THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2468/16

In the matter between:

GERSHON MOSIANE **Applicant**

and

CCMA **First Respondent**

COMMISSIONER T MOLOTSI N. O **Second Respondent**

THE HEALTH PROFESSIONS COUNCIL OF

SOUTH AFRICA **Third Respondent**

Heard: **21 June 2019**

Delivered: **27 June 2019**

Summary: Opposed review on relief granted – exceptions in section 193 of the LRA – if non-existent – denial of a primary relief amounts to an error of law – reviewable basically on the principle of legality. Evidence must be led to demonstrate existence of the exception – unless *res ipsa loquitur* principle applies. Held: (1) The award is reviewed and set aside and replaced with an order re-instating the applicant; (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This review application was enrolled without other matters on the roll for reasons that it comprised of about eight lever arch files. It is apparent that the Registrar formed a view that given the size of the papers filed, the matter is complicated and deserves its' own space on the court roll. Moreso, it was the only matter on my roll for the week commencing 18 June 2019. Unfortunately, it turned out that the matter turns only on the issue of the relief granted by the commissioner.

[2] This of course presents a difficulty. If this was known to the Registrar, she would not have given this matter the kind of special attention it received much to the chagrin of other deserving matters festering at the Registrar's office. This Court, particularly the Johannesburg Court, is beset with an ever-growing backlog of motion matters. I venture to suggest that where the record is huge, like in this present matter, parties should include a note addressed to the Registrar in particular, to the effect that despite the size of the record, a matter turns on a limited aspect and does not deserve a space of its own. Practice notes are addressed to a judge hearing the matter and often times, parties file these notes a day or two before the allocated hearing date. If parties are consistent with this suggested practice, the efficiency of this Court would be enhanced and the backlog would sooner rather than later dissipate. Nonetheless, the application is before me and it is opposed by the third respondent.

Background facts

[3] Given the fulcrum of this review, it is not necessary to punctiliously traverse the facts of this matter. It is sufficient to mention that this matter has a sorry history. This is its' second sojourn in this Court. The dismissal under attack by the applicant happened on 1 June 2010. In November 2012, my brother Cele J entertained the matter and remitted it back to the Commission for Conciliation, Mediation and Arbitration (CCMA) to be heard *de novo.* This was after Commissioner Koekemoer had issued an award declaring the dismissal to be unfair on 19 October 2012.

[4] From November 2015 up to and including 9 September 2016, the arbitration *de novo* as ordered by Cele J took place. On 6 October 2016, the impugned award was issued by Commissioner Molotsi. This review was launched on or about December 2016. The application was only heard two and half years later. The picture painted above, over and above the fact that it is a deplorable one, is incongruent with the provisions of section 1 (d)(iv)[1] of the Labour Relations Act[2] (LRA).

[5] The applicant was employed as a legal advisor – *pro forma* prosecutor effective 1 May 2004. During 2008, the applicant plied his duties in a disciplinary matter involving one Dr Luke Gordon (Gordon). It was in the course of the plying of his duties, that it was alleged that he received an amount of R60 000 in the form of a bribe from Gordon. As a sequel, the applicant was arrested on 9 April 2008 and released on bail on 10 April 2008. Shortly thereafter, the applicant was placed on suspension. He was ultimately charged with allegations of misconduct. Following a disciplinary hearing, which commenced on 15 September 2008, the applicant was found guilty as charged and dismissed on 1 June 2010. Aggrieved by his dismissal, the applicant referred a dispute alleging unfair dismissal around 15 June 2010 to the CCMA. As pointed out above, he was successful before the first commissioner. Unfortunately for him the victory was short-lived when Cele J reviewed the favourable award.

[6] In addition to his dismissal, the applicant faced criminal charges. He was found not guilty and discharged. At the second arbitration, a finding was made by the second respondent that the dismissal was substantively and procedurally unfair. The applicant was denied the primary remedy and was awarded compensation of ten months' salary. Aggrieved thereby, the applicant launched the present application.

Grounds of Review

[1] To promote the effective resolution of labour disputes.
[2] Act 66 of 1995, as amended.

[7] As depicted above, the challenge is mounted on the relief granted by the second respondent. The applicant alleges that the second respondent committed a reviewable irregularity by not awarding him the primary remedy. In denying him the primary remedy, the second respondent failed to apply his mind, in that he took into account irrelevant considerations. He, the second respondent, misinterpreted section 193 (2) (b) of the LRA. Failure to award arbitration costs was also challenged.

Evaluation

[8] I must state upfront that in this review, in my view, the applicable test is one of correctness as opposed to one of reasonableness. In denying the applicant the primary remedy, the second respondent purportedly drew sustenance from the provisions of section 193 (2)(b) of the LRA. Therefore, if his interpretation of the enabling section is wrong, then he committed a material error of law which affects the outcome. Differently put, on proper interpretation of the enabling section the second respondent was not empowered to deny the applicant the primary remedy. Before I deal with the merits of this matter, I shall first deal with the preliminary points raised by the parties.

Defective answering affidavit.

[9] The applicant submits that the answering affidavit by Khanyiso Dube should be disregarded due to the manifest defect in it. The defects being (a) that the deponent does not set out his or her gender; (b) that the deponent does not state that he is authorised to depose to the affidavit, thus lacks the required *locus standi* to depose to the affidavit; (c) that he does not state that the facts fell within his personal knowledge and (d) that the Commissioner of Oaths failed to specify or print his full names and designation.

[10] Defects (a), (c) and (d) are technical in nature. The Labour Court is a Court of equity and as such, there is no room for technical arguments in this Court. I then shall, without hesitation, dismiss these objections. In relation to (d), a deponent does not require authority to testify. Therefore,

on the strength of the judgment of *Ganes and Another v Telecom Namibia Ltd*[3], this point must suffer the same fate. Accordingly, the preliminary point is not upheld.

[11] I hasten to say, in review proceedings what matters is the record of the evidence placed before a commissioner. Therefore, even if I upheld the objection, it shall not axiomatically follow that a review must be granted simply on the basis that it stands "technically" unopposed.

The relief sought in the amended notice of motion.

[12] This point was raised by the third respondent in its heads of argument. Although not pressed with any vigour during oral argument by Mr Tsatsawane SC, appearing for the third respondent, it was not mentioned by him that the point has since been abandoned. The point is simply that since the applicant did not in his amended notice of motion seek reinstatement, he is not entitled to it even if the award is reviewed, corrected and set aside. Yet again, this is a technical objection.

[13] However, it is sufficient to mention that section 145(4) appropriates discretionary powers on the Labour Court to determine the dispute in the manner it considers appropriate. If it is appropriate to order reinstatement, this Court is adequately sceptered to order it irrespective of what the notice of motion states. What ignites this discretionary power is the setting aside of the arbitration award. Accordingly, this point is equally not upheld.

The Merits

[14] The only relevant question at this juncture is whether the provisions of section 193 (2) (b) arose?

[15] Section 193 (2) (b) states: -

> "(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

[3] [2004] 2 All SA 609 (SCA) –The deponent to an affidavit in motion proceedings need not be authorised to depose to the affidavit (at para 19).

(b) The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable."

[16] Recently, the Constitutional Court in *SACCAWU and others v Woolworths (Pty) Ltd*[4], reaffirmed the position thus: -

"[46] Reinstatement must be ordered when a dismissal is found to be substantively unfair unless one of the exceptions set out in s 193(2) applies…

[47] As affirmed by this court previously, the fact that a significant period might have lapsed from the date of dismissal to the date of the judgment is not a bar to reinstatement. An employee whose dismissal is substantively unfair should not be disadvantaged by the delays of litigation where she or he has not unduly delayed in pursuing the litigation."[5]

[17] The second respondent sought to invoke the provisions of subsection (2) (b). He concluded in his award thus: -

"[96] My finding is that reinstatement would be intolerable under the circumstances of this case. The applicant was dismissed almost six years ago. There has been protracted litigation between the parties both at the CCMA and the Labour Court. Mr Boikanyo who is currently the chief operations officer of the Respondent gave evidence which implicate the Applicant in the possession of money, shows that if the Applicant return back to work things might not be good between the Applicant and Boikanyo. Furthermore, the Applicant is currently running his own practice as an immigration consultant. Some of the evidence of the Applicant about the money at Mugg 'n Bean is questionable. The Applicant was referred to page 701 Volume 2 where it was stated that the Applicant will testify that the money was a gift for advice given. The Applicant answer to the above is said that in hindsight after all evidence that they had in preparation of trial they learned it was money. This was an unacceptable answer by the Applicant and his version here was improbable. Furthermore,

[4] (2019) 40 ILJ 87 (CC).
[5] Own underlining and emphasis.

> the Applicant's evidence was that when he was arrested he was in possession of a motivational book but cannot remember the author's name. This is very suspicious…."

[18] In court, Mr Tsatsawane correctly conceded that the fact that Boikanyo was the current COO was an error of fact, thus this fact would not account for the denial of the primary remedy.

What is the meaning of the exception in section 193(2) (b)?

[19] The section makes reference to the circumstances surrounding the dismissal, so, it is those circumstances that should make continuation of employment relationship intolerable. To my mind, such would mean circumstances confined to the dismissal itself. Therefore, in my view anything not connected to the dismissal should not be a factor. This Court in the matter of *New Clicks SA (Pty) Ltd v CCMA and others*[6], had an occasion to say the following: -

> "[8] As a point of departure the section recognises that reinstatement is a primary remedy…
>
> [9] In Mr Watt-Pringle's submission, fact that the applicant's witnesses testified that the dismissed employees were not to be trusted is such circumstances contemplated in section 193 (2) (b) which would render continued employment intolerable. That being the case, so the argument went, then the second respondent was precluded by operation of law to reinstate.
>
> [10] I do not agree…So if section 193 (2) (b) were to be interpreted to mean that because at one point, the employer has had a strong suspicion that an employee is guilty of misconduct then such renders continued employment intolerable, then the primary remedy will never be afforded to an employee dismissed for misconduct.
>
> [11] In my view, the section must be interpreted <u>to mean that evidence need to be led to substantiate the fact that continued</u>

[6] (JR 1333/05) [2008] ZALCJHB 14 (27 February 2008).

employment would be intolerable. Such may include but not limited to evidence of a fall out between the dismissed employee which is caused by a factor independent of the allegations of misconduct or closely connected to the misconduct alleged.

[12] This must be so, in that once a commissioner finds that the misconduct alleged has not been proven, then the cause of intolerability would be naturally removed. However, if an employer leads evidence to suggest that despite the finding of misconduct there exists circumstances and not allegations that would render continued employment intolerable.

[13] Again care must be exercised by employers to leave it for the commissioner as it is argued in this matter to phantom that the continued relationship would be rendered intolerable. It is the duty of an employer to present evidence that will suggest that the continued employment would be intolerable.

[15] …Of course given the fact that reinstatement is a primary remedy, the commissioners should sparingly and after careful consideration of all circumstances invoke the provisions of section 193 (2) (b) of the LRA, to deny the remedy.

[17] All in all, I am saying for section 193 (2) (b) to defeat the primary remedy, there must be convincing reasons for such…

[19] On the contrary, a decision to refuse the primary remedy is reviewable if no cogent reason supported by evidence is given for it. Such in my view would be an unreasonable award.

[21] I must add, to deny individual employees job security albeit with capped compensation, offends the very basic principle upon which the right to fair labour practice is founded…

[20] Shortly after the *New Clicks* judgment supra, the Labour Appeal Court (LAC) in *Maepe v CCMA and Another*[7], per Zondo JP (as he then was) said the following about the subsection:-

[7] [2008] 8 BLLR 723 (LAC).

> "[14] …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, particularly where it was one of the factors that were taken into account in making the decision to dismiss. However, it does not appear to me that the same can be said of a situation where giving false evidence only occurs in the arbitration or at the trial subsequent to the dismissal."

[21] I therefore understand the learned Justice President (as he then was) to be saying that a factor that crops up after the dismissal is not and cannot be a factor to render continued employment intolerable. The *Maepe* judgment was followed in a number of decisions thereafter. However recently, the LAC in *Afgen (Pty) Ltd v Ziqubu*[8] without expressly stating that *Maepe* was wrongly decided said the following:-

> "[26] The other relevant matter is that of *Glencore Holdings (Pty) Ltd and another v Gagi Joseph Sibeko and others* (Glencore) where the Court properly accepted that an employee's behaviour can be taken into account to determine if reinstatement or re-employment must be awarded, more particularly where an employee behaved offensively against the employer. Whether the bad behaviour was pre- or post-dismissal is irrelevant. This Court in Glencore stated that an employee's behaviour no matter how abominable, cannot automatically deny him/her an award of reinstatement or re-employment. Consideration should be given to the degree of relationship contact between the employee and his superior. The lack of "functional role" performed by the employee in Glencore including the lack of "functional rapport with superiors" meant that they could be no real obstacle in the continued employment of the employee by Glencore notwithstanding the employee's abominable behaviour"

[22] It is apparent to me that the LAC in *Afgen* did not approve of the statement by Zondo JP that post dismissal factor is not relevant. However, as I pointed out earlier, the LAC did not expressly overrule *Maepe* on that point. It could be said that by implication there was an

[8] Case JA34/18 delivered on 13 June 2019

overruling. However, in my understanding, the LAC in *Afgen* found that the timing is not a particularly relevant factor. The safer option would be to consider that what was said in *Maepe* is still binding on me. With time, the LAC shall express itself clearly on this aspect. Either way, it seems to be settled that an employer bears the onus to demonstrate that reinstatement would be intolerable. The Constitutional Court in *SACCAWU*, *albeit* dealing with section 193 (2) (c) stated the following: -

> "[50] An employer must lead evidence as to why reinstatement is not reasonably practicable and the onus is on the employer to demonstrate to the court that reinstatement is not reasonably practicable…"

[23] The LAC in *Potgieter v Tubatse Ferrochrome*[9] took a view that it must be borne in mind that the commissioner had exonerated the employee of all the charges and where the objective facts do not support a finding of non-reinstatement, such a finding cannot be upheld. Therefore, I take a view that a commissioner, like the one in this matter, is not empowered to willy-nilly choose which evidence he or she believes would make continued employment intolerable. It remains the call of the employer to identify, by way of evidence, which factors would make continued employment intolerable.

[24] In considering the factors taken into account by the second respondent, I come to the conclusion that the fact that the dismissal happened six years ago, cannot be a factor to bar reinstatement. The Constitutional Court has spoken on this aspect. The second factor relating to the evidence of Boikanyo, Mr Tsatsawane correctly jettisoned his support of this factor. Thus, it cannot serve as a bar to the reinstatement relief. The third factor that the applicant was running an immigration practice is not a factor to bar reinstatement. There was no evidence from the respondent that this factor would render continuation of employment intolerable. At the very best, if the applicant was running a thriving immigration practice, he could himself have testified that he does not wish to be reinstated.

[9] (2014) 35 ILJ 2419 (LAC).

The fourth factor, which is effectively a contradiction in terms cannot serve as a bar. On the one hand, the second respondent made the following decisive finding: -

> "[89] Even if I am wrong in respect of the above finding, the dismissal of the Applicant would still be substantively unfair in that the Respondent failed to prove that the Applicant received money from Dr Gordon…"

[25] To then on the other hand make reference to the money issue and raise questions and/or suspicions is inappropriate in my view. All the submissions made by Mr Tsatsawane seem to point to the finding that the third respondent failed to prove that the applicant received money from Gordon is inconsistent with the evidence placed before the second respondent. I agree with the submission, the second respondent himself suggested that some evidence is questionable and/or suspicious. The difficulty I have though is that there is no cross-review before me. These aspects go to the question whether on the balance of probabilities, the applicant did receive money, thus guilty as charged. They are not relevant to the question of a relief. In *New Clicks* this Court stated the following: -

> "[20] Such similar argument was rejected by this court in *Amalgamated Pharmaceuticals supra*. At para 13 of the judgment the following was said:
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> "The mere fact that the applicant does not trust the individual respondents cannot without more be a basis for holding that employment relationship has broken down…To punish the individual respondents with unemployment, even if this is accompanied with some compensation, without finding them guilty of any wrongdoing is grossly unfair.""

[26] Having considered all the factors considered by the second applicant, I must then consider whether the second respondent nonetheless acted lawfully by denying reinstatement. In other words, his application of section 193 (2) (b) was justified regard being had to the proper meaning

of the section. In my view, the second respondent wrongly interpreted the purpose and the import of the subsection[10]. Secondly, he took into account irrelevant factors, which conduct amounts to a material error of law that vitiates his award. Simply put, the award was wrong in this regard. There were no cogent reasons to deny the applicant the primary remedy. The LAC in *Potgieter*[11] made it clear that intolerability generally addresses trust relationship issues between the employer and the employee.

[27] It is rather surprising to me why the third respondent did not file a counter-review, especially in circumstances where it submitted that the applicant on his own version probably received the money.

[28] Accordingly, the award of the second respondent in denying the applicant reinstatement is reviewable in law. In a number of decisions, this Court and the LAC found that where reinstatement as a competent relief was ordered by a commissioner, such order fell within the bounds of reasonableness.

What then?

[29] Mr Tsatsawane submitted that it would be fair and equitable to direct the third respondent to pay to the applicant maximum compensation in order to bring an end to the dispute. In fact, at the conclusion of argument, the Court was favoured with a "with prejudice" offer to pay the applicant an amount equivalent to R 1 269 536 – 42. This offer was not accepted by the applicant.

[30] One must not lose sight of the fact that this court, at this stage, is sitting as a court of review. Section 193 (1) permits this Court sitting as a Court of first instance to, within its discretion, order the employer to pay

[10] In *Boxer Superstores (Pty) Ltd v Zuma and others* (2008) 29 ILJ 2680 (LAC) the court stated that: "*In a case, as in the present dispute, where it is found that an employer has not discharged the onus of proving that the dismissal was fair, the competent remedy is that of reinstatement. Reinstatement is in effect, the default position…*
[11] Ibid.

compensation, if it makes a finding that a dismissal is unfair[12]. The second respondent made a finding that the dismissal of the applicant was both substantively and procedurally unfair. He chose to award compensation as opposed to the primary remedy. This remedy was not competent since the default position is that of reinstatement. The applicant is aggrieved by this choice of remedy.

[31] It being a review, section 145 (4) of the LRA decrees that if the award is set aside, the Labour Court may determine the dispute in the manner it considers appropriate. Once the Labour Court exercises a discretion to determine the matter, appropriateness is what guides it. In my view, appropriate in this instance should mean to do what is lawful. What is lawful is for the arbitrator to have required the third respondent to reinstate. Having not done what is appropriate, this court must do it in his stead[13].

[32] Unlike in a matter where some evidence is required to reach a conclusion on the appropriateness of a remedy, in a matter where a decision maker has failed to apply the law-ordering a competent default order of reinstatement, the Court of review is empowered to simply apply the law[14]. In this instance, the application of the law entails that the third respondent must be required to reinstate the applicant. A finding has been made, and such a finding has not been challenged, i.e. that the dismissal of the applicant was unfair on both legs. Such finding calls without more for the affording of a competent remedy unless the exceptions are shown to exist. It is my finding in *casu* that the exceptions

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[12] In *Draken Industries CC v Commissioner Maande and others* [2014] ZALAC 42 at para 22 "*In Billiton Aluminium SA Ltd t/a Hillside v Khanyile (2010) 31 ILJ 273 (CC) at para 27 the Court held that these remarks in the Equity Aviation case "relate to the inquiry at the first level of engagement namely when the matter first comes before a court or commissioner. A commissioner or court, at that level, must act in accordance with the provision of section 193(1) and (2) in the manner explained in Equity Aviation."*

[13] This being the approach taken by the LAC in the *Potgieter* matter. There the LAC upheld the appeal and replaced the award of the commissioner with an order reinstating an employee into his position and to be paid a salary he would have received had he not been unfairly dismissed. It is instructive to note that Potgieter was dismissed around 2006 and the order of retrospective reinstatement was made in 2014 – almost 8 years later.

