



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 1928/24

In the matter between:

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION WORKERS UNION ("AMCU")
OBO BVUMA, VT**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION
ROBERT SKOSANA N.O.**

First Respondent

Second Respondent

MARLEY ROOFING (PTY) LTD

Third Respondent

JR 2006/24

In the matter between:

MARLEY ROOFING (PTY) LTD

Applicant

and

**THE ASSOCIATION OF MINeworkERS AND
CONSTRUCTION UNION ("AMCU") OBO
VERNON TLANI BVUMA**

First Respondent

ROBERT SKOSANA N.O.

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 22nd January 2026

Delivered: 18th February 2026

JUDGMENT

MUNSAMY, AJ

Introduction

- [1] The respective parties have both instituted review applications against the same arbitration award of the Second Respondent. The applications have been consolidated to be heard together by order of the above Honourable Court on the 6th of June 2025, which stated as follows:

‘1. The abovementioned matters under case number JR 1928/24 and JR 2006/24 are to be set-down simultaneously on a date to be allocated by the Registrar.’

- [2] The parties, for ease of reference, will be referred to as AMCU, Marley and the employee, Mr Bvuma. AMCU seeks that the arbitration award be reviewed and set aside insofar as the Second Respondent, after finding in its favour that the dismissal was substantively unfair, ordered compensation as opposed to retrospective reinstatement. Marley seeks that the arbitration award, insofar as the Second Respondent found that the dismissal of AMCU’s member was substantively unfair, be reviewed and set aside and replaced with a finding that the dismissal was fair, alternatively, that the matter be remitted to the First Respondent.

- [3] No serious argument was pursued by either party for a remittal of the matter. The record of proceedings reflects that the matter was fully ventilated before the Second Respondent, and this Court is well placed to deal with the matter in its entirety based on the record.

- [4] Preliminary issues were raised by AMCU regarding Marley's alleged non-compliance with the rules of the above Honourable Court with regard to the filing and prosecution of the review applications. I advised both Counsel that I did not believe that these issues prevented the matter from being argued or had to be determined first prior to the matter proceeding and I would take same into consideration regarding the issue of costs. Both Counsel agreed that this was appropriate.
- [5] The employee referred an unfair dismissal dispute to the First Respondent. The Second Respondent, under the auspices of the First Respondent, found that the dismissal was procedurally fair but substantively unfair. The Second Respondent ordered Marley to pay eight (8) months salary to the employee as compensation for being unfairly dismissed.
- [6] The employee's unfair dismissal referral stemmed from him being charged and dismissed for:
- '(i) *Marketing services at the company without the approval of management that in turn was dishonest conduct by the employee.*'
- [7] The alleged marketing of services was for canvassing and recruiting members for AMCU without following Marley's necessary procedures. That appears to be, if one wishes to market services, that management must approve the said marketing of services.

A summary of the essential evidence before the Second Respondent in relation to the issue of substantive fairness

Ms Debbie Steenkamp – "Steenkamp"

- [8] Steenkamp stated that she is the human resources manager – Marley Roofing (Pty) Ltd. She framed the dispute as one of dishonesty not union membership. She confirmed that the dismissal was not for union membership but for "*marketing services without approval*". She accepted that employees are entitled to join a union of their choice. Steenkamp stated that procedural fairness was not in dispute and that a disciplinary hearing had been held.

Steenkamp asserted the notion that management's approval was required before any "*marketing*" activity occurred on company premises.

- [9] Steenkamps' evidence did not point to a written policy prohibiting union recruitment. She accepted that joining a union itself is not misconduct. She relied heavily on conclusions drawn rather than firsthand knowledge. Her evidence failed to establish a clear rule breached by the employee beyond a broad allegation of "*marketing*" AMCU without following internal procedures.
- [10] The contention being that when the employee was questioned about recruiting for AMCU he denied doing so. She alleged that this amounted to a "*marketing of services*" which he was dishonest about when questioned regarding his involvement.

Ms Ronalda Dominique Pillay – "Pillay"

- [11] Pillay stated that she is the human resources director – Marley Roofing (Pty) Ltd. She testified about meetings with the employee and his alleged dishonesty. HR became aware of possible AMCU recruitment after receiving an email from AMCU. She met with the employee and initially accepted his explanation that he was not recruiting members. She later concluded he had been dishonest after lists of AMCU members emerged during CCMA proceedings (the organizational rights referral by AMCU). At those proceedings the AMCU official advised that he had received the union membership forms from the employee.
- [12] She accepted that HR did not object to employees joining AMCU. She accepted that deductions and verification of subscriptions were still unresolved at the time. However, she contended that one cannot say that a person is just handed a form to sign the employee had to "*market*" the services of AMCU.
- [13] She could not clearly explain how recruitment differed from employees voluntarily joining. She accepted that no clear process existed for how unions should recruit. She relied on what other employees allegedly said (hearsay). Her evidence significantly watered down the allegation of dishonesty by

conceding that Union membership is lawful, no clear instruction or rule was communicated to the employee.

Mr Mohammad Ridhwaan Singh – “Singh”

- [14] Singh testified that he is the plant manager – Olifantsfontein. He personally questioned the employee about whether he was recruiting employees for AMCU and the employee denied involvement in recruiting.
- [15] Singh stated that the employee should have involved management and followed procedures. Further, that union activities should not occur during company time.
- [16] He was the line manager to whom the employee reported. He confirmed that the employee approached him regarding employees wanting to join AMCU. He accepted that no recruitment arrangements to his knowledge were made on company premises. He distanced himself from the proceedings by stating that he was not the person who charged or dismissed the employee. He described the employee as a good employee who was always at work.
- [17] Singh confirmed that employees had already joined AMCU before HR became involved. He could not identify any specific instruction given to the employee that was breached. He accepted that union activities were not clearly regulated by policy.

Mr Vernon Tiani Bvuma – “employee”

- [18] The employee stated that he was employed in 2019 as an Artisan Assistant. He denied recruiting employees for AMCU. He explained that employees collectively decided to join AMCU. He confirmed he merely assisted by handing over forms from an organiser. He later testified that he never threatened anyone and never acted as a shop steward. There was no rule which required him to inform management of which union employees chose to join. He denied dishonesty and explained he answered questions honestly based on his understanding, which was, whether or not *he* was recruiting for AMCU *during company time*.

- [19] Marley's representative put it to the employee that he was offered reinstatement and declined. The employee disputed this and contended that it was not an offer of reinstatement as he would be employed by Marley but on different terms and conditions of employment.

Analaysis on the substantive fairness of the dismissal

- [20] The Second Respondents decision amounts to that of a reasonable decision maker in circumstances where:

- 20.1 Marley's witnesses could not point to a clear rule breached. The witnesses relied on assumptions and hindsight. The witnesses, other than accusing the employee of changing his version regarding handing over forms versus actively recruiting did not establish much to convince a presiding officer that the employee was dishonest.
- 20.2 In fact, Pillay reads terribly on the record and one can understand the employee's hesitance to commit to a version when questioned about joining/recruiting for a new union. He may have been evasive but this equally begs the question of whether he was required to disclose his union activities which the employer Marley could not prove affected their operations in any manner or form. Her evidence demonstrated uncertainty and retrospective justification.
- 20.3 For Steenkamp and Pillay to escalate this to the "*marketing*" of services is quite astonishing and appears a somewhat desperate attempt to find fault with the employee.
- 20.4 Singh's evidence strongly favoured the employee in that it can be inferred from his evidence that no instruction was disobeyed, no active recruitment occurred on company premises that he could testify too either authorised or prohibited. There was no operational harm proven. His evidence contradicted the allegation of dishonesty insofar as "*marketing*" was concerned.

20.5 Employees enjoy a freedom of association and cannot be required, even if a policy were in place, to answer to an employer regarding recruitment and membership. The very nature of the animal is such that it is done behind closed doors until enough numbers are recruited to then use the provisions of the LRA to persuade an employer to recognize a union and get access to assist its members in the workplace.

20.6 The employee appears consistent throughout his testimony. He explained clearly the distinction between recruitment by a union and workers independently choosing union membership. His evidence established that he did not commit misconduct. He explained that there was no dishonest intent. He was entitled to his lawful exercise of freedom of association. He provided a reasonable and probable version that was accepted by the Second Respondent.

[21] The evidence fully supports the finding of substantive unfairness and underpins AMCU's case that dismissal was disproportionate and unjustified. One cannot fault the findings of the Second Respondent in this regard. He reached a decision that any reasonable decision maker would have reached.

