THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG,

Not Reportable

Case No: JR1806/18

In the matter between:

SINENHLANHLA PRECIOUS MTHETWA **Applicant**

And

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER NATASHA MONI **Second Respondent**

MOTOR INDUSTRY BARGAINING COUNCIL **Third Respondent**

Heard: **12 July 2019**

Date Delivered: **14 November 2019**

Summary: Review application in terms of section 145 of the LRA – factors an arbitrator takes into consideration in respect of section 193(2)(a) – (d) when deciding to reinstate an employee.

JUDGMENT

YEATES AJ

Introduction.

[1] This is an application brought in terms of section 145 of the Labour Relations Act 66 of 1995, as amended ("**LRA**") to review and set aside the arbitration award made by the Second Respondent on 27 August 2018 acting under the auspices of the Third Respondent under case reference number GAJB15966/17 ("**Arbitration Award**").

[2] The application for review is opposed by the Third Respondent, however, there was no appearance on behalf of the Third Respondent on the day of hearing the matter.

[3] The crux of the Applicant's review application lies in the application of sections 193(1) and 193(2) of the LRA. The Applicant contends that the Second Respondent misconducted herself when she deviated from the primary remedy of reinstatement which the Applicant sought and that none of the situations as contemplated in section 193(2)(a) – (d) of the LRA existed.

Background

[4] The Applicant commenced with her employment with the Third Respondent on 24 March 2014 as a Client Service Representative, until her dismissal on 26 July 2017, when she held the position as a Returns Processor.

[5] On 5 July 2017, an altercation occurred at the workplace between the Applicant and one Martina Malebana ("**Malebana**") in the manager's kitchen. Although the Applicant reported the incident, there was another altercation when the Applicant returned to the kitchen.

[6] The Applicant was given permission to go home by the Third Respondent's course co-director, however, shortly before leaving, the Applicant lodged a complaint against Malebana for threatening her with a knife. On the same day, the Applicant was also involved in another altercation with another employee, Zandile Kwabe ("**Kwabe**") where the Applicant believed that Kwabe was trying to 'steal her man'.

[7] All three employees, the Applicant, Malebana and Kwabe were charged with acts of misconduct.

[8] Insofar as it may be relevant, the charges levelled against the Applicant were the following:

> *1. **Assault**: Unlawfully and intentionally applying force to the person of another employee or initiating any fighting during working hours or while on the Council's premises or business i.e. One party deliberately attacks another, with the intent to commit grievous bodily harm.*
>
> *A. Assault in that on Wednesday, 5 July 2017, during working hours, you held Martina by the clothes in her working area and continuously poked her on the face saying she must hit you.*
>
> *B. Assault in that on Wednesday, 5 July 2017, during working hours, you went to Zandile's working area and threw an open can of coldl drink on her. This spilt on her clothes and the throwing of the can could have caused her bodily harm or any other employee nearby.*
>
> *2. **Intimidation and Harassment**: Any injure [SIC] or cause damage to any employee, with the intention to compel or (continuously) induce/s such employee to react to such inducement.*
>
> *A. In that during working hours, on the same date as above, you intentionally used provoking language that is meant to induce and belittle Martina.*
>
> *B. In that during working hours, on the same date as above, you intentionally used provoking language that is meant to induce and belittle Zandile.*
>
> *3**. Bringing the company name into disrepute**: Improper behaviour with the effect of potentially damaging the name/ interests of the company.*

> *4. **Unauthorized absence**: Unauthorized absence or absence without advancing a valid reason, from work for less than three consecutive days or leave work post before scheduled end of day or report late back to work post after lunch or absence from work post without prior authorisation from supervisor or a manager i.e. absenteeism without authorisation 0 – 2 days.'*

[9] On 20 July 2017, and during her disciplinary hearing, the Applicant pleaded guilty to all the charges which were levelled against her. Her disciplinary hearing was chaired by Mapalo Tsatsimpe ("**Tsatsimpe**").

[10] At this juncture it is necessary to set out the particulars of a previous incident which occurred in 2015, also involving the Applicant.

