



- (1) Reportable: NO
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JA87/24

In the matter between:

**EDUCATION TRAINING & DEVELOPMENT PRACTICES
SECTOR EDUCATION & TRAINING AUTHORITY**

Appellant

and

NEHAWU obo MAHOMED YUSUF SADER

Respondent

This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Labour Appeal Court website, and released to SAFLII. The date and time for hand-down is deemed to be on

29 January 2026.

Heard: 18 September 2025

Coram: Van Niekerk JA, Djaje AJA and Chetty AJA.

JUDGMENT

DJAJE, AJA

- [1] This appeal is against the order of the court *a quo*, which ordered that the respondent be remunerated for his full salary from 1 March 2019 to 30 June 2020, amounting to R1 521 585.00 (one million five hundred and twenty-one

thousand and five hundred and eighty-five rand). In addition, the appellant was ordered to pay the costs on a party-and-party scale.

- [2] The appeal centres around the date of dismissal and the date from which remuneration should be paid. The respondent was employed by the appellant as a Development Quality Assurance Manager from 8 July 2015. He was charged with nine counts of misconduct on 5 December 2017. The disciplinary hearing concluded on 30 July 2018, when the respondent was found guilty, and a sanction of dismissal was recommended. He was issued a dismissal letter on 22 August 2018. It is crucial to note that the letter of dismissal stated that he had the right to appeal the decision under the Human Resources policy. He enquired about the financial implications of appealing the dismissal. On 27 August 2018, he received a letter from the appellant's Labour Relations Specialist, Mr Jacob Dikobo (Dikobo), stating that:

'The ETDP SETA will pay you a Salary up to 22 August 2018, which is the date of your dismissal. Should you lodge and Appeal, the decision will not be implemented pending the decision on your Appeal.'

The respondent proceeded to lodge an appeal relying on the information above.

- [3] The appeal was finalised on 4 September 2019, and the ruling was issued on 30 September 2019, stating that the respondent be given a final written warning instead of dismissal. The appellant did not accept the appeal outcome, resulting in the respondent being denied access to the workplace. The appellant instituted review proceedings in the Labour Court against the outcome of the appeal. The review was initiated on 28 November 2019. On 18 February 2020, pending the finalisation of the review, the respondent launched an application to have his remuneration, which was withheld from 1 March 2019 to 4 September 2019, paid to him.

- [4] On 30 June 2020, the appellant issued the respondent a letter of dismissal and withdrew the review application. The letter of 30 June 2020 informed the respondent that, despite the outcome of the appeal, it stands by the dismissal of 22 August 2018. On 29 July 2020, the respondent referred the dismissal to

the Commission for Conciliation, Mediation and Arbitration (CCMA) as an unfair dismissal. The arbitration award on 8 March 2021 found that the dismissal was both procedurally and substantively unfair and that the respondent be reinstated without any back pay. The appellant took the CCMA ruling on review on 31 March 2021, and that application is still pending.

- [5] The respondent's application to have his salary reinstated was heard, and a judgment by the Labour Court was handed down on 10 January 2024. The Labour Court ordered as follows:

- '1 The respondent is ordered to pay Mahomed Yusuf Sader his full remuneration from 1 March 2019 until 30 June 2020. This amount due to Mahomed Yusuf Sader is 1 521 585.00 (One million five hundred and twenty-one thousand and five hundred and eighty five rand alone) (R101 439.00 x 15);
2. The amount in paragraph 1 must be paid on or before 28 February 2024;
3. The respondent must pay the applicant's costs on a party party scale.'

Condonation for the late filing of the record

- [6] At the commencement of the proceedings, the appellant applied for condonation of the late filing of the record of appeal. The delay in filing the record was for ten days and occasioned by the transcribers' inability to finalise the transcription timeously. The delay in filing the record of proceedings was not caused by the appellant or the attorneys of record. The respondent did not oppose the application.

- [7] A party seeking indulgence must show good cause for such indulgence and not pay lip service to such a request. In *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others*¹, it was held that the "applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives".

¹ 2000 (3) SA 87 (W) at para 12.

- [8] The Constitutional Court in *Grootboom v National Prosecuting Authority and Another*² held that:

‘It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default.’

- [9] The appellant’s explanation shows that there was always an intention to prosecute the appeal. When the appellant realised that the record was delayed, a request was made to the office of the Judge President for an extension, which was duly granted. Considering the degree of lateness, it is not excessive, as the record was delivered after the expiry of ten days. The appellant has shown good cause for the late filing of the record, and there exists no reason for the condonation not to succeed.

Labour Court

- [10] On the issue of the date of dismissal, the Labour Court³ at paragraphs 21 and 22 found that:

‘[21] In considering the date of dismissal it is important to consider the following-

- (a) After Sader was dismissed on 22 August 2018 he was informed that if he lodge an appeal the decision will not be implemented;
- (b) The respondent then went ahead and paid his salary until February 2019;
- (c) The appeal was successful. If the appeal ruling was only a recommendation the respondent had the choice not to accept

² 2014 (2) SA 68 (CC) at para 23.

³ *NEHAWU obo Sader Education Training and Development Practices Sector Education and Training Authority* [2024] ZALCJHB 48.

the recommendation however they elected to bring an application to review the ruling;

- (d) The respondent then withdrew the review and issued Sader with a letter of dismissal dated 1 July 2020;

[22] Based on the above considerations it is clear that Sader was only dismissed on 1 July 2020. It was also not disputed that he tendered his services to the respondent.'

[11] Having determined that the respondent was dismissed on 1 July 2020, the court ordered that he is entitled to his full salary for the period from 1 March 2019 to 30 June 2020. This conclusion was based on the fact that, after withdrawing the review application, the appellant issued the respondent a dismissal letter dated 1 July 2020. The court also found that if the respondent was indeed dismissed on 22 August 2018, he would not have been entitled to receive his salary from February 2019 until 1 July 2020. However, if the dismissal occurred on 1 July 2020, then entitlement to salary arises even though he did not perform any services for the appellant.

[12] The above finding could have been informed by the fact that the appellant decided to challenge the appeal and only issued the respondent with a letter on 1 July 2020, stating that, despite the outcome of the appeal, it stands by its letter of 22 August 2018.

Grounds of appeal

[13] The appellant raised the following grounds of appeal:

- 1.1. The court erred in ordering the applicant to pay an amount of R1 521 585.00 (One Million Five Hundred and Twenty Thousand and Five Hundred and Eighty Five Rands) to the respondent as remuneration for the period 1 March 2019 to 30 June 2020.
- 1.2. The court ought to have found that, as a matter of law, the noting of an internal appeal by the respondent did not suspend his dismissal.

2. The court misdirected itself in the application of the law to the facts by finding that the employment relationship between the applicant and the respondent ended on 01 July 2020.
 - 2.1. The court ought to have found that the employment relationship between the applicant and the respondent ended on 22 August 2018 when the applicant duly notified the respondent that he was dismissed.
 - 2.2. The court ought to have found that the claim fell within the ambit of section 77(1)(3) and 77 A (d)(e) of the Basic Conditions of Employment Act 75 of 1997 instead of section 158 of (1) (a) (iii) of the Labour Relations Act 66 of 1995.
3. The court erred in disregarding a CCMA award which found that the respondent be reinstated without backpay and that award had not been set aside.
4. The court further erred in ordering the applicant to pay back the amount of R1 521 585.00 when the decision of the chairperson of the internal appeal is silent about back pay.
 - 4.1. The court ought to have found that it did not have the jurisdiction to hear the dispute on the ground that the issue of back payment ought to have been paid and dealt with at the internal appeal.
5. The court erred in ordering that applicant to pay costs of the application.'

Submissions

[14] The appellant argued that the court a *quo* was bound by the pleadings that the respondent was dismissed on 22 August 2018 and not on 1 July 2020. This argument was based on the allegations in both the founding and answering affidavits, where the parties agreed that the respondent was dismissed on 22 August 2018. It was submitted that the respondent could not have appealed if he had not been dismissed. In contention, the respondent argued that the letter of 27 August 2018 clearly stated that the decision would

not be implemented pending the finalisation of the appeal. As a result of this representation, the respondent appealed. Once the appeal was finalised, the appellant sought to have it reviewed and set aside. It was only after the review was withdrawn that the appellant issued the letter of 1 July 2020 confirming the appellant's stance.

- [15] The appellant at the commencement of these proceedings conceded that the respondent's claim is contractual and brought under section 77 (3) of the Basic Conditions of Employment Act⁴. The respondent argued that an offer was made to him to continue receiving his salary, and he accepted. The appellant submitted that there was no obligation to pay the respondent after August 2018, as the employment contract was terminated, and that the amounts paid to the respondent between August 2018 and February 2019 were paid in error. The appellant relied on the decision of *Booyesen v National Union of Metalworkers of South Africa*⁵ (*Booyesen*) for this proposition, where the court held that:

'When an employee is lawfully, albeit unfairly dismissed, the employment relationship is terminated there and then. (It is true that for the purpose of proceedings in the Labour law realm the necessary fiction is upheld that the relationship continues but that is a legal construct which exists to facilitate equity litigation and does not undermine the finality of the dismissal per se.) Unlike in legal proceedings where an appeal suspends the operation of a judgment, no such doctrine of suspended operation is applicable to a dismissal by an employer.'

- [16] It was argued that the court *a quo* did not consider the CCMA's finding, which is final and binding. The finding stated that, despite his dismissal being procedurally and substantively unfair, the respondent was entitled to reinstatement but not to back pay, as there was a transgression on his part. This meant that the respondent could not contend that he was entitled to back pay. The appellant's case is that the respondent should have applied to make the CCMA award an order of court in terms of section 158(1)(c) of the Labour

⁴ Act 75 of 1997.

⁵ [2014] ZALCJHB 161 at 19.

Relations Act⁶. Once that was done, the respondent's remedy was to institute contempt of court proceedings for the appellant's failure to reinstate him and a claim under section 77 of the BCEA would arise for payment of back pay.

- [17] During argument, the appellant for the first time raised the defence of mistake in law regarding the offer to pay the respondent's salary from August 2018 to February 2019. This issue was never raised before the court *a quo* for consideration in deciding this matter, and the argument was not pursued.
- [18] In contention, the respondent argued that he was entitled to his remuneration pending the finalisation of the appeal, as informed by the appellant's written representation that the decision to dismiss would not be implemented pending the appeal. Indeed, the decision was not implemented as the appellant continued to pay the respondent's salary until February 2019. The respondent, in essence, accepted the offer made pending the finalisation of the appeal, and the appellant complied.
- [19] The respondent submitted that after the outcome of the appeal, which rescinded the decision to dismiss, the appellant could not enforce its earlier decision to dismiss him. Which meant that the letter of 30 June 2020 was a fresh dismissal. The respondent relied on the decision of this court in *Booyesen*, where it was held that: "...In cases where the appeal succeeds, the initial dismissal is undone or retrospectively rescinded".

Legal principles

- [20] In terms of section 77 of the Basic Conditions of Employment Act, the Labour Court has jurisdiction to entertain contractual claims. The Supreme Court of Appeal in *Withok Small Farms (Pty) Ltd and Others v Amber Sunrise Properties 5 (Pty) Ltd*⁷ held that:

'It is a trite principle of the common law that, unless the contrary is established, a contract comes into being when the acceptance of the offer is brought to the notice of the offeror.'

⁶ Act 66 of 1995, as amended.

⁷ [2008] ZASCA 131 at para 10.

- [21] The respondent in the heads also quoted from the matter of *J Space (Pty) Ltd v O-Yes Auctions CC*⁸, where the court held that: *"In South African law, no contract can come into existence unless the offer is accepted, which acceptance must be clear and unambiguous. For acceptance of an offer to be effective it should correspond with the terms set out in the offer"*.
- [22] It is common cause that Mr Dikobo of the appellant sent a letter to the respondent that the decision to dismiss him would not be implemented pending the decision on appeal. It is trite that a dismissed employee is not entitled to any salary after the termination of employment. In Mr Dikobo's communication to the respondent, it was stated that the appellant would pay his salary up to 22 August 2018, the date of his dismissal. This meant that after the 22nd of August 2018, the respondent would not be entitled to receive any salary. However, the sentence that followed was an undertaking on behalf of the appellant that, should the respondent elect to lodge an appeal, the decision would not be implemented, effectively meaning that he would remain employed and entitled to continue receiving his salary. As the respondent continued to receive his salary after August 2018, this indicated that the decision was not implemented.
- [23] At the time of Mr Dikobo's letter to the respondent, an offer was made that, should he lodge an appeal, the decision would not be implemented. The respondent accepted the offer by lodging an appeal. The acceptance corresponded with the terms set out in the offer by the appellant. The acceptance was brought to the notice of the appellant with the lodgement of the appeal. A legally binding contract came into effect, and the appellant complied with it by continuing to pay the respondent's salary until February 2019.
- [24] The appellant argued that there was no obligation to pay the respondent because he had been dismissed. However, no steps were taken by the appellant to withdraw the offer made or to recover the monies already paid to the respondent. The appellant stopped paying the respondent from the 1st of March 2019 until the appeal was finalised on 30 September 2019. This was a

⁸ [2024] ZAGPJHC 32 at para 33.

clear breach of contract by the appellant. The terms of the offer made and accepted were that, pending the finalisation of the appeal, the decision would not be implemented. The appeal was finalised on 30 September 2019, which should have been the date on which the decision was to take effect under the offer.

[25] The appellant relied on the decision in *Nchabeleng v University of Venda and others*⁹, which held that lodging an internal appeal does not suspend the employee's dismissal. The circumstances in this matter are distinguishable based on the fact that after the decision to dismiss the respondent, the appellant made an offer not to implement the decision. It is so that an employer's decision to dismiss an employee terminates the employment relationship. However, the offer made to the respondent in this case fell within the employer-employee relationship, as it concerned the decision to dismiss and the non-payment of salary.

[26] The court *a quo* found that the respondent was entitled to his salary from 1 March 2019 to 30 June 2020, when he received a letter of dismissal after the appellant withdrew the review application. This finding is not consistent with the offer that was made and accepted. The offer related to the period pending the appeal's finalisation, which is from 1 March 2019, when payment was stopped, to 30 September 2019, when the appeal process was finalised.

Costs

[27] As far as the costs of this appeal are concerned, both parties have partially succeeded, and there is no need for a cost order.

[28] Consequently, the following order is made:

Order

1. The appeal succeeds to the extent that the order of the court *a quo* is varied and substituted with the following:

⁹ [2002] ZALC 167.

- (a) The respondent is ordered to pay Mahomed Yusuf Sader his full remuneration from 1 March 2019 until 30 September 2019. The amount due to Mahomed Yusuf Sader is R10 439.00 x 7= R710 073.00 (Seven hundred and ten thousand and seventy-three rand).
- (b) The amount of R710 073.00 to be paid with the interest rate applicable as at September 2019 to date of payment.
- (c) The respondent is to pay the applicant's costs on a party and party scale.'

2. There is no order as to costs.

Djaje AJA

Acting Judge of the Labour Appeal Court

Van Niekerk JA, and Chetty AJA concur.

APPEARANCES:

For the Appellants: Adv T Moretlwe

Instructed by KNT Attorneys

For the Respondents: Mr N Thaanyane

Instructed by Thaanyane Attorneys