



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D131/2023

Not Reportable

In the matter between:

NATIONAL HEALTH EDUCATION
AND ALLIED WORKERS UNION

First Applicant

NEHAWU obo LULAMA NCANYWA

Second Applicant

and

COMMISSIONER BONGANI MTATI

First Respondent

MTHATHA PRIVATE HOSPITAL
CROSSMED HEALTH

Second Respondent

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

Third Respondent

Heard: 14 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 14h00 on 31 July 2025.

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] The applicants sought to review an arbitration award handed down by the first respondent in which he had awarded the second applicant compensation pursuant to having found her dismissal to have been unfair. In view of the fact that the application had been initiated outside the six week time period stipulated in s145(1)(a) of the LRA, the applicant applied for condonation.

[2] The record was delivered by 29 August 2023 and the applicants' supplementary affidavit on 12 September 2023, however by 28 September 2023 the respondents had not yet opposed the application which led the applicants to request its enrolment on the unopposed roll. The applicants request was placed before a Judge in chambers, who issued a directive that the applicants file proof of service of the review application, the record, and the notice in terms of Rule 7A(8), upon which the application could be enrolled for hearing. The applicants duly filed several service affidavits, pursuant to which the application was enrolled on 19 November 2024. Notwithstanding that it had been enrolled on the unopposed roll, and the second respondent had not delivered any intention to oppose the granting of the relief sought, the Notice of Set Down was nonetheless been transmitted to the second respondent by email on 7 October 2024. Upon receipt of the Notice of Set Down, the second respondent appointed a firm of attorneys to represent it, which firm delivered a Notice of Opposition on 4 November 2024.

[3] At the hearing of the matter on 19 November 2024 the second respondent was represented by its attorney of record and the application was accordingly not determined on an unopposed basis. Instead, orders were made for the delivery of further affidavits within stipulated time periods, including an application for condonation for the late delivery of the second respondent's answering affidavit in the review application, with the application adjourned to 14 March 2025.

[4] On that date there was no appearance by or on behalf of the second respondent. The applicants' representative Mr Damoyi informed the court that the second respondent had taken none of the steps envisaged in this court's order of 19 November 2024 and, save for the previously delivered Notice of Opposition dated 30 October 2024, the review application remained unopposed. As a result, this court heard the applicants' submissions in relation to both condonation and the review itself, and judgment was reserved.

[5] Some six weeks later, on 9 May 2025, the second respondent's attorney addressed correspondence to this court (with no indication that such correspondence had been drawn to the attention of the applicants). The purpose thereof appeared ostensibly to be to place certain facts before this court, and to enquire as to whether any further steps would then be permissible. The response provided to the second respondent's attorney was that it was not appropriate to attempt to litigate through correspondence, and that this court does not dispense legal advice. The correspondence which was transmitted to this court by the second respondent's attorney has accordingly not been taken into account in considering the issues relevant to the determination of this application.

Analysis

[6] It was common cause between the parties that the second applicant had been employed as a General Worker by the second respondent on 1 April 2019, and was dismissed on 1 September 2022. The evidence introduced by the parties led the first respondent to conclude that her dismissal had been by reason of the second respondent's operational requirements. He found her dismissal to have been unfair and, by way of an award dated 22 December 2022, awarded her compensation equivalent to five months' salary in the amount of R20 871.00.

[7] The first applicant's offices were closed for the festive season on 23 December 2022, on which date the award was transmitted to it. Upon the re-opening of its offices on 10 January 2023 the first applicant's official responsible for the matter considered the award and was of the belief that the first respondent had

erred by having awarded compensation, in view of the fact that the second applicant had expressly sought reinstatement. In the circumstances, the applicants initiated an application for variation (which was accompanied by a condonation application as the initiation of the variation application had been slightly delayed). Having considered such applications, the first respondent delivered a written ruling on 7 February 2023 in which he refused to grant condonation. Albeit that he found the period of the delay not to have been excessive, he was of the opinion that the applicants did not have good prospects of success, and that the second respondent would be prejudiced if it was required to reinstate the second applicant as it had no substantive post into which she could be placed. One week later the applicants applied to this court for a case number, having requested that the number be issued quickly in light of the delay.

[8] The award which forms the subject matter of the review application was handed down on 23 December 2022, with the application having been initiated on 13 March 2025. The last day of the six week period within which the applicants were required to have launched their application was 3 February 2023, with the result that the period of the delay was one of five weeks, a not excessively long period.

[9] Albeit that the applicants fully explained the events which led to the need to initiate the application, they did not however furnish this court with any explanation as to the cause of the further delay from the date on which they applied for a case number until the date on which the application was ultimately launched.

[10] In the absence of any opposition by the second respondent, nothing has been placed before this court evincing that it stands to be prejudiced by the granting of condonation. The prejudice potentially to be suffered by the second applicant is inextricably linked to the prospects of success in the review application itself.

[11] The applicants' grounds of review concerned the relief which was awarded by the first respondent. It was the applicants' case that the second applicant sought to be retrospectively reinstated and, instead, he awarded an amount of compensation, being relief which had not been sought by her.

[12] S193 of the LRA stipulates the remedies which may be awarded by a commissioner who has found a dismissal to have been unfair,

‘(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 any 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.’

[13] It is trite that an employee is entitled to an award of re-instatement unless one of the provisos listed in s193(2) finds application. This was confirmed by the Constitutional Court in Booi v Amathole District Municipality and Others (2022) 43 ILJ 91 (CC),

‘It is plain from this Court’s jurisprudence that where a dismissal has been found to be substantively unfair, “reinstatement is the primary remedy” and, therefore, “[a] court or arbitrator must order the employer to reinstate or re-employ the employee unless one or more of the circumstances specified in section 193(2)(a) (d) exist, in which case compensation may be ordered depending on the nature of the dismissal”.’¹

¹ At paragraph 38

[14] In having concluded that the second applicant's dismissal had been unfair, the first respondent did not particularise whether such finding was on the basis of a procedural irregularity, a failure on the part of the second respondent to have established the substantive fairness of her dismissal, or both. He concluded,

'In this case the applicant sought compensation and I am satisfied that the Applicant was unfairly dismissed as has not been consulted for retrenchment or not charged nor invited to a hearing.'

[15] Whilst his reasoning for having awarded her compensation appears to have been premised on the basis that this had been what she had requested, in light of his further explanation provided in his subsequent Ruling, it is apparent that this was not the only factor which had informed such a conclusion,

'On prospects of success, I find that the Applicant has no prospects of success, as the reason for granting compensation was based on paragraph 15 and 16 of the Award, which stated that the Applicant was redundant as she refused to be transferred to another company, therefore I concluded that there was no post to reinstate the Applicant to and viewed relief of compensation proper.'

[16] From the reasoning which informed his rejection of the possibility of the second applicant's reinstatement as reflected in his Ruling, it appears that in addition to having been of the belief that the second applicant sought compensation, he was also of the belief that the proviso embodied in s193(2)(c) was present: the absence of any post to which she could be reinstated which rendered such a remedy impracticable.

[17] Such conclusion was incapable of having been arrived at on the evidence introduced by the second respondent in the arbitration proceedings. The only witness to testify on behalf of the second respondent was one Ms Celeste Sharpley-Haupt, an HR consultant who was not employed by the second respondent. In such capacity she had acted as its advisor in the course of a process in terms of s197

undertaken by it in terms of which certain of the second respondent's employees who she referred to as 'support staff in the hospital' were transferred to another business entity. Insofar as the second applicant was concerned, her evidence constituted only that which had allegedly been related to her by unnamed members of the second respondent's management staff. Such evidence was confined to the question of the alleged refusal on the part of the second applicant to have accepted the transfer of her employment to another company to which the second respondent had intended to outsource certain of its operations,

'I say I was later advised by the company management that they had terminated the two employees because they did not want to accept the transfer as a going concern.'

[18] As to whether such decision had been operationally justifiable, or constituted an impediment to the second applicant's reinstatement, her evidence was only speculative,

'If the position is redundant and the employee has no alternative employment there has to be a process to terminate.'

[19] Even if the first respondent had accepted the correctness of Ms Sharpley-Haupt's evidence concerning the s197 process, that in and of itself was incapable of establishing the rationale for the termination of the second applicant's employment, let alone that her position had indeed been made redundant thereby. This being the case, the conclusion reached by the first respondent that the possibility of reinstatement was rendered impracticable by the absence of any position into which she could have been placed was unsupported by any evidence to that effect.

[20] As to the statements made by the first respondent in the award that the second applicant had sought compensation, these were also unsupported by the case before him. Mr Damoyi when representing the second applicant in the arbitration twice repeated in his opening statement that she sought to be reinstated and at no time mentioned the possibility of compensation as an alternative.

Furthermore, at no point in the course of the second applicant's evidence did she testify that she would have been equally content with such an award.

[21] In the circumstances, the decision reached by the first respondent to award the second applicant compensation was not rationally connected to the evidence before him, and stood in contradiction to the entitlement on the part of an employee whose dismissal has been found to have been substantively unfair to the primary remedy of reinstatement. This being the case, insofar as the applicants' condonation application is concerned, their prospects of success are assured.

[22] Taking this into account, together with the relatively short period of delay, the potential prejudice which the second applicant would suffer as a consequence of being deprived of the remedy to which she was entitled, and the absence of any discernible prejudice on the part of the second respondent in the event of the granting of condonation, this court is of the opinion that the interests of justice require that it exercise its discretion in favour of granting the indulgence sought, notwithstanding that a short period of the delay was unexplained.

[23] For the reasons set out above, it is the further finding of this court that the first respondent's award of compensation falls to be reviewed and set aside. Had the applicants asked for an order of substitution, such order would have been made on the basis that this court was placed in as good a position as that of the second respondent to make its decision. However, as the applicants asked only that the matter be remitted to the third respondent to be arbitrated *de novo*, this is the order which will be granted.

Costs

[24] The applicants asked for costs only in the event of opposition of which there was none, and nor were the costs of the adjournment of 19 November 2024 reserved.

Order

1. Condonation is granted for the late initiation of the application.
2. The arbitration award under case number ECEL 4085-22 dated 22 December 2022 is reviewed and set aside.
3. The dispute referred by the applicants to the third respondent and allocated case number ECEL 4085-22 is remitted to the third respondent to be arbitrated *de novo* before a commissioner other than the first respondent.
4. There is no costs order.

K Allen-Yaman
Judge of the Labour Court of South Africa

Appearances

Applicants:

Mr T Damoyi, NEHAWU

Respondents:

No appearances