[22] This Court is not required to sit in the seat of the arbitrator and make a finding. Marley's case as pleaded in its founding affidavit essentially required this exercise of the Court. Whilst framed as a reasonableness review it largely sought to redetermine whether or not the applicant is guilty of misconduct rather than whether or not the Second Respondent reached a reasonable decision. I have considered the decision and principles set out by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*¹. In particular, the Court held that:

'[110] ... s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is

¹ [2007] ZACC 22; [2007] 12 BLLR 1097 (CC)

now suffused by the constitutional standard of reasonableness. That standard is the one explained by *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

[23] Against the aforementioned jurisprudence the review application against the substantive fairness of the dismissal must fail.

Whether the employee should have been compensated or retrospectively reinstated?

[24] It is evident from the record of proceedings that the 7.11 referral form sought reinstatement. The employee consistently prayed for an order of reinstatement.²

[25] The above is further supported by the arbitration transcription:

'Commissioner: What is the Applicant looking for? What sort of relief?

Mr Chijokwe: Reinstatement commissioner. [Reinstatement commissioner, it's always been our prayer.³] But obviously the commissioner will decide. From the union, the same point. The employee is still not working.

Commissioner: Still not working?

Mr Chijokwe: Yah he is [inaudible]. [He needs his employment back].⁴

Ms Steenkamp: Mr Commissioner, we did offer the employee a reinstatement at the last meeting at the CCMA.

Commissioner: Yes, when we last met.

Ms Steenkamp: Yes and he declined it.

[Background comments]

² Para 11, founding affidavit, page 8 of the indexed pleadings.

³ Line 17, page 124 of transcript in 1928/2024.

⁴ Line 21, page 124 of transcript in 1928/2024.

Commissioner: Sorry Mr?

Applicant: Yes I declined it because for me, I did not do anything wrong and I cannot... (intervenes).

Commissioner: Reinstatement – Return to Work.

Applicant: Oh. They never... it was not reinstatement.

Ms Steenkamp: Yes it was. It was. We offered you reinstatement at the new line that we started this year. We started a new metal sheet line. We requested for two people. Renaldo offered it to you. We even gave you the salary and you said to us... you never came back to us and said that you will accept it. Renaldo even said the line was to start in August, which the line has started and we have employed people on the line. We did offer you.

Commissioner: You offered re-employment on another line, which was separate from what he was doing?

Ms Steenkamp: But that is the only position we had. So we offer him a reinstatement. It was the same company, just on a different line.

Mr Chijokwe: This is not reinstatement.

Ms Steenkamp: It is reinstatement. You are working for Marley.

Mr Chijokwe: Re-employment on (inaudible) line, which was separate from what he was doing.

Ms Steenkamp: It is a Marley line.

Mr Chijokwe: That is why he said if I go back I'll be worse off than I was before if I were to take that offer. And he would be isolated from... his condition is (inaudible). [And he will be isolated from his colleagues, his group]⁵

Steenkamp: Has he even gone to look at it? The line is at Marley Roofing in the same factory.

⁵ lines 15-16, page 126 of transcript in 1928/2024

Chijokwe: Let us not debate much but I think it is not proper to say... (intervenes).

*Commissioner: Okay let's go off record. We will deal with closing arguments.*⁶

[26] In terms of its closing argument, AMCU submitted:

*'As against this background Commissioner, we submit that the dismissal of the Applicant was too harsh a decision in the circumstances and we pray that the dismissal should be overturned and the Applicant be reinstated.'*⁷ (Own emphasis)

[27] Adv. Cook on behalf of AMCU argued that:

27.1 There was no evidence that the employee had abandoned his prayer for reinstatement. The record does not contain any evidence that the employee did not seek reinstatement because he had moved on and started a small business venture for himself. The only evidence before the commissioner was that the employee was made an 'offer' of reinstatement. It is clear that the commissioner neglected to consider the evidence before him and relied upon evidence that was not before him.

27.2 Section 193(2) of the LRA establishes reinstatement as the default and primary remedy for substantively unfair dismissals. Compensation is exceptional and may only be awarded if one of the statutory exceptions in s 193(2)(a)–(d) is established. Therefore, reinstatement must follow a finding of substantive unfairness unless one of the limited statutory exceptions is proven.

