

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2545/14

In the matter between:

FERMEL (PTY) LTD

Applicant

and

**SIPHO TALANE, N.O. (Cited in his capacity as
Commissioner of the Second Respondent**

First Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Second Respondent

NESU MAROVEKE

Third Respondent

Heard: 12 July 2018

Delivered: 4 April 2019

JUDGMENT

DAMANT. AJ

Introduction

- [1] This matter has an unfortunate history. Mr Nesu Maroveke (The Third Respondent) was dismissed on 16 July 2009 and the matter was heard before me on 12 July 2018 (some 9 years later). The history of the matter was that the first arbitration award was handed down on 12 November 2009. The Commissioner concluded that the dismissal was unfair in that the procedure was unfair. Reinstatement was awarded. The matter was brought on review to the Labour Court. Van Niekerk, J decided the

review application in favour of Fermel (Pty) Ltd (the Applicant) on the basis that the Commissioner's reasoning was fundamentally flawed. The Court substituted the finding that the dismissal was both substantively and procedurally fair. Judgment was delivered on 20 April 2012. The matter was then taken on appeal to the Labour Appeal Court. On 1 July 2014 the Labour Appeal Court concluded that the Labour Court had erred in not remitting the matter back to the CCMA for a hearing *de novo* and in finding that the Third Respondent's dismissal was both procedurally and substantively fair. It found the record of the proceeding that was placed before it to be "*in a deplorable state and not one which could be confidently be relied upon to decide the issues in this matter*". The Order of the Labour Court was set aside and substituted with an order reviewing and setting aside the Arbitration Award of 12 November 2009 and remitting the matter back for a hearing *de novo* before a different Commissioner.

- [2] The matter was then set down and heard on 6 October 2014 and the Arbitration Award was given on 14 October 2014. That Arbitration Award is now the subject matter of the review before this Court.
- [3] The issue to be determined by the Commissioner was whether the Third Respondent was negligent when he drove a company vehicle into the water, which caused damage to the engine of the motor vehicle. The Applicant's case for review was premised on an allegation that the Commissioner failed to properly assess the two conflicting versions that were put up by the Applicant's only witness ("Mr Setagane") who testified to the events and the version put up by the Third Respondent. The Applicant's argument was that the Commissioner failed to undertake a balanced assessment of the credibility, reliability and probabilities of the different versions given. In particular, the allegation is made that the Commissioner failed to make credibility findings, which he should have done in determining the facts.

The Facts

- [4] The Third Respondent was employed as an artisan by the Applicant in this matter. He was attending to a breakdown in a mine. At the disciplinary enquiry he testified

that they had received a distress signal of someone trapped in a basket at a lift and he was required to attend to this. He was driving a company Jeep underground to attend to the breakdown. He states that on his way to the breakdown, *"the tunnel in which the water was had no lighting. I stopped and checked to see if the water wasn't too deep. Due to the poor lighting in that section it was difficult to see the span of the water. While I proceeded slowly, there was a step in the roadway. When the Jeep went down I put it in neutral and I tried to reverse. As the engine sound changed I switched off the machine and walked out."*¹

- [5] At the arbitration the Applicant only called Mr Setagane as a witness. Mr Setagane was in the vehicle with the employee. His evidence was that while they were travelling they found water in the tunnel. He told the Third Respondent that *"there is a lot of water but do not know whether he heard me or not."*² He then told him to *"Go back. This water is too much."*³ The Third Respondent drove into the water.⁴ When he stopped to go back the Jeep stalled.⁵ When he got out the water was at the level of his hip.⁶ He did not know the procedure for measuring the water when one is in a Jeep, only the procedure when one is walking, which is the gumboot test.⁷ The road that they were travelling on had rocks and was bumpy.⁸ He confirmed that when going through the water in a vehicle they used the wheel test⁹ however, he only learned about the wheel test after the accident happened.¹⁰ It was only when the water was above the wheels that he made the comment about turning back.¹¹ In other words, the vehicle had already entered the water. According to him the water should be tested before they drive in.¹² He accepted that there was an unexpected decline in the road.¹³ The unexpected decline

¹ Record, pages 8 and 9.

² Record page 74, lines 4 and 5.

³ Record page 74, line 7.

⁴ Record page 74, line 21.

⁵ Record page 74, line 16.

⁶ Record page 76, lines 5 to 8.

⁷ Record page 77, lines 1 to 4.

⁸ Record page 82, lines 1 to 3.

⁹ Record page 83, line 19.

¹⁰ Record page 87, line 15.

¹¹ Record page 87, line 15.

¹² Record page 90, line 9.

¹³ Record page 91, lines 12 to 16.

caused the vehicle to be suddenly immersed deeper in the water.¹⁴ He accepted that the employee did not drive the vehicle at speed.¹⁵ He conceded that the accident could have happened to anyone.¹⁶ He stated a lot of the company vehicles get damaged in this manner.¹⁷

- [6] The Third Respondent's testimony in material respects was that on his way to the breakdown they encountered pools of water.¹⁸ It is a slow Jeep which travels at 8km an hour.¹⁹ The road is rough, there are rocks, small holes and "graters" (which I understand to mean craters).²⁰ The vehicles are designed for these conditions. They used the half tyre method to check the depth of water for all the pools of water. He stopped the vehicle before entering the water and entered slowly.

Evaluation of the Evidence

- [7] The Applicant's complaint was that there were additional aspects to the Third Respondent's version on which the Commissioner made no finding. These aspects go to the Third Respondent's credibility. Those aspects of the Third Respondent's version are the following:

7.1 He contended that Mr Setagane was asleep.

7.2 After the vehicle stalled Mr Setagane tried to start the vehicle and this caused the damage. Mr Setagane tried to start the vehicle three times.

- [8] It is correct that the version that Mr Setagane was sleeping was never put to Mr Setagane when he testified. It is also correct that the version that Mr Setagane tried to start the vehicle and caused the damage to the vehicle was not put to Mr Setagane.

¹⁴ Record page 91, lines 19 to 23.

¹⁵ Record page 99, lines 10 to 14.

¹⁶ Record page 101, line 24 to page 102, line 4.

¹⁷ Record page 102, lines 8 to 16.

¹⁸ Record page 128, line 20.

¹⁹ Record page 129, line 6.

²⁰ Record page 129, lines 14 to 17.

- [9] It is also correct that these conflicts of fact should have been resolved by the Commissioner. If Mr Setagane was asleep, then it impacts on the Applicant's entire case as it was based on Mr Setagane's evidence of the conditions in the mine and the two warnings that he apparently gave.
- [10] In my view both of these versions of the Third Respondent fall to be rejected. They were not put up as a defence at the disciplinary enquiry and they were not put to Mr Setagane when he testified. The Commissioner should correctly have rejected these versions. However, the question is whether the error on the part of the Commissioner resulted in the Commissioner coming to a conclusion that was unreasonable.
- [11] The Applicant had to discharge the onus of proving that the Third Respondent was grossly negligent. In doing so it relied exclusively on the version of Mr Setagane. It is essential, therefore, that the evidence of Mr Setagane be assessed to establish whether the Applicant has discharged the onus of proving the employee's gross negligence.
- [12] Mr Setagane conceded that the only way to test the depth of the water when driving a vehicle is to enter the water. He could not dispute that the gumboot method is used for someone walking, while the half wheel method of testing the water is used for driving. Accordingly, to suggest that the driver should test the water before entering makes no sense as he has to drive the vehicle into the water to apply the half wheel test. Accordingly, entering the water could not be regarded as negligent.
- [13] Mr Setagane did not state that the vehicle was being driven at speed. In fact, he conceded that the vehicle was not being driven at speed. Accordingly, entering the water in the manner in which the employee did cannot be described as negligent.
- [14] Mr Setagane's warning to turn back was when the vehicle was already in the water. It appears from his evidence that the vehicle hit an unexpected dip. He

concedes that the accident could have happened to anyone. He stated that many of the vehicles are damaged in this way. Based on this version alone, it would not have been unreasonable for the Commissioner to conclude that the Applicant had not discharged the onus of establishing that the Third Respondent had been negligent in this manner.

- [15] Accordingly, even if the Third Respondent's evidence falls to be rejected in respect of two aspects of his evidence, I am of the view that the Applicant did not discharge the onus of proving that the Third Respondent was grossly negligent. The conclusions that the Commissioner came to were accordingly not an unreasonable conclusion despite the error that he may have made in failing to weigh up the credibility of the witnesses and the probabilities of each version.

The remedy

- [16] The evidence was that the Third Respondent successfully obtained employment elsewhere two months after his dismissal. At the hearing, when asked about retrospective reinstatement, the Third Respondent stated it was not about the money, it was about the principle. He, however, insisted that he wanted reinstatement.²¹

- [17] The Commissioner determined that the Third Respondent was entitled to the primary remedy of reinstatement and did so by relying on the requisite sections in the Labour Relations Act²² (the LRA).²³

- [18] Section 193(1) of the LRA provides:

- “(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 re-instate the employee from any date not earlier than the date of dismissal;

²¹ Record page 166, lines 7 to 9.

²² 66 of 1995, as amended.

²³ Record page 18, paragraph 36.

- (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 not earlier than the date of dismissal; or
- (c) order that the employer pay compensation to the employee.”

[19] Further, section 193(2) of the LRA provides:

“(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.”

[20] Accordingly, the Commissioner cannot be faulted in this regard insofar as his finding that, the Applicant’s failure to prove the misconduct on the part of the Third Respondent rendered the Third Respondent’s dismissal substantively unfair and that in the circumstances reinstatement is the appropriate remedy in the absence of any of the factors in section 193(2) of the LRA.

[21] In determining the extent of retrospectivity, the Commissioner concluded that:

“It is now settled law that a reinstatement order can be given retrospective operation for longer than 12 months.”²⁴ The Commissioner then went on further to state that, “the Constitutional Court in *Equity Aviation* supra at para 43 reiterated that I have a discretion to determine the extent of the

²⁴ Pleading page 19, paragraph 37.

retrospectivity of the order of reinstatement. In exercising the discretion I may, among other things, consider the fact that the dismissed employee was without income. In the present case the employee has not been without income: He has been working except for two months. His marriage fell apart. While I must ensure that the employer is not unjustly financially burdened by an order of retrospective reinstatement, I must also ensure that the employee does not benefit from the mishap that has befallen him. If reinstatement is ordered from the date of dismissal, the employee will benefit from the mishap, and he will not have been placed in the position he would have been had there been no dismissal. I am also alive to the sentiment expressed by the learned Grogan when he wrote: “The concern expressed in the minority judgment in Kroukam that employees may be tempted to obtain greater compensation than that permitted by the Act by seeking orders of full retrospective reinstatement then immediately resigning, remains a consideration” (dismissal, Juta 2010 page 525).²⁵

[22] It was for this reason that the reinstatement was ordered to be retrospective for a period of 12 months.

[23] The Commissioner is correct in that a competent commissioner or court can award reinstatement in excess of a 12 month period for a finding of an unfair dismissal²⁶ and that he, as a commissioner, has the discretion to determine the extent of the retrospectivity, which is clear from cases such as *Equity Aviation Services (Pty) Ltd v CCMA & Others*²⁷ and *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers obo Masha and Others*²⁸ in which the Court held:

“...reinstatement is the primary remedy under the LRA and involves placing an employee back in employment as if the dismissal had never occurred. If

²⁵ Pleading page 19, paragraph 38.

²⁶ *SACCAWU & others v Primserv ABC Recruitment (Pty) Ltd t/a Primserv Out Sourcing Incorporating* (2007) 1 BLLR 78 (LC) at paragraphs 18-21.

²⁷ (2009) (1) SA 390 (CC)

²⁸ (2017) 4 BLLR 384 (LAC)

the exceptions to the remedy of reinstatement do not apply, the Labour Court and arbitrators only have a discretion with regard to the extent to which reinstatement should be made retrospective.”²⁹

[24] A commissioner is however required to exercise this discretion reasonably and to consider the circumstances of the matter before him/her to ascertain the extent of retrospectivity that is appropriate in the circumstances.

[25] In *Equity Aviation (supra)* the Constitutional Court held that the purposes of reinstatement was to place an employee in the position in which he or she would have been had the dismissal not occurred. Nkabinde J as follows:

“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. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal ... The fact that the dismissed employee has been without income during the period since his or her dismissal must, amongst other things, be taken into account in the exercise of the discretion, given that the employee’s having been without income for that period was a direct result of the employer’s conduct in dismissing him or her unfairly.”³⁰

²⁹ Id fn 28 at para 8.

³⁰ Ibid fn 27 at para 36.

[26] Zondo J in *Toyota SA Motors (Pty) Ltd v CCMA and Others*³¹ stated:

“A reinstatement order is not intended to put the employee in a position in which he would not have been had he not been dismissed. That means neither a less disadvantageous position nor a more advantageous position than the one in which he was or would have been in had he not been dismissed.”³²

[27] In *National Union of Metalworkers of South Africa obo Fohlisa and others v Hendor Mining Supplies*³³ the Court held:

“What is the legal context in this matter? What Equity Aviation tells us is certainly central to that context, Reinstatement may be, but is not always, retrospective. To state the axiomatic, reinstatement means the resuscitation of the employment agreement with all the attendant reciprocal rights and obligations. Again to state the obvious, the element of retrospectivity in the reinstatement does not entail the rendering of services for the back-dated period of reinstatement. That is an impossibility. Perhaps that makes the very notion of “retrospective reinstatement” a bit of a misnomer, if not a legal fiction. What then is the practical value of retrospective reinstatement? It is the reinstatement of all the employee’s benefits in terms of the contract of employment from the date specified in the order so as to “plac[e] an employee in the position he or she would have been but for the unfair dismissal”. Obviously, if the employer may be able to demonstrate that – for one reason or another – an employee would not have been able to render services, the employee concerned would not be entitled to retrospective remuneration. That much is illustrated by the total obliteration or reduction of benefits in respect of employees who died either before 1 January 2007 or on or after that date but before the date of reinstatement.”³⁴ (My underlining)

³¹ (2016) 37 ILJ 313 (CC)

³² Id fn 31 at para 155.

³³ [2017] 6 BLLR 539 (CC).

³⁴ Id fn 33 at para 13.

- [28] The Commissioner is therefore required to award retrospective reinstatement in a manner that places the employee in the position he/she would have been had it not been for the dismissal. An employee is not to be placed in a more advantageous position which results in the dismissal being beneficial to the employee and the reinstatement ordered is not meant to place the employer in an unnecessarily burdensome financial position. The Commissioner stated in his award that the Third Respondent had only been unemployed for 2 months. The purpose of the back-pay awarded to the employee is to restore the status quo. If an employee is dismissed and is only unemployed for 2 months and not earning an income for that period and then commences work at a new employer, awarding this employee 12 months back-pay places the employee in a better position than he would have been had he not been dismissed.
- [29] Further, an employee can only be remunerated by his/her employer if he/she is able to render services. If the Third Respondent commenced employment with another employer subsequent to his dismissal than he cannot be said to have been in a position to render services for the Applicant and the Third Respondent would not be entitled to retrospective remuneration for that period.
- [30] The Third Respondent relied on the case of *Palace Engineering Services (Pty) Ltd v Phasa*³⁵ in order to put forward the argument that the Commissioner was correct in awarding 12 months back-pay to him and that there was no legal obligation for the Commissioner to deduct the income the Third Respondent earned rendering services for another employer after his dismissal. The Third Respondent quoted the following paragraphs from the judgement:
- “Mr Vuyo submitted that the respondent was not unfairly advantaged by the order of reinstatement. The respondent testified on the challenges he had to endure after being unfairly retrenched. It could not have been expected of the respondent to simply wait for the outcome of this particular case. He had to secure employment to make ends meet. It is submitted that this complaint

³⁵ [2013] ZALAC 5

is devoid of substance. Mr Jackson did not develop his submission that the respondent was under a duty to mitigate his loss or to reduce the appellant's burden, by seeking employment. His submission is that something less than full reinstatement should be ordered and that the degree of reinstatement should be reduced by an amount or a rebate taking into account what the respondent has earned in the interim. The common law concept of specific performance approximates to the concept of statutory reinstatement. In *Toerien v University of Stellenbosch* (1996) 17 ILJ 56 (C), followed in *Dauids v Boland Rugby (Pty) Ltd* (C12/10) [2011] ZALCCT 35 (5 September 2011), it was held by Traverso J (as she then was) that where an employee claimed specific performance for his unlawful termination of employment the employer was not entitled to deduct amounts the employee earned from other sources. I am of the view that the common law position referred to in the *Toerien* judgment applies to statutory reinstatement."³⁶

[31] I have considered the *Palace Engineering* case as well as *Toerien v University of Stellenbosch*³⁷ and *Dauids v Boland Rugby (Pty) Ltd*³⁸, the cases referred to in the quote above, in order to understand whether these cases interfere with the principle enunciated by the Constitutional Court that reinstatement is intended to put the employee back in the position they would have been in but for the dismissal. I have also considered whether they in any way deal with the principle that an employer is not obliged to pay an employee who is unwilling or incapable for any reason of tendering their services. I have also considered how the case reconciles with the statement made by court the in the *Hendor* case (supra) that if an employee would not have been able to render services, the employee concerned would not be entitled to retrospective remuneration.

[32] The *University of Stellenbosch* case dealt with the common law position and a pure contractual claim. The position was that the contract of employment had not been validly terminated. It was common cause "*that the Applicant tendered his services*

³⁶ *Id fn 35 at paras 28 to 30.*

³⁷ (1996) 17 ILJ 56 (C),

³⁸ (C12/10) [2011] ZALCCT 35 (5 September 2011).

and put them at the disposal of the Respondent at all material times”.³⁹ He had, however, procured some consultancy work as an independent contractor and earned some income. The employer sought to deduct the amount earned based on the principles applicable to set off in contract.

- [33] The Court found that dealing with a contract of employment, ie. a *locatio conductio operarum*, all the Applicant has to do is put his labour at the employer's disposal in accordance with the employer's reasonable instructions. Once he does so he is entitled to be paid. As it was common cause that the Applicant in that matter had tendered to work therefore he was entitled to be paid.
- [34] The material issue was that the employee had tendered to work and there was never any suggestion that the consultancy work he had obtained had interfered with that tender. This was not argued in that case.
- [35] The *Boland Rugby* case was also a case regarding a contractual claim. The court at paragraph 13 of the judgment distinguished the *University of Stellenbosch* judgment on the basis that the employee in that matter had not at the time of his suspension or thereafter tendered his services. In that case it was concluded that the employee, by securing alternative employment, had mitigated his damages and that his claim for compensation should be dismissed.
- [36] That then brings me to the *Palace Engineering* case. In that case the employee had been unemployed for a period of 5 months. He had secured employment at half the salary. The argument by the employer was that the degree of reinstatement should be reduced by an amount or rebate taking into account what the employee had earned in the interim. Applying the *University of Stellenbosch* decision, the Court held that there was no entitlement to deduct amounts the employee earned from other sources.
- [37] It was not argued and it was not found in this matter that the employee had not tendered his services. The Court did not deal with the issue of tender and dealt only

³⁹ Id fn 37 at p 202 para (H).

with the ability to deduct amounts earned from other sources. Had the Court had to deal with an argument that the employee had not tendered his services or was unable to do so, and had it applied the *University of Stellenbosch* judgment (as it was applied in the *Boland Rugby* case) it would have been constrained to find that both these judgments were premised on the tender of service. The tender of services was common cause in the *University of Stellenbosch* case which entitled him to remuneration, whereas in the *Boland Rugby* case the employee was not able to tender their services and accordingly was not entitled to be paid.

- [38] The court in *Palace Engineering* was accordingly dealing with the issue of mitigation of damages and the ability to factor that into a reinstatement order. It was not dealing with an argument pertaining to the tender of services. The issue of an employee being unable to tender their services because they are employed elsewhere was accordingly not dealt with in the *Palace Engineering* judgment.
- [39] The analysis of the above authorities accordingly reveals that for an employee to claim reinstatement, they are required to tender their services. They are under no obligation to seek to mitigate damages by seeking alternative employment. Earnings from engagements that do not preclude them tendering their services cannot be factored in and cannot be set off. However, if an employee does secure employment elsewhere the employee then needs to accept that he/she is precluded from tendering their services for the period they are employed elsewhere. If this evidence is led and placed before a Commissioner, the Commissioner is obliged to take cognisance of this and fashion the reinstatement award according to the period that the employee was able to tender their services. Applying this principle gives recognition to the Constitutional Court statement that an employee should be put back into the position they would have been in had they remained employed. They should not be better off. It also accords with the statement in the *Hendor* case that an employee who is unable to tender their services is not entitled to retrospective remuneration.

- [40] Accordingly, the Commissioner did not make a decision that a reasonable commissioner would make in awarding 12 months back-pay. Retrospective reinstatement should have been limited to 2 months.
- [41] I do not deal with the consequences of the reinstatement order from the date of the arbitration award to the date of this judgment as it is not before this Court. The parties will need to deal with the ability of the Third Respondent to tender his services during this period and the consequences of any inability to do so.
- [42] On the question of costs, both parties have been partially successful. The reinstatement order is upheld but the period of retrospective reinstatement falls to be set aside. On this basis, I do not intend to award costs and both parties will bear their own costs.
- [43] In the circumstances the following order is made:

Order

1. The decision of the Commissioner that the dismissal of the Third Respondent was substantively unfair is upheld.
2. The decision of the Commissioner to reinstate the Third Respondent retrospective to 1 November 2013 and to award the Third Respondent back pay for 12 months is set aside.
3. The Third Respondent's award is replaced with the following:

"The Third Respondent is to be reinstated with effect from the date of the Arbitration Award, being 14 October 2014. Third Respondent is entitled to be reinstated from 14 August 2014. For the avoidance of doubt, the employer shall pay the employee back pay equivalent to 2 months' wages (R11,294.69 x 2 = R22,589.38) on or before 30 April 2019.
4. There is no order as to costs.

G. Damant
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv. Paul Kirstein

Instructed by: Weavind & Weavind Inc. (Sean van der Merwe)

For the respondent: Ms FC Sithole

Instructed by: Nesu Maroveke