workers Union and Others*²⁵ the court said that fairness ought to be assessed objectively on the facts of each case.
- [41] In determining the extent of retrospectivity of the reinstatement, I considered among others, the fact that the Applicant also had to file condonation applications because of non-observance of time lines prescribed in the Rules of this Honourable Court. I considered also, among others, the fact that the case had to be postponed because of the Applicant's non-attendance. I looked also into other delays as contained in the file. The financial consequences of this order was also taken into account.
- [42] In the case of *Penny v 600 SA Holdings (Pty) Ltd*²⁶ the court when dealing with the deduction of tax from employee’s remuneration said “An employer

²⁴ At para 29.

²⁵ (2012) 33 ILJ 160 (LAC) para 12.

²⁶ (2003) 24 ILJ 967 (LC) at para 8.

has a statutory obligation in terms of the Income Tax Act 58 of 1962 (The Income Tax Act) to deduct the required tax from any remuneration which it pays to an employee". Any back pay payable in terms of this order is also subject to tax.

- [43] In conclusion, the commissioner's reasons as contained in the award for the refusal to reinstate the Applicant is thus a decision a reasonable commissioner could not have arrived at.

Other two grounds of review

- [44] I dismiss the Applicant's last two of grounds of review. The commissioner ordered relief in the unfair labour practice dispute as he directed that the final written warning be set aside. It is therefore inaccurate to contest that the commissioner did not make an order after finding that the unfair labour practice was committed.

- [45] In respect of the commissioner directing the Applicant not to testify, such ground was expounded in the confirmatory affidavit²⁷ deposed to by Mfusi as follows:

"I also confirm that on 09th February 2012 during First Respondent normal arbitration short break (between the parties) the second Respondent stated that the following, that can we not see that the Third Respondent does not have any case at all, being the fact that the Applicant should not testify or take a stand, and that I his representative should also not proceed or continue with cross-examination as this will be a complete waste of time."

²⁷ Page 99-101 of Index Pleadings.

- [46] I view these allegations against a commissioner in a very serious light. They are expounded in full detail for the first time in the confirmatory affidavit attached to the replying affidavit. In the founding affidavit no reference was made at all to the fact that the commissioner directed the Applicant not to testify during break off the record.
- [47] My challenge is that though the founding affidavit was served on the CCMA and the Second Respondent, the reply and confirmatory affidavits were not. It is for this reason that these expounded grounds are dismissed as they are not properly part of this application. The CCMA normally abides by the decision of the court as it did in this case after receiving the review application. There is a practice that once such declaration is received, no subsequent papers are served on them. As there are probabilities that the remaining parties can still make allegations in both the responding and replying affidavits that might taint the credibility of the CCMA or the commissioner, it is my view that fairness and justice dictate that they be served with all pleadings even after they declared their non-opposition. This will enable them to reconsider their decision in the event another party pleads allegations affecting their integrity.
- [48] Furthermore, there are rules governing the introduction of new evidence in the replying affidavit. Overall, the discretion was on me to accept this new expounded ground: In the case of *Finishing Touch 163 (Pty) Ltd, v BHP Billiton Energy Coal SA Ltd and Others*²⁸ the court set out what the approach should be when an applicant introduces new material in its replying affidavit. The following was said:

“..The court has a discretion to allow new matter in a replying affidavit in exceptional circumstances. A distinction must be drawn between a case in where the new material is first brought to light by the Applicant who knew of it at the time when his founding affidavit was prepared and one in which facts alleged in the respondent’s answering affidavit reveal the existence of a further ground for the relief by the Applicant”.

²⁸ (2013) 2 SA 204 SCA at para 26.

[49] Since the incident allegedly happened during arbitration, the Applicant was thus aware of this expounded ground of review when preparing the founding affidavit but chose not to reveal it. I therefore exercise my discretion not to allow these expounded grounds.

[50] I revert now to the ground of review as raised in the founding affidavit properly served on all parties. The Applicant only contended that the Second Respondent directed her not to testify. However, the record reveals the following:

“Commissioner: Yes, Mr Mfusi, what are you doing, (that the) is the case of employer’s case, are you calling the employee to give evidence?

Mr. Mfusi: Mr. Commissioner, it will not be necessary for her to take the stand”.

[51] Clearly the commissioner provided Mfusi an opportunity to call the Applicant to testify. This attack does not resonate with the record. The ground is therefore dismissed.

[52] Notwithstanding my dismissal of the above ground, commissioners in the arbitration proceedings must avoid engaging one party off the record about the merits of the case in the absence of the other party. That will constitute misconduct. Should there be an incident off the record that might taint the credibility of the proceedings such must be subsequently put on record or reported in one way or the other.

[53] The record reveals as follows:

“Commissioner: Yes, Mr Mfusi, what are you doing, (that the) is the case of employer’s case, are you calling the employee to give evidence?

Mr. Mfusi: Mr. Commissioner, it will not be necessary for her to take the stand”.

[54] The ground of review as set out in the founding affidavit is dealt with by the above quoted part of the record which clearly shows the commissioner giving Mfusi an opportunity to decide the way. The review on that ground is therefore dismissed.

Costs

[55] I am of the view this is not a case warranting a costs order to be made against any of the parties.

[56] Accordingly, I make the following order:

Order

1. The Second Respondent's arbitration award made under the auspices of the First Respondent on 20 February 2012 under case number GAJB 29210-11 in which the Second Respondent ordered that the Third Respondent should pay the Applicant three (3) months compensation in the amount of R19 608.00 is hereby reviewed and set aside.
 2. The Second Respondent's award of three (3) months compensation is substituted with an order that: the Applicant is hereby reinstated retrospectively, such retrospectivity being limited to a period of 24 months.
 3. There is no order as to costs.
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M.S Molebaloa

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Applicant in Person.

For the Third Respondent: Advocate. M Kruger

Instructed by: C Marshall Attorneys.

LABOUR COURT