



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1133/2023

In the matter between:

TRANSNET SOC Ltd

Applicant

and

TRANSNET BARGAINING COUNCIL

First Respondent

COMMISSIONER JOHN MASHIKA

Second Respondent

UNTU

Third Respondent

DAVID CHAUKE

Fourth Respondent

Heard on: 13 August 2025

Delivered: 27 October 2025

JUDGEMENT

MAMANYUHA, AJ

Introduction

- [1] This is an application in terms of section 145(2) of the Labour Relations Act¹ (LRA) to review and set aside an arbitration award made by the second respondent (Commissioner) dated 8 May 2023, in terms of which he found that the dismissal of the fourth respondent was substantively unfair.
- [2] The Commissioner ordered that the fourth respondent be reinstated with retrospective effect to the date of dismissal, with backpay.
- [3] The applicant challenges the Commissioner's findings, resulting in this application, which alleges that the Commissioner:
- i. committed misconduct in his conduct;
 - ii. committed gross irregularity; and
 - iii. issued an award that a reasonable commissioner could not make.

Background facts

- [4] The fourth respondent was employed by the applicant on 2 November 2011. At the time of his dismissal, he was based at the Ermelo depot in Mpumalanga as a Yard Official. He was, however, since the beginning of 2022, performing an alternative function at the time, temporarily, while recovering from an injury that prevented him from fulfilling the duties of a Yard Official for reasons of workplace safety.
- [5] He was on compassionate leave for the loss of his partner, which was converted to sick leave after he was involved in a motor vehicle accident on 15 August 2022.
- [6] On 16 August 2022, he was arrested as a suspect in the murder of his life partner, who was also an employee of the applicant at Ermelo, and was kept in custody by the South African Police Service (SAPS).

¹ Act 66 of 1995, as amended.

- [7] On 16 September 2022, the applicant issued a letter to the fourth respondent, noting that he had not reported for duty since 26 August 2022, that his failure to tender services amounted to a material breach of his employment contract, and calling on him to provide reasons why his contract should not be terminated as a result.
- [8] The fourth respondent responded in writing on 20 September 2022, confirming that he was in the custody of the SAPS, that he would be applying for bail on 30 September 2022 and that the applicant should not terminate his employment contract, pending the outcome of the bail application.
- [9] The applicant terminated his employment contract with effect from 21 September 2022, based on the fourth respondent's impossibility to tender his services and perform his duties.
- [10] On 30 September 2022, the fourth respondent was released on bail under conditions that prohibited him from entering the Ermelo area except to attend proceedings related to his arrest, and required him to report to the Alexandra Police Station in Johannesburg every Tuesday, Thursday, and Saturday.
- [11] The fourth respondent referred an unfair dismissal dispute.
- [12] The Commissioner ordered his retrospective reinstatement with backpay.
- [13] The applicant launched these proceedings, which are being opposed by the fourth respondent.

The arbitration award

- [14] In his award, the Commissioner expressed doubt that delaying the dismissal until 30 September 2022 would have prejudiced the employer's operations, particularly as the employer had already accommodated the fourth respondent in an alternative position from February 2022. He concluded that the employer's claim that the position was critical was therefore unconvincing.
- [15] The Commissioner ordered the retrospective reinstatement of the fourth respondent into a suitable position equivalent to the one he held prior to

dismissal, at any of the applicant's operations located in the Gauteng Province, pending the finalisation of the criminal proceedings.

- [16] He further directed that the applicant pays the fourth respondent an amount of R166,980.94, representing the salary he would have earned for the period from October 2022 to 30 April 2023.

Grounds for review

- [17] The applicant contends that the Commissioner's award falls to be reviewed and set aside on the following grounds:

- 17.1 The Commissioner found the dismissal unfair, stating it was premature as the employer was aware of an impending bail application. However, the applicant argues that at the time of dismissal, it was impossible for the fourth respondent to perform his duties due to incarceration, with no certainty of bail. The applicant finds this conclusion by the Commissioner to be materially flawed.
- 17.2 After bail was granted, the Commissioner claimed the impossibility of performance was removed. The applicant contests this, deeming it irrational, noting that the bail conditions prevented the fourth respondent from returning to his original workplace. The Commissioner further erred by ordering reinstatement to an unspecified role in Gauteng, without evidence that such a position existed or could accommodate the respondent's limitations.
- 17.3 The Commissioner ignored critical factors, including the seriousness of the charge, the risk of labour unrest, and the impracticality of reinstatement under section 193(2) of the LRA. The applicant contends the Commissioner misdirected himself by focusing on future developments rather than the fairness of the dismissal at the time it occurred, and ultimately issued an irrational, unenforceable, and legally flawed reinstatement order.

Analysis of the matter

- [18] Section 145(2) of the LRA sets out the grounds on which an arbitration award issued by the CCMA or a bargaining council can be reviewed. The Labour Court will not interfere unless the decision is so unreasonable that no reasonable arbitrator could have reached it.²
- [19] I concur with the Commissioner's view that the applicant acted prematurely by dismissing the fourth respondent only nine days before his scheduled bail hearing and without full knowledge of the outcome or specific bail conditions. This conduct suggests a possible predetermined intention to dismiss, and violates the principle of fairness.
- [20] The fourth respondent had already advised the applicant of the upcoming bail hearing and requested that they await its outcome. Had the employer exercised patience and waited just a few more days, it would have had clarity on the bail conditions and could then have been in a position to make a well-informed, reasonable decision regarding the feasibility of alternative placement.
- [21] Notably, the bail conditions did not prohibit employment entirely but only restricted access to the Ermelo area. Given the applicant's national presence, alternative arrangements at other sites could have been explored and considered once the full facts were known. By proceeding with dismissal before considering these options, the employer prematurely foreclosed the possibility of making a reasonable accommodation.
- [22] It is trite that the primary remedy for an unfair dismissal is reinstatement or re-employment; however, there are exceptions to this remedy, which are set out in s 193(2) of the LRA as follows;
- '(a) the *employee* does not wish to be reinstated or re-employed;
 - (b) if the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110.

- (c) it is not reasonably practicable for the employer to reinstate or re-employ the *employee*; or
- (d) the *dismissal* is unfair only because the employer did not follow a fair procedure.'

[23] The Commissioner observed that the only restrictions placed on the fourth respondent arose from his bail conditions, which primarily prohibited him from entering the Ermelo area. He further noted that, since his employment with the applicant began in 2011, the fourth respondent had worked in the Gauteng, KwaZulu-Natal and Mpumalanga provinces. This, in the Commissioner's view, supported the fourth respondent's own testimony that he was capable of working in any location. On this basis, the Commissioner ordered his reinstatement at any of the applicant's operations located in the Gauteng Province, to ensure compliance with his bail condition requiring him to report to the Alexander Police Station.

[24] The Commissioner's order of retrospective reinstatement to any of the applicant's operations located in the Gauteng Province, based on the fourth respondent's past deployments in other provinces, signifies a fundamental misconstruction of the nature of the enquiry he was required to undertake under section 193(2)(c).

[25] The Commissioner was obliged to undertake an enquiry into whether reinstatement was reasonably practicable, not merely whether it was hypothetically possible or based on the employee's past employment history.

[26] The Commissioner failed to assess actual operational feasibility in these other locations, which include current operational capacity, structure, vacancies, budget, or practical ability to accommodate the employee elsewhere. He substituted the employer's prerogative, effectively taking over the employer's managerial function by ordering placement '*at any of applicant's operations in the Gauteng Province*', which is not his role. This violates the principle set out in *Sidumo supra*, where the Court held:

'It is a practical reality that in the first place it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in

the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing “discretions”. Employer and commissioner each play a different part. ...’³

And

‘To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.’⁴

- [27] In *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others*⁵, the Labour Appeal Court (LAC) held:

‘The object of s 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate... The term “not reasonably practicable” in s 193(2)(c) does not equate with “practical” as the arbitrator assumed. It refers to 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.’

- [28] No evidence was presented regarding the practical feasibility of reinstating the fourth respondent in the Gauteng Province. What remains undisputed, however, is that he is unable to tender his services at his former workplace in Ermelo. The Commissioner, in ordering reinstatement, relied on a speculative assumption about future feasibility without properly engaging with the applicant’s current operational realities. This constitutes a misdirection and warrants the review and setting aside of the reinstatement award.

- [29] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁶, the Constitutional Court held that:

³ Ibid at para 75.

⁴ Ibid at para 79.

⁵ (2016) 37 ILJ 2313 (LAC) at para 11.

'Section 193 provides for three remedies a court or arbitrator may order after ruling that a dismissal is unfair. They are reinstatement, re-employment or compensation. A court must order reinstatement or re-employment unless one or more specified circumstances exist in which case compensation may be granted depending on the nature of the dismissal.'

[30] Section 194 (1) provides that:

'The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

Conclusion

[31] In light of the foregoing, reinstatement is not reasonably practicable. The fourth respondent's inability to return to his previous workplace, coupled with the absence of evidence supporting alternative placement, renders reinstatement unfeasible. Accordingly, the reinstatement order falls to be set aside.

[32] However, given the finding of substantive unfairness in the dismissal, the fourth respondent is entitled to a remedy. In terms of section 194(1), compensation equivalent to twelve months' remuneration is just and equitable in the circumstances.

[33] Accordingly, the following order is made:

Order

1. The applicant's review application is granted.
2. The arbitration award ordered by the second respondent is reviewed and set aside.

⁶ 2009 (1) SA 390 (CC) at para 1.

3. It is determined that the dismissal of the fourth respondent is procedurally fair but substantively unfair.
4. The applicant is ordered to pay the fourth respondent an amount equal to 12 months' salary as compensation, calculated at his rate of remuneration on the date of dismissal, within 30 days of this order.
5. There is no order as to costs.

T Mamanyuha
Acting Judge of the Labour Court of South Africa

Appearances

For The Applicant: Mr Tshepo Makamu

Instructed by: Puke Maserumule Attorneys

For The Respondent: Adv MJ van As

Instructed by: Fluxmans Inc

LABOUR COURT