



(1) Reportable Yes
(2) Of interest to other Judges: Yes
(3) Revised

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case no: DA09/2025

In the matter between:

BAKHRESA SA (PTY) LTD

Appellant

and

ROSHELLE JAIPAL

First Respondent

COMMISSIONER CHARLES OAKES N.O.

Second Respondent

CCMA

Third Respondent

Heard: 26 February 2026

Delivered: 24 March 2026

Coram: TOKOTA AJA; COLLIS AJA and MOSHOANA AJA

JUDGMENT

MOSHOANA, AJA

Introduction

- [1] This is an appeal against the judgment and order of the Labour Court. The appeal comes before this Court following an order of the Labour Court dated 13 December 2024 granting the appellant leave to appeal to this Court. The appeal is opposed by the first respondent, Ms Roshelle Jaipal. On 02 July 2024, the Labour Court dismissed an application seeking to review and set aside an arbitration award issued by the second respondent, Commissioner Charles Oaks. The Labour Court delivered reasons for its order on 27 September 2024.
- [2] This Court must remark at this embryonic stage that, the judgment of the Labour Court furnished what is clearly terse reasons why the award of the Commissioner was upheld. Albeit that the appellant had raised the issue of furnishing of insufficient reasons as a ground of appeal before us, Mr Itzkin, who appeared for the appellant, did not press on this ground, but he did not expressly abandon it. In due course, this Court shall express itself on this complaint.

Background Facts

- [3] Ms Jaipal commenced employment with the appellant, Bakhresa SA (Pty) Ltd, in 2015 as a Procurement Supervisor. The appellant is a South African subsidiary of the Tanzanian-based Bakhresa Group specialising in large-scale wheat milling and agro-processing. It is located in the province of KwaZulu Natal, in Durban. Ms Jaipal was a member of a trade union that organised members at the appellant's workplace. On 7 July 2020, the employees of the appellant embarked on an unprotected strike action. The striking employees blocked the entrance to the appellant's premises, thereby preventing clients from entering as well as stopping employees from reporting for work.
- [4] Displeased by the strike action and the conduct of its employees, the appellant resolved to approach the Labour Court in order to seek an order interdicting the striking employees. The notice of motion and the supporting affidavits were affixed on the wall of the premises of the appellant. Copies of

the court papers were also sent to the trade union. Additionally, a short message service (sms) was dispatched to all the employees advising them that the interdict application shall be heard on 09 July 2020.

- [5] Indeed, the order applied for was granted by the Labour Court. Again, the order so obtained was affixed on the wall and smses were dispatched to all the employees advising them of the obtained order. On 20 July 2020, Ms Jaipal forwarded an email drafted by her advocate sister to the appellant in terms of which she raised certain shortcomings in the notice of motion used to obtain the court order of 09 July 2020. Amongst other things, the email read:

‘I would therefore be very surprised, should you be able to furnish me with an actual court order, legally issued and granted by the Labour Court and not by Bakhresa.’

- [6] Prior to 20 July 2020, Ms Jaipal exchanged WhatsApp messages with one Mr Irshaad Moidheen, the Legal and Human Resources Manager of the appellant. In one of the messages, Ms Jaipal stated the following:

‘That message is for rao and Vivek because they don’t have *the balls* to deal with us so since you passing their messages to us you can pass this message about our safety to them. We are not the enemy. We are here to work.’

- [7] A month later, around 20 August 2020, Ms Jaipal was served with a disciplinary notice calling upon her to answer to two allegations of misconduct. It is important, for the purposes of this judgment, to set out the allegations levelled against Ms Jaipal. The allegations were couched in the following terms:

‘Charge One

It will be contended by the Company that you in your position as Procurement Supervisor, given your attitude and/or inappropriate behaviour, you are incompatible with the corporate culture, in that:

In your email of 20 July 2020, you made numerous allegations implying fraud having been committed by the Company in respect of the Court Order that had been obtained from the Labour Court on 09 July 2020, and in response to your email of 20 July 2020, you were provided with the Court papers as well as the Court Order on 20 July 2020, through Company's attorneys. Despite having been provided with the aforementioned documentation as well as an opportunity to retract your serious allegations implying fraud, you refused and or failed on 21 July 2020 to do so, as you were of the view that this was not necessary.

Charge Two

Disorderly Behaviour-abusive language and untrue and false statements against management.

In the circumstances, the Company will contend that your behaviour is not conducive to good employment practices and that your conduct is such that there is a breakdown of the employment relationship, in particular because you have behaved in a manner that makes it unacceptable to continue with employment relationship, which for purposes of that matter is based on trust and mutual respect.'

- [8] Following a disciplinary hearing, Ms Jaipal was found guilty as charged and dismissed. Disenchanted by her dismissal, she referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging unfair dismissal. On 6 June 2022, Commissioner Charles Oaks published his award and found that the dismissal of Ms Jaipal was substantively unfair but procedurally fair. He ordered the appellant to reinstate Ms Jaipal with retrospective effect from 21 August 2020. Further, he ordered the appellant to back-pay Ms Jaipal. He directed Ms Jaipal to tender her services on or before 25 June 2022.
- [9] The appellant was chagrined by the award and launched a review application. The Labour Court dismissed that application as outlined at the dawn of this judgment. It is against that order that this appeal lies.

Judgment of the Labour Court

- [10] With considerable regret, the Labour Court judgment is adorned with brusqueness. Other than stating that the award is reasonable, nowhere does the learned judge engage with the merits of the dispute that led to the dismissal of Ms Jaipal. To that, this Court finds it befitting to restate the role of a Court of review. This Court is by no means decreeing that a Labour Court judgment should be detailed to be acceptable to a Court of appeal. Additionally, this Court does not suggest that where reasons for the order are terse, that on its own renders the order of the Labour Court appealable.
- [11] However, the Labour Court is a Court of law and not an administrative body like the CCMA or Bargaining Council. In terms of section 151(2) of the Labour Relations Act¹ (LRA), the Labour Court is a superior court and has standing equal to that of a court of a Division of the High Court of South Africa. In terms of section 165(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution), the judicial authority of the Republic is vested in the courts. In terms of section 165(5) an order or decision issued by a court binds all persons to whom and organs of state to which it applies. Additionally, section 34 of the Constitution affords everyone the right to have any dispute decided in a fair public hearing before a court. Given these constitutional imperatives, a court of law is under a duty to provide orders and decisions that are properly reasoned.
- [12] In *Mphahlele v First National Bank of South Africa Ltd*², the Constitutional Court expressed the following vista:

‘The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions

¹ Act 66 of 1995, as amended.

² 1999 (2) SA 667 (CC) at para 12; *S v Machaba* 2016 (1) SACR 1 (SCA) ([2015] 2 All SA 552; [2015] ZASCA 60) PARA.63.; Hoexter Administrative Law in South Africa 2 ed (Juta & Co Ltd, Cape Town 2012) at 477. *Nomala v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (8) BCLR 844 (E) at 856D – E.

is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to make an informed decision as to whether or not to appeal, or where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.

[Own emphasis]

- [13] The above vista received an imprimatur in the decision of *Prithilal v Akani Egoli (Pty) Ltd and Another*³. Might I add, an arbitration award is an administrative action within the meaning of section 1 of the Promotion of Administrative Justice Act⁴ (PAJA). Where the Labour Court upholds it, the Court is duty bound to provide adequate reasons why it upholds it. It is insufficient for the purposes of an appeal Court to contend with what may appear as a 'throw away' statement that a decision is one that a reasonable decision maker could not reach. This is indeed the approved test applicable to review applications. However, it is incumbent on the Labour Court to provide adequate reasons why such a test is applicable onto the impugned arbitration award.

- [14] In *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd*⁵, the Supreme Court of Appeal added:

'This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if

³ 2025 (8) BCLR 921 (CC).

⁴ Act 3 of 2000.

⁵ 2003 (6) SA 407 (SCA) at para 40

those facts have been in dispute), and the reasoning processes which led him to those conclusions.'

Speaking for this appeal Court, in order to confirm the correctness of the impugned order, it had to trawl through the record as well as the arbitration award to establish for itself why the impugned arbitration award is one that a reasonable decision maker would reach. As decreed in *Mphahlele*, when judges pen judgments, they must have in mind the parties; the public; as well as the Court of appeal. This, in my considered view, can be achieved by providing adequate reasons why a particular order is reached. A finding like the one quoted below is unhelpful to the losing party and to the Court of appeal.

'Similarly, the evidence is well analysed, and this analysis cannot be faulted when checked against the evidence which was actually presented at the arbitration.'

- [15] In sum, this Court takes a view that a Labour Court judge must make a concerted effort to provide adequate reasons in a judgment, particularly where an arbitration award is either upheld or set aside. Section 145(1) of the LRA approbates the special supervisory power to the Labour Court over arbitration awards. Regard being had to the approved test of review, in a court judgment there must be a clear demonstration that such supervisory powers were appropriately exercised. This Court is not advocating for seminal and scholarly judgments by the Labour Court. It simply advocates for furnishing of adequate reasons for court orders. This Court must caution though that furnished poor reasons on their own do not justify judicial intervention. However, there must be a discernible or perceptible basis to demonstrate that a judge had grappled with issues that will justify the order reached. The losing party and the Court of appeal benefits immensely out of this suggested approach.

[16] Regarding the challenge on the granting of the remedy of reinstatement, the Labour Court, after referencing the Constitutional Court decision in *Booi v Amathole District Municipality*⁶ tersely reasoned as follows:

'19. I concur with these judgments and the decision of the Third Respondent to order the reinstