

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS442/21

In the matter between:

SATAWU obo SIBUSISO SIBEKO

Applicant

and

G4S CASH SOLUTIONS

Respondent

Heard: 26 March 2025

Delivered: 4 August 2025

JUDGMENT

TSHISEVHE, AJ

Introduction

[1] *'The strongest trees bend in the storm and rise again.'*

[2] This matter concerns an issue where the Applicant seeks payment for backpay for the period between the date of his reinstatement in terms of the arbitration award, being 6 June 2016, and the date on which he actually returned to the service of the Respondent, being January 2021.

[3] What the employer did instead, was to engage in attempts to have the order overturned through appeal processes. It was only after these attempts had failed that the employee was able to return to work.

[4] However, the employer contends that the Applicant took up other employment and never tendered his services in compliance with the award of the arbitrator, and as a result, he is not entitled to any backpay.

[5] On the other hand, the Applicant submitted that he only took up a learnership program where he earned a stipend.

Issues in dispute and what need to be decided

[6] This court has been called upon to determine whether or not the Applicant herein (Mr Sibusiso Sibeko) did tender his services after the reinstatement ruling by the arbitrator for the period July 2016 to December 2020.

[7] Whether or not the Applicant is entitled to remuneration for the period between the date of dismissal and the day that he actually reported for duty being from July 2016 to December 2020.

[8] Whether or not the Respondent refused and/or failed to reinstate the Applicant before 4 January 2021;

[9] Whether or not the Applicant had been out of employment, therefore not earning a salary for a period of four years and six months.

Salient Background

[10] The Applicant was employed by the Respondent on 1 June 2011 as a Crewman earning an amount of R10 500-00 per month.

[11] Following allegations of misconduct, the Applicant was charged with several charges relating to gross negligence, misconduct and breach of trust. The Applicant was dismissed on 4 May 2015.

[12] The Applicant referred a dispute of unfair dismissal to National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) (Bargaining Council).

[13] The Respondent was ordered to retrospectively reinstate the Applicant by 4 July 2016.

Applicant's case

[14] The Applicant submitted that he tendered his services on 4 July 2016, where he gave the Respondent's employee, Deborah Bishop, an award and she informed him that the matter is under review, as a result he cannot report for duty.

[15] The Applicant's further evidence is that in 2019 when the review application was dismissed, he attended at the Respondent in order to tender his services, however, once again was met by the same Deborah Bishop who refused to reinstate him saying that they are challenging the judgment.

[16] The Applicant's further testimony was to the effect that his trade union SATAWU also sent the Respondent a letter asking them to reinstate him but they never agreed.

[17] During cross examination, a version was put to the Applicant that he took up other employment and was dishonest about it as he did not disclose same. The Applicant stated that it was not employment but an internship where he earned a meagre stipend ranging between R1952 to R4713.63 at times.

[18] The Applicant submitted that he only took up an apprenticeship training where he earned the above stipend and referred the Court to salary advises to support the above income.

Respondent's defence that the Applicant never tendered his services

[19] In the heads of arguments and testimony before me the Respondent's witness Ms Nicolette Cronje testified that the Applicant never tendered his services.

[20] Ms Cronje's further evidence is that she knew of the Applicant for the first time in 2019, during the contempt application which was brought to her attention by Ms Deborah Bishop but had no record of him reporting for duty.

[21] Ms Cronje expressly stated that she lacked knowledge of a pending review by the Respondent as it was launched in 2016.

[22] She averred that if an employee fails to report for duty, abscondment process ensues and the said staff member will be sent a formal letter or telegram to his last known address asking him to report for duty on a specific date, failing which an inquiry commences. She also indicated that she never tried to find out from the Applicant as to why he was not reporting for duty.

[23] It is common cause that the Applicant's salary before dismissal was R10500-00 per month. The Respondent argued that the Applicant failed to disclose the fact that he was employed between January 2018 and December 2020. As a result, the Respondent argued that the Applicant is not entitled to any claim for backpay from them for the period between 2018 and 2020.

[24] The Respondent called its second witness by the name of Deborah Bishop who happened to have been seated in the court room throughout the testimony of Ms Cronje, the Respondent's first witness.

[25] However, the Respondent's legal representative, Mr Lerm, requested that the evidence of Ms Bishop be ignored or struck out after an objection from the Applicant's attorneys.

Evaluation of submissions and application of the law

[26] The Respondent submission that the Applicant failed to tender his services cannot be sustained in that, there is no evidence of an abscondment process which the Respondent said should ensue once a staff member fails to report for duty.

[27] Since the Respondent submitted that I should strike out the evidence of Ms Deborah Bishop, the evidence of the Applicant that he reported for duty and was refused to tender his services remains unchallenged.

[28] This Court accepts, without reservation, that the Applicant in fact tendered his services. The Court further accepts without reservation that the tender of service by the Applicant was not accepted by the Respondent.

[29] It is not in dispute that the arbitrator ordered that the Applicant be retrospectively reinstated without any loss of income. It is therefore automatically clear that the Applicant should be paid backpay in this regard.

[30] The issue of backpay has been clarified by the Constitutional Court in the case of *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*,¹ this is how Nkabinde J explained reinstatement in *Equity Aviation*:

“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

¹ *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 (1) SA 390 (CC) at para 36.

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, among 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."

[31] The Respondent had an option to allow the Applicant to report for duty at the time of the reinstatement, however, they opted to challenge the award to no fruition.

[32] It is therefore preposterous that the Applicant would choose a stipend of around R1900 to R4700, instead of his R10500 salary with the Respondent which is far higher than the stipend he received.

[33] Therefore, I do not regard the above stipend as an income that should be considered when paying backpay to the Applicant as it was fugacious and his backpay should be paid after such hiatus.

[34] The Constitutional Court had in *Maroveke v Talane NO and Others*² held as follows:

"I am satisfied that the Labour Court was correct when it held that the award of 12 months' back pay was unreasonable and not in keeping with the established principle that reinstatement ought to neither impoverish nor enrich the employee beyond the extent to which he would have been but for the dismissal."

[35] In my view, an employee who was in a situation where his salary was not paid for over a period of more than four years would have been left with an indelible mark financially.

² *Maroveke v Talane NO and Others* 2021 (10) BCLR 1120 (CC) at para 25.

[36] I need to accentuate that this court is therefore not convinced that by paying the Applicant his backpay without considering the stipend he received after he was refused to tender his services stand to enrich him.

[37] What then comes to be determined, is whether the Applicant is supposed to starve in midst of all this? I do not believe that the law has been created in a way that a person in the position of the Applicant should have to suffer as a result of the Respondent challenging the award, otherwise that will be too abrasive.

[38] Even though the Applicant was working as an intern or on a learnership programme, I feel that it is important to indicate that such income cannot be equated to his then salary with the Respondent. It was however, just another means of survival on the part of the Applicant for which he should not receive any punishment by unnecessary deductions or set off.

[39] In fact, I should say that the Respondent is very lucky because the Applicant did not seek an interest order on backpay, otherwise, they were going to pay an arm and a leg herein.

[40] This court is of the view that the Applicant is not required to starve or exist in a state of perpetual poverty or remain destitute in the face of the rejection of his tender of services. As a family man and in his position, must do what he can to exist or support his family.

[41] It would be perverse should the Respondent be able to reject a tender of services and then snatch at a bargain because the Applicant had to earn an income by other means.

[42] The Respondent should have been aware that they run the risk of accumulating a huge debt should their legal challenge of the award fail where they will be expected to pay as a result of their procrastination to reinstate the Applicant more especially after he tendered his services and they refused.

[43] In *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and others*:³

‘Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If at that time it was appropriate, it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate. Where an order for reinstatement has been granted by the industrial court, an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order.’

[44] Upon the restoration of the contracts of employment when workers get reinstated, the contracts of employment are deemed to have been in place for the whole period when appeals were being pursued or when applications for leave to appeal were pending, so is the position *in casu*.

[45] The Court in *HOSPERSA and Another v MEC for Health: Gauteng Provincial Government*,⁴ (*HOSPERSA*) held in relation to failure to pay the salary of the employee, that:

“[17] An employee has a common law right to be paid her salary. If through the default on the part of the employee his or her services are not rendered, the wage must be diminished in proportion to the time during which the services were not rendered (see *Boyd v Stuttford* 1910 AD 101, 104-105). The position is, however, different where the employee’s inability to perform her duties is her employer’s doing. See in this regard *Myers v SA Railways & Harbours* 1924 AD 85 where the Court held as follows at 90C: “If however, it was due to his employer that he had been unable to perform his work, then he would be entitled to be paid notwithstanding that no service had been rendered by him.” In terms of the common law, the unilateral suspension of an employee also does not relieve the employer of the duty to pay the employee. It is also accepted in our labour law that an employer may not suspend an

³ *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union* 1994 (2) SA 204 (A) at p 220 H – I.

⁴ (2008) 29 ILJ 2769 (LC) at para 17.

employee without pay and may only do so if they have contracted to that effect, either when the contract was first entered into or if a collective agreement provides for such penalty, or when the employee is faced with dismissal and agrees to unpaid suspension as an alternative penalty (see Grogan Workplace Law 2007 at p. 103)."

[46] This Court is alive to the fact that the Court in *HOSPERSA* dealt with the consequences of a suspension, the principle applies equally to a refusal to accept the tender of services which may be seen as a suspension of the services of the employee in another form. After all, if it swims, waddles and quacks like a duck, it will likely be a duck.

[47] The Applicant should be given some apricity this time around, maybe his pain will be extirpated one day.

Costs

[48] I have had regard to the requirements of law and fairness in line with *Zungu v Premier of the Province of KwaZulu-Natal and Others*,⁵ in considering costs and am of the view that costs should only be awarded where it is warranted such as *in casu* where the Respondent was aware that their case was hirpling throughout.

[49] The Respondent knew that an order of reinstatement had been made by the Council in favour of the applicant and that he had tendered his services which tender they rejected. The Respondent also knew that, had they not rejected that tender of services, the applicant would have worked and earned his wages.

[50] I do not see any penitence from the Respondent conduct that would at least ameliorate their refusal to pay backpay. I am of the view that a cost order is warranted in this matter.

⁵ (2018) 39 ILJ 523 (CC).

[51] In the premises, the following order is made:

Order

1. The Respondent is ordered to pay the Applicant an amount of R567 000, subject to statutory deductions, which amount represents backpay for the period between July 2016 to December 2020.
2. The Respondent is ordered to pay costs of the Applicant including costs of a Counsel were warranted.

N. Tshisevhe
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Ms L Lenyehelo of Lenyehelo Attorneys INC
For the Respondent:	Adv JH Lerm
Instructed by:	Crawford Attorneys