27.3 It is trite that the phrase not reasonably practicable means more than inconvenience or discomfort. It requires proof that reinstatement is beyond feasibility, not merely undesirable or operationally inconvenient. The onus rests on the employer to lead compelling

⁶ line 5, page 89 to line 20, page 90 of the transcript

⁷ Page 84 of the record.

evidence demonstrating impracticability. The mere fact that the employer has filled the post does not render reinstatement impracticable. An employer cannot rely on circumstances it created through its own unfair conduct.

27.4 Accordingly, the Second Respondents' finding that the employee should be compensated and not reinstated is a finding that no reasonable decision maker could have reached.

[28] One cannot fault Adv. Cook's argument in this regard, it is well supported by a plethora of authorities surrounding reinstatement and submitted in his heads of argument.

[29] The Constitutional Court in *SACAWU v Woolworths (Pty) Ltd*⁸:

[46] Reinstatement must be ordered when a dismissal is found to be substantively unfair unless one of the exceptions set out in section 193(2) applies, namely that the affected employees do not wish to continue working for the employer; the employment relationship has deteriorated to such a degree that continued employment is rendered intolerable; it is no longer reasonably practicable for the employees to return to the position that they previously filled; or the dismissal is found to be procedurally unfair only.

[47] As affirmed by this Court previously, the fact that a significant period might have lapsed from the date of dismissal to the date of the judgment is not a bar to reinstatement. An employee whose dismissal is substantially unfair should not be disadvantaged by the delays of litigation where they have not unduly delayed in pursuing the litigation.

[48] At this stage, I deem it appropriate to focus particularly on the exception provided for in section 193(2)(c), namely instances wherein reinstatement is not "reasonably practicable".

⁸ [2018] ZACC 44; [2019] 4 BLLR 323 (CC).

[49] The LRA does not define the term “reasonably practicable”. However, guidance can be sought from various authoritative court decisions. The Labour Appeal Court in *Xstrata* held:

“The object of [section] 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the job no longer exists, or the employer is facing liquidation or relocation or the like. The term ‘not reasonably practicable’ in [section] 193(2)(c) does not equate with term ‘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. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile.”

It is thus evident that the term “not reasonably practicable” means more than mere inconvenience and requires evidence of a compelling operational burden.

[50] An employer must lead evidence as to why reinstatement is not reasonably practicable and the onus is on that employer to demonstrate to the court that reinstatement is not reasonably practicable.’ (Own emphasis)

[30] “Not reasonably practicable” must mean more than inconvenient, troublesome or uncomfortable.⁹ In *DHL Supply Chain (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Others*¹⁰ this Court held:

[21] The Labour Relations Act 61 of 1995 prescribes reinstatement unless it is proven to be intolerable or impracticable. (Section 193(2)(b) and (c)) The evaluation of this question is clinically objective, having regard to the balance of fairness between employer and employees and a decision is the outcome of the exercise of discretion. (*Equity Aviation Services (Pty) Ltd v CCMA* (2008) 29 ILJ 2507 (CC) at [48]).

⁹ *Equity Aviation Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (P428/09) [2010] ZALC 221 (21 September 2010) at para 36.

¹⁰ [2014] ZALAC 15; [2014] 9 BLLR 860 (LAC).

A decision in terms of this Section is therefore, in part, a value judgment and, in part, a factual finding made upon the evidence adduced about the unworkability of a resumption. Core equitable values demand that a worker who is not proven to be guilty of dishonesty should not forfeit a valuable and scarce employment opportunity. This is precisely the reason why reinstatement is the primary and default remedy, unless it is displaced by factors that serve to outweigh its underlying rationale. Those factors are intolerability or impracticability and set high thresholds.’ (Own emphasis)

[31] In *Booi v Amathole District Municipality*¹¹, the Constitutional Court held that:

‘The language, context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one. The term “intolerable” implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult, fraught or [Page LRA 8-114(9)] even sour. This high threshold gives effect to the purpose of the reinstatement injunction in section 193(2), which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal.’

Khampepe ADCJ added that “the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability ... The evidentiary burden to establish intolerability is heightened where the dismissed employee has been exonerated of all charges”.

[32] Marley did no more than allege that they offered the employee a position. This offer was not an offer of reinstatement on the terms and conditions which applied at the date of his dismissal. The relief sought in his referral being reinstatement. This was an offer which also did not clarify how Marley intended to compensate the employee for the time period that he had been dismissed. Too little information around this ‘offer’ was provided for any reliance to be placed on it. What reliance can be placed on it, which Advocate Cook for AMCU pointed out is that the notion that the trust relationship has

¹¹ [2010] ZALC 221; [2022] 1 BLLR 1 (CC) at paras 40, with reference to *Equity Aviation Services (Pty) Ltd v CCMA* [2008] 12 BLLR 1129 (CC) at para 36. See also *Mthethwa v CCMA* [2022] ZALAC 95; [2022] 9 BLLR 814 (LAC).

broken down can all but be forgotten against Marley's offer for the employee to return to work. Had this employer been, realistically, so affected by the alleged dishonesty that it destroyed the trust relationship it would not have made such an offer.

[33] Further, the employee should not be punished for finding means to sustain himself and his family whilst awaiting the outcome of his dismissal dispute. He is duty bound to do so and would be irresponsible to await the outcome of an arbitration, review application and any further proceedings. It could result in the ultimate ruin of his home and life to do so. It is trite that the employee also has no duty, in labour law jurisprudence, to mitigate his loss¹². In any event, his decision to do so cannot be used as grounds to infer that he no longer seeks reinstatement unless he expressed same.

[34] The Second Respondent's findings in this regard is one that no reasonable decision maker could have reached on the prevailing jurisprudence surrounding reinstatement.

[35] The order hereunder will dispense with both the respective review applications.

AMCU – point in *limine* – Rule 37

[36] AMCU's point in *limine* relates to Marley's abuse of rule 37 of this Honourable Court and alleges that it did not comply with the said rule by filing a "*verbose account of Mr Bvuma's employment*" history with Marley. Whilst I accept that the review application did not comply with Rule 37. It is trite that this Court can only consider the evidence before the Second Respondent. I have, accordingly, confined my consideration of this matter to the record as it stood before the arbitrator and the pleaded grounds of review in the respective review applications. I will take into account Marley's non-compliance with Rule 37 in respect of the issue of costs.

Marley's counter-application

¹² *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (CCT 72/09) [2010] ZACC 3 paras 39 – 44

- [37] Marley, in filing its answering affidavit to AMCU's review application, has filed a counter-application seeking a declarator that the dismissal is procedurally and substantively fair. This is precisely what their review application required the Court to determine. The filing of the counter-application therefore being academic and unnecessary.

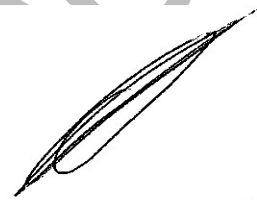
Costs

- [38] Both parties sought costs, including the costs of Counsel, in the event that either party was successful. I have considered the provisions of s 162 of the LRA. AMCU correctly sought to review and set aside the arbitration award by the Second Respondent insofar as he did not reinstate the employee when the law requires that he do so. Marley opposed these proceedings and, in addition thereto, filed a counter application seeking a declarator that the dismissal was fair. As pointed out above. This was wholly unnecessary. Its opposition thereto being without merit when there was simply no evidence before the Second Respondent to have failed to apply the primary remedy in s 193 of the LRA.
- [39] Marley's conduct in respect of its own review application was an abuse of this Court's processes. Marley's non-compliance with Rule 37 warrants an adverse costs order where parties have been specifically directed under the current rules to comply with same.
- [40] Neither party made submissions in regard to whether an ongoing relationship exists between AMCU and Marley, which could have persuaded this Court otherwise on the issue of costs.

Order

1. The Second Respondent's arbitration award under case no. GATW: 14326-23 is reviewed and set aside. The Second Respondent's award is substituted with an order as follows:
 - 1.1 The dismissal of Mr. V.T. Bvuma was substantively unfair;

- 1.2 Marley is directed to reinstate Mr. V.T. Bvuma, with full retrospective effect, on the same terms and conditions that applied prior to his dismissal;
- 1.3 Mr. Bvuma must tender his services within three (3) days of receipt of this order.
2. Marley is ordered to pay AMCU's costs of both applications under case number 1928/2024 and 2006/24, on a party and party scale C, together with the costs of Counsel.



K.R. Munsamy
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. A. Cook
Instructed by: LDA Attorneys

For the Respondent: Adv. XT Van Neikerk
Instructed by: Waldick Inc. Attorneys