



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR1563/22

In the matter between:

ENGINEERING COUNCIL OF SOUTH AFRICA

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION**

First Respondent

COMMISSIONER THEMBA CEDA N.O.

Second Respondent

ZOLA KHOZA

Third Respondent

Heard: 18 March 2025

Delivered: 10 April 2025

JUDGMENT

KIRSTEIN, AJ

Introduction

[1] The applicant delivered a review application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award dated 22 July 2022 under case no: GAJB8333-21. In the arbitration award, the second respondent determined:

‘82. The dismissal of the Applicant, Zola Khoza, by the respondent, Engineering Council of South Africa, was substantively unfair.

83. The respondent is ordered to re-instate the applicant to the position of executive in the office of the CEO with retrospective effect to the date of his dismissal.

84. The respondent, Engineering Council of South Africa, is ordered to pay back the applicant, Zola Khoza, an amount of R1 217 816.25 (one million two hundred and seventeen thousand eight hundred and sixteen rand twenty five cents) which is equivalent to the applicant’s rate of R81 187.76 per month to cover for the 15 months period of unemployment.

85. The respondent is ordered to pay the applicant an amount of R1 217 816,25 not later than the 25 July 2022.’

[2] In a variation award dated 29 July 2022, the second respondent corrected the monthly remuneration of the third respondent and determined that the backpay to be paid to the third respondent by the applicant is an amount of R233,301.15. The third respondent opposed the review application and delivered a counter-review application seeking the correction of the arbitration award with a determination that the third respondent’s dismissal was also procedurally unfair. The applicant opposes the counter-review application of the third respondent.

Background

¹ Act 66 of 1995, as amended.

[3] The third respondent was employed by the applicant on 1 June 2015 initially as a Quality Manager and subsequently on 26 September 2016 as the Executive: Office of the CEO.

[4] The applicant is the Regulator of the Engineering Profession in South Africa with the core functions of the accreditation of engineering programs, registration of persons as professional in specific categories and the regulation of practice of professional.

[5] The position of the third respondent as Executive: Office of the CEO was created in an effort to foster greater collaboration between employees, members of the applicant, the Council and administration and provide leadership and direction to business support functions. The third respondent was, to some extent, involved in the development of the applicant's organisational strategy. The strategy was finalised and approved by the applicant's Council during November 2019, which *inter alia* entailed an organisational redesign to streamline the operations and structure its functions to ensure the organisation was fit for purpose.

[6] On 9 December 2020, the Council of the applicant resolved to approve the new organisational design, which resulted in the redundancy of the position of the third respondent as Executive: Office of the CEO.

[7] On 21 January 2021, the CEO of the applicant, M S Madonsela, instructed the third respondent to take over the reigns as Acting Executive: Regulatory Functions with effect from 1 February 2021, whilst the final phases of the restructuring process are concluded.

[8] On 25 January 2021, the third respondent raised concerns regarding the manner in which the direction was given but stated *inter alia* the following:

‘13. Having said all of the above, I reiterate that as an employee of the organisation I remain committed to serving the organisation to the best of my ability. Accordingly, I shall abide by the instruction to move to the role of Executive Manager: Regulatory Function. All my rights are reserved.’

[9] On 24 February 2021, the CEO of the applicant informed the third respondent that she had been appointed to act in the Executive: Regulatory position with effect from 1 March 2021 under the following conditions:

- 9.1 The appointment is temporary until the position has been filled;
- 9.2 Whilst it is an acting appointment, it is expected to perform the full functions;
- 9.3 The third respondent can apply for the permanent position of Executive: Regulatory Function upon advertisement or recruitment and selection processes will be carried out in line with the HR Policies and procedures relating thereto.

[10] On 2 March 2021, the third respondent raised her concerns and specifically indicated that she did not consent to a temporary acting lateral appointment and that she did not relinquish her permanent employment status.

[11] On 6 March 2021, the CEO of the applicant responded to the third respondent and stated *inter alia* the following:

[6] You have been directed to, with effect from Monday, 1 March 2021, take over the reigns [sic] of Executive: Regulatory Functions whilst I conclude the final phases of the OD process, is an operational imperative. Therefore, your statement in paragraph 8 of your letter to me that you do not consent to moving to the position of Executive: Regulatory Functions in an acting capacity, is in effect communicating your refusal to head to my lawful and reasonable instruction, which I view in a serious light.

...

[8] In view of your stated refusal to take up the role of Executive: Regulatory Functions in an acting capacity while I conclude the final phase of the organisational design (OD/restructuring process), I have no option: either to take corrective disciplinary measures against you for gross insubordination, or to forthwith commence with the process contemplated in section 189 of the Labour Relations Act, 1995. I have opted the latter.

[9] In the section 189(3) notice attached to the letter of the CEO of the applicant dated 6 March 2021, where it was inter alia stated the following:

‘4. The reasons for commencing with this process are briefly as follows:

4.1. The position of Executive in the Office of the CEO is no longer in ECSA’s Council-approved organisational structure.

4.2. This is following an organisational design and restructuring exercise that took place during the year 2020.

4.3. That position will therefore become redundant with effect from 1 April 2021 when the newly approved organisational structure will come into effect.

5. ECSA, in its contemplation of your retrenchment based on the redundancy of your position, followed a fair and objective criterion, namely: there is no longer an operational necessity for the role of an Executive in the Office of the CEO. This was brought to your attention during the organisational design/restructuring process during the second half of the year 2020.

6. ECSA has, with a view to averting retrenchment, considered alternatives, such as:

6.1. Possibly moving you to a vacant (existing position) of Executive: Regulatory Functions, initially an acting role and possibly on a permanent basis at a later stage (subject to ECSA’s recruitment processes). You failed to take ECSA’s offer in this regard.

6.2. Demotion: There is no vacant position into which ECSA could consider demoting you into (and thereby ensure that you continue to receive income).”

[12] On 11 March 2021, the third respondent raised her concerns in relation to the section 189(3) notice in a letter addressed to the CEO of the applicant.

[13] On 19 March 2021, a consultation was conducted between the parties.

[14] On 23 March 2021, the CEO of the applicant extensively dealt with the issues

raised in the letter of the third respondent dated 11 March 2021 and the issues raised during the consultation of 19 March 2021. The view of the CEO of the applicant was consistent to the effect that if the third respondent took up the position of Executive: Regulatory Functions, the section 189 process would not have been invoked.

[15] On 29 March 2021, a further consultation was conducted between the parties.

[16] On 31 March 2021, the third respondent was issued with a letter of termination of her services based on operational requirements.

[17] On 2 November 2021, the parties conducted a pre-arbitration meeting, and in the minutes thereof, the parties agreed that the background facts referred to above are common cause. It was further agreed that the issue for determination was whether the retrenchment of the third respondent was both procedurally and substantively fair.

Analysis

[18] In the arbitration award dated 22 July 2022, the second respondent determined that the termination of the applicant's services was substantively unfair on the following basis:

'71. However, there are two fundamental elements decisive pertaining to retrenchment in terms of 189 of the LRA. Firstly, the law requires that the respondent must have made him an offer of alternative employment. Secondly, the second is that the employee must have unreasonably refused to accept such an offer.

72. In this regard in so far as this matter is concerned, the respondent did not make an alternative offer as required in terms of retrenchment law or in terms of section 189 of the LRA. She was given an acting position. She did not accept rightly so the acting role since it was not guaranteed that the position would be hers on a permanent basis hence she did not sign the offer.

73. In terms of the law an offer once accepted by the employee must amount to a contract of employment. An act an acting role does not give rise or give assurances to an employee faced with possible retrenchment which was a no fault dismissal.

74. Therefore the employee acted unfairly when it retrenched the applicant without offering her the position of Executive: Regulatory Functions. An alternative to retrenchment cannot be a position on an acting pending a recruitment process which meant that the applicant or employee would be required to participate in and compete with others as Mashinini testified even external candidates after the advertisement of such a post.

75. The respondent should have offered the applicant the vacant position of Executive: Regulatory Functions and not as an acting role because it was an alternative to retrenchment.

76. More significantly if the position was offered to the applicant, the respondent would have a recourse of subjecting the applicant to disciplinary process, if she did not perform.

77. In this regard the retrenchment of applicant stands in violation of the law of retrenchment which makes it abundantly clear that a dismissal for operational requirement is a no fault termination.

78. An employer may not dismiss an employee on the basis that the position is redundant where there are offer suitable positions available.'

[19] The Labour Appeal Court again recently restated the principles to be considered in a review application as follows:

'[16] It is trite that a party alleging a defect in arbitration proceedings may seek the review of an award on the grounds set out in s 145(2) of the Labour Relations Act (LRA), namely misconduct committed in relation to the duties of the arbitrator; a gross irregularity in the conduct of the arbitration proceedings; the exceeding of powers; or improperly obtaining an award. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, these grounds were found to be suffused by the standard of reasonableness, with it for the review court to determine whether the decision reached by the arbitrator was one that a reasonable decision-maker could not reach.

[17] In *Herholdt v Nedbank (Congress of SA Trade Unions as Amicus Curiae)* [2013] ZASCA 97; 2013 (6) SA 224 (SCA) (Herholdt), it was stated that:

‘For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by Section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

[18] This Court in *Head of Department of Education v Mofokeng and Others*, noted that a material error or irregularity may have a “*distorting effect*” on the decision arrived at such as that it may lead to an unreasonable result, in the sense that but for an error or irregularity, a different outcome would have resulted. Errors of fact or law may therefore not be enough to vitiate an award unless it is established that the arbitrator undertook the wrong enquiry, in the wrong manner or arrived at an unreasonable result.’²

[20] The substantive rationale of the applicant to declare the position of Executive: Office of the CEO redundant was not challenged by the third respondent during the arbitration. The main issue at the arbitration was the conditions upon which the third respondent was offered the position of Executive Manager: Regulatory Functions. The applicant maintained that if the third respondent accepted the offer made to her to occupy the position of Executive: Regulatory Function, there would have been no requirement to retrench the third respondent.

[21] On 21 January 2021, the CEO of the applicant directed the third respondent to, with effect from 1 February 2021, take over the reins of the Acting Executive: Regulatory Functions. On 25 January 2021, the third respondent indicated that she

² *Gauteng Department of Education v General Public Service Sectoral Bargaining Council and Others* (JA141/2022) [2025] ZALAC 2 (22 January 2025).

would abide by the instruction to move to the role of Executive Manager: Regulatory Function. However, on 24 February 2021, the CEO of the applicant indicated that the third respondent was appointed to act as the Executive: Regulatory Function on the condition that it was a temporary appointment until the position had been filled, and that the third respondent was welcome to apply for the permanent position of Executive: Regulatory Functions.

[22] The third respondent already occupied the position of Executive: Regulatory Functions with effect from 1 February 2021. There was, therefore, no reason for the applicant to embark on a retrenchment process in relation to the third respondent in that the third respondent occupied the available position of Executive Manager: Regulatory Functions. The applicant did not provide any reasons why the third respondent could not have remained in the position that she occupied since 1 February 2021. The third respondent was entitled and correctly rejected the amended conditions as was stated in the letter of 24 February 2021.

[23] The second respondent determined that the applicant acted unfairly in not offering the position of Executive: Regulatory Functions to the third respondent, and therefore, the retrenchment was substantively unfair. The second respondent correctly determined that there was no assurance given to the third respondent that she would have been appointed in the recruitment process in relation to the position of Executive: Regulatory Functions. There was no reason to advertise the position of Executive: Regulatory Functions in that the third respondent already occupied the position with effect from 1 February 2021. The determination of the second respondent that the dismissal was substantively unfair is, therefore, a reasonable determination on the facts presented at the arbitration.

[24] The second respondent ordered the applicant to reinstate the third respondent to the position of Executive: Office of the CEO with retrospective effect from the date of dismissal. It is common cause that the position of Executive in the office of the CEO was made redundant. It was on that basis that the third respondent was directed to occupy the position of Executive: Regulatory Functions. It is, therefore, not reasonably practicable for the applicant to reinstate or re-employ the third

respondent in the position of Executive: Office of the CEO. The indication is that the position of Executive: Regulatory Functions was still not occupied during March 2022 when the arbitration was still in process. The arbitration was concluded in June 2022. The second respondent did not engage the parties in relation to the availability of the position of Executive: Regulatory Functions at the conclusion of the arbitration. Although it is trite that reinstatement is the primary remedy for an unfair dismissal, the determination of whether the remedy of reinstatement is appropriate is objective.³ The determination of the second respondent that the third respondent be reinstated in the position that became redundant has not been considered objectively. The second respondent further did not engage the parties with regard to any period of employment after the dismissal of the third respondent.⁴ The Constitutional Court stated the following in the matter of *Maroveke v Talane NO and Others*:

‘[27] However, the applicant’s claim for appropriate backpay stands on a different footing and there are reasonable prospects that this Court will materially alter the decision of the Labour Court. The compensation to the wronged party is intended to ‘offset’ the financial loss suffered as a result of a wrongful act. What must be determined is the extent of the loss, while considering the nature of the unfair dismissal. Underlying this is the intent to restore the applicant to the position he would have been in but for the wrongful act by the employer. That restoration must not assume a punitive character. This view is properly enunciated in *Dauids* as follows:

“The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee’s loss and not to punish the employer.”

³ *Engen Petroleum Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 5; (2007) 28 ILJ 1507 (LAC) at para 84.

⁴ *Maroveke v Talane NO and Others* [2021] ZACC 20; (2021) 42 ILJ 1871 (CC).

[28] In restoring the applicant to his previous position, this Court ought to consider both the amount he would have earned but for his dismissal and what he earned while working at Goldfields. As far as this is concerned, the Labour Court did not set out the facts it considered about the earnings of the applicant. It merely issued an order in the following terms:

“The [applicant] is to be reinstated with effect from the date of the Arbitration Award, being 14 October 2014. The [applicant] is entitled to be reinstated from 14 August 2014. For the avoidance of doubt, the employer shall pay the employee backpay equivalent to two months’ wages ($R11\,294.69 \times 2 = R22\,589.38$) on or before 30 April 2019.’

[25] Without considering the availability of a position to be reinstated in and the failure of the second respondent to engage the parties with regard to the employment of the third respondent subsequent to her dismissal, it is determined that the remedy granted by the second respondent was not judicially exercised and cannot be considered as a remedy that a reasonable arbitrator would have granted in the circumstances. It is, therefore, appropriate to refer the remedy to be granted to the third respondent back to the first respondent for reconsideration and determination of an appropriate remedy.

[26] The second respondent did not determine the procedural challenge of the third respondent’s dismissal. The pre-trial minute indicated that the third respondent contested the substantive and procedural fairness of the dismissal. The third respondent’s representative conceded that the most appropriate manner in which to deal with the failure of the second respondent to consider the procedural fairness of the dismissal is to refer the matter back to the second respondent to consider whether the dismissal of the third respondent was procedurally fair or unfair.

Costs

[27] Both parties were, to some extent, successful in the review application. It is my view that a cost order would not be appropriate and consider it fair and justified

that no order as to costs be made.

[28] For all the reasons set out above, I make the following order:

Order

1. The third respondent's dismissal by the applicant is substantively unfair;
2. The remedy granted in the award dated 22 July 2022 as was varied in the variation ruling dated 29 July 2022 under Case No GAJB 8333/21, is reviewed and set aside;
3. The matter is remitted to the first respondent to direct the second respondent, alternatively another arbitrator if the second respondent is not available, to allow the parties to present evidence on the remedy to be granted to the third respondent and to consider the procedural challenge of the dismissal of the third respondent;
4. There is no order as to costs.

P.H. Kirstein

Acting Judge of The Labour Court Of South Africa

Appearances:

For the Applicant: Adv P Maharaj-Pillay

Instructed by: Malatji & Co. Inc.

For the Respondent: Adv Mtombeni

Instructed by: Olivia Mamabolo Inc.