[14] The Court in Equity Aviation had the following to say: *"The LRA's objectives to resolve unfair dismissal disputes expeditiously will be frustrated if remittal is granted especially where no exceptional for that relief are shown to exist."*

are not shown to exist, therefore the default position must obtain. The situation that obtained in *Afgen*[15] does not obtain on the facts of this case. In other words, this case is distinguishable from *Afgen* on the facts. Had the arbitrator ordered reinstatement, he would have been in the position to fix a date from which the reinstatement was to take effect. That involves an exercise of discretion. The only limitation in the exercise of the discretion is that the date cannot be fixed at a date earlier than the date of the dismissal.

[33] Therefore, in my view, this court is in as good a position as the arbitrator was. Ordinarily, a commissioner who orders reinstatement would be doing so from the date of the award, unless he or she orders retrospectivity – the date not earlier than the date of dismissal. In this matter, if this Court exercises its discretion to order reinstatement from the date of dismissal – 1 June 2010, such would mean that the third respondent would be saddled with backpay in the region of nine years' salary. Although it was done in *Potgieter,* this shall not be appropriate in my view. Since I am a Court of review, I must postulate what should have happened in order to conform to the law. At best, had the second respondent afforded the applicant reinstatement as he should have, he should have reinstated him effective from the date of the award.

[34] Since I exercise a discretion to determine this dispute as opposed to remitting it back to the CCMA, I must do what the second respondent should have done when making his award on 6 October 2016.

[35] For expediency and effective resolution of disputes as enjoined by the LRA, this Court places itself in the shoes of the second respondent as at the time of making the award. It is appropriate to order reinstatement from the date of the award[16]. *Equity Aviation*[17] judgment decreed that the fact that the dismissed employee has been without income during the period since his or her dismissal is a factor to be taken into consideration

[15] See para 27-29 of the judgment.
[16]This approach was taken by the LAC in *Equity Aviation* and was endorsed by the Constitutional Court as being correct. (para 50 of Nkabinde J judgment).
[17] *Equity Aviation Services (Pty) Ltd v CCMA and others* (2008) 29 ILJ 2507 (CC).

when exercising discretion on fixing the date of reinstatement. Ever since being decided, *Equity Aviation* has been like an *alter ego* of any judgment considering reinstatement in the context of the LRA. It has never been departed from for the past 11 years now.

[36] Although there is no evidence as to the employment status of the applicant currently, there was evidence before the second respondent that the applicant did ply a trade as an immigration practitioner. It must follow axiomatically that he did earn some income in the plying of his trade as an immigration practitioner. In fact, Mr Meiring, appearing for the applicant during argument retorted thus: "*Had he not practiced as an immigration officer whilst still dismissed how he would have survived?"* This factor was considered by the second respondent in denying reinstatement. Correctly categorized, it is in fact a factor relevant to retrospectivity of reinstatement as opposed to denial of reinstatement. The applicant sought job security and the order I am about to make would satisfy the applicant's job security. The core value of the LRA is security of employment.

[37] With regard to the refusal to award arbitration costs, when it comes to costs, a commissioner has a wide discretion. A court of review is loath to interfere with exercise of discretion unless it is shown, which is not shown here, that the discretion was exercised with some *mala fides* or in a capricious manner. Therefore, this court shall not interfere with this part of the commissioner's award.

[38] In the results, I make the following order:

Order

1. The award issued by the second respondent on 10 October 2016 under case number GATW7089-10 is hereby reviewed and set aside only to the extent of denying the applicant the remedy of reinstatement.

2. It is replaced with an order that the applicant is reinstated with effect from the date of the arbitration award.

3. There is no order as to costs.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate C Meiring

Instructed by: Geldenhuys CJ @ Law Inc, Pretoria.

For the third Respondent: Advocate K Tsatsawane SC

Instructed by: Gildenhuys Malatji, Pretoria.