[11] In June 2015, the Applicant was almost dismissed for acts of misconduct, where she was found guilty of having made degrading insults towards her superior. Tsatsimpe also chaired the Applicant's disciplinary hearing in this instance and imposed a sanction of dismissal. The Third Respondent's General Secretary at the time, Mr Tom Mkhwanazi ("**Mkhwanazi**") however, intervened and overturned the Applicant's sanction of dismissal after taking into consideration the Applicant's mitigating factors which detailed unfortunate events of an abusive upbringing.

[12] The Applicant was, instead of being dismissed, offered a 'conditional reprieve' from dismissal. She was, in addition to being placed on a final written warning, demoted to a back-office position and was required to seek assistance with her personal anger management issues. The Applicant was also informed that should she repeat her behaviour, then the sanction of dismissal would be applicable with immediate effect.

[13] It is also apposite to mention that the Third Respondent had arranged and paid for the Applicant to receive professional assistance with her anger management. This intervention, however, did not seem to quell the Applicant's anger issues.

[14] On 24 July 2017, following the altercation and after the Applicant's disciplinary hearing, the chairperson handed down her findings and the Applicant was summarily dismissed on 26 July 2017.

[15] Malebana and Kwabe were issued with final written warnings.

Arbitration

[16] On 28 July 2017, the Applicant referred an unfair dismissal dispute to the First Respondent.

[17] The arbitration proceedings took place on 13 March, 8, 22 and 29 May, 18 June and 7 August 2018.

[18] Importantly, in the party's pre-arbitration minutes, the Applicant indicated that if it is found that her dismissal was unfair, she merely required compensation. However, at the commencement of the proceedings, she amended the relief she sought to retrospective reinstatement.

[19] During the arbitration proceedings, extensive evidence was led by both parties.

[20] In her evaluation of the evidence, the Second Respondent makes a credibility finding against Malebana and held that large portions of the Applicant's testimony were not contested by the Third Respondent's witnesses.

[21] The Second Respondent further held that the Applicant's unfortunate upbringing, contributed to her being easily provoked by Malebana, when she threatened to hit the Applicant, and when Kwabe threatened her support network. The Second Respondent further held that due to the provocation, the Applicant's capacity to act was diminished and that the rules which she broke were consequently diminished as well. Accordingly, the Second Respondent held that the Applicant was guilty of a lesser charge of 'disgraceful conduct towards a fellow employee' which warranted a sanction of a final written warning, as opposed to Assault, Intimidation and Harassment, which warranted a dismissal.

[22] The Second Respondent further took issue with the fact that Malebana and Kwabe were merely given final written warnings as part of a 'plea bargain', albeit for similar acts of misconduct, whereas the Applicant was subjected to a disciplinary hearing and dismissed. The Third Respondent's disciplinary code does not make provision for a 'plea bargain' mechanism and the Applicant was not afforded this opportunity to plea for mercy.

[23] On the issue of procedural fairness, the Second Respondent further held that the Third Respondent's disciplinary code[1] specifically provided the Applicant should have been afforded an opportunity to state her case and to defend herself both in terms of the allegations, but also in the determination of the charges. The Applicant was also not afforded this opportunity.

[24] The Applicant's dismissal was therefore found to be both substantively and procedurally unfair.

Arbitration Award

[25] In arriving at her award, the Second Respondent relied on the on the principles established in the Constitutional Court matter of *Hoffman v SA Airways*[2] which states –

> *The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source."*

[1] Paragraph 5.4.5.4
[2] 2000 (11) BCLR 1211 (CC) at paragraph 12

[26] The Second Respondent awarded the Applicant the maximum compensation permissible in terms of section 194(1) of the LRA but does not order the retrospective reinstate of the Applicant.

[27] In justification for not ordering the Applicant's reinstatement, the Second Respondent states the following in her Arbitration Award[3]:

> *"The respondent failed to address the relationship of trust and whether it was tethered or broken. In my observation of the various role players in this matter, I think that the applicant's tenure would be unsafe and insecure should she be retrospectively reinstated."*

Review application

[28] On 7 September 2018, the Applicant launched her review application.

[29] On 16 October 2018, the Third Respondent served and filed its Notice to Oppose and the Applicant subsequently served and filed her Notice in terms of Rule 7A8(b) and the record of the proceedings on 22 October 2018.

[30] The Third Respondent filed its Answering Affidavit on 5 November 2018.

Ground for review

[31] In terms of the Applicant's founding papers, the Applicant's only ground of review is the issue of her non-reinstatement.

[32] The Applicant contends that none of the situations contemplated in section 193(2)(a) – (d) existed, and that the Second Respondent misconducted herself when she deviated from the primary remedy which the Applicant sought, being retrospective reinstatement.

[33] The Third Respondent opposes the review application on the basis the Second Respondent observed "*that the Applicant's tenure would be unsafe and insecure should she be retrospectively reinstated.*[4]*"* and that the Second Respondent could not order the Applicant's reinstatement where "*the*

[3] Paragraph 63 of the Arbitration Award
[4] Third Respondent's Answering Affidavit paragraph 11

circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable."[5]

[34] The exact basis of the Second Respondent's contention that the Applicant's tenure would be unsafe and insecure should she be retrospectively reinstated is not explained, and despite the Third Respondent's reliance thereon, the Third Respondent also does not offer any elaboration in this respect.

Evaluation

[35] Section 193(1) and (2) of the LRA reads:

> *"**Remedies for unfair dismissal and unfair labour practice.** – (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;*
>
> *(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 the employer to pay compensation to the employee.*
>
> *(2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless—*
>
> *(a) the employee does not wish to be re-instated 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.*

[5] Third Respondent's Answering Affidavit paragraph 12

[36] In the matter of *South African Municipal Workers' Union and Another v Ethekwini Municipality and Others*[6] the LAC held the following at paragraphs [16] – [18]:

> *"[16] The use of the peremptory "must" in section 193(2) requires that reinstatement, or re-employment, must follow upon a finding of unfair dismissal, as the primary remedies under the LRA,6 unless it is not sought by the employee, or where either, or both, of the "non-reinstatable conditions", referred to section 193(2)(b) and section 193(2)(c), exist, making an order of reinstatement, or reemployment, inappropriate.7*
>
> *[17] There is no onus on the employer to prove the existence of these "non-reinstatable conditions". The approach is one of fairness to both employer and employee even when ". . . no specific evidence was canvassed or submissions made during the trial on the issue of the non-reinstatable conditions".[7] The court or Arbitrator is "obliged to take into account any factor which in the opinion of the court or the Arbitrator is relevant". The determination involves the exercise of a discretion, which is "in part a value judgment and, in part, a factual finding".[8] If none of the non-reinstatable conditions exists, the Arbitrator has a discretion only as to the extent to which reinstatement should be made retrospective.[9]*
>
> *In Xstrata, it was held that the term "not reasonably practicable" in section 193(2)(c) of the LRA, did not equate with "practical", but with the concept of feasibility:*
>
> > *"Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile".*

[37] In the absence of the Second Respondent further elaborating on the factors she considered for not granting the Applicant reinstatement, this Court is left

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[6] [2019] 1 BLLR 46 (LAC).
[7] *Mediterranean Textile Mills (Pty) Ltd v SACTWU and Others* [2012] 2 BLLR 142 (LAC) at para [30].
[8] *DHL Supply Chain (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and others* [2014] 9 BLLR 860 (LAC); (2014) 35 ILJ 2379 (LAC) at para [21]; *Equity Aviation Services Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 29 ILJ 2507; [2008] 12 BLLR 1129 (CC) at paras [36] and [48].
[9] *Mediterranean Textile Mills (Pty) Ltd v SACTWU and Others*, supra, at para [8].

in the unenviable position to guess what the Second Respondent may have meant where she states in the Arbitration Award -

> *" In my observation of the various role players in this matter, I think that the applicant's tenure would be unsafe and insecure should she be retrospectively reinstated."*

[38] There is little indication whether the possibilities of the situation make reinstatement inappropriate or may be potentially futile.

[39] The Third Respondent's answering papers takes the matter no further.

[40] The LAC judgement in the *South African Municipal Workers' Union* matter thankfully provides some additional guidance at paragraphs [21] and [22]:

> *"[21] Having found the dismissal substantively unfair for reason of inconsistency, the Arbitrator was to consider whether the peremptory reinstatement should not be awarded in light of the particular circumstances of the matter. This required the Arbitrator to have regard to section 193(1) and (2), and in doing so, also take into account all the relevant circumstances before him. These included, that the employee sought reinstatement as the primary statutory remedy available to him in his unfair dismissal dispute; the employee's long service and previously clean disciplinary record; the short period left before his retirement; the nature and extent of the misconduct; whether the principle of progressive discipline could reasonably be applied; the fact that the dismissal had been found to have been substantively unfair due to inconsistency; the operational and other circumstances of the employer; the extent to which the evidence supported a conclusion that the trust relationship have been severed.*
>
> *[22] The finding that it was not reasonably practicable to reinstate the employee was based on two reasons: that other employees, including union members, had complied with the employer's instruction; and that the employee had not used the machinery available to him to lodge a grievance. It is not apparent that the Arbitrator had regard to all relevant factors in arriving at the conclusion that the non-reinstatable conditions were extant. The Arbitrator relied on unduly narrow considerations, while disregarding, or placing insufficient emphasis on, the other relevant considerations which had*

been placed before him. In the result, without a careful and thorough consideration of these other relevant considerations in the exercise of his discretion, the Arbitrator arrived at a decision which fell outside of the ambit of reasonableness required. It followed for these reasons that the decision of the Arbitrator fell to be set aside on review."

[41] Taking into consideration the factors enunciated above, it emerges on the face of it that many of the factors appear in favour of the Applicant's reinstatement –

a. The Applicant sought reinstatement as the primary statutory remedy;

b. The nature and extent of the misconduct, when viewed in the context of the inconsistent treatment of the Applicant juxtaposed against the final written warnings of Malebana and Kwabe;

c. the fact that the dismissal had been found to have been substantively unfair due to inconsistency;

d. the lack of evidence supporting a conclusion that the trust relationship has been severed.

[42] The factors that weight against the Applicant's reinstatement for the following:

a. She was already on a final written warning; and

b. The measures already taken by the Third Respondent to assist the Applicant with her anger management, did not appear to have the desired effect. Therefore, the principle of progressive discipline had already been applied with little effectiveness to alter the Applicant's behaviour.

[43] I am however mindful of the fact that the Second Respondent is the person best placed to observe the party's interaction with each other. This is a feature which gives the Second Respondent an obvious advantage over this Court who is reliant on the record of proceedings and cannot determine for itself whether reinstatement may be potentially futile or not.

[44] As set out in the matter of *DHL Supply Chain (Pty) Ltd and others v National Bargaining Council for the Road Freight Industry and Others*[10] the Second Respondent was obliged to take into account any factor which in her opinion, is relevant, in addition to the factors set out in the South African Municipal Workers' Union matter.

[45] In the matter of *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[11] the Constitutional Court held:

> *"The LRA allows for any of the three remedies set out in section 193(1) to be granted to an unfairly dismissed employee. Reinstatement or re-employment remains the legislatively preferred remedies so as to restore the employee to the employment relationship. They safeguard the employee's security of employment. Either of the two remedies may be granted except in the specified circumstances set out in section 193(2) in which case compensation in terms of section 193(1)(c) may be ordered, the amount of which depends on the nature of the dismissal.*[12]

[46] *In Casu*, the Second Respondent expresses her concern that the Applicant's tenure would be both 'unsafe and insecure' if she were to be reinstated. The Third Respondent does not deny this. It is clear that an order for reinstatement would not necessarily have the desired effect of safeguarding the employee's security of employment, the reasons she observed. This, coupled with the fact that the Applicant was on a final written warning and that the measures already taken by the Third Respondent to assist the Applicant, leaves me with the sense that the Second Respondent's value judgement in this respect, is not far fetched or one which a reasonable decision-maker could not have arrived at.

[47] Accordingly, I make the following order.

Order

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[10] See *fn 8 supra*
[11] 2009 (2) BCLR 111 (CC)
[12] Republican Press above fn 20 at para 17.

1. The review application is dismissed.

2. There is no order as to costs.

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Yeates AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Sinenhlanhla Precious Mthetwa

FOR THE RESPONDENT: No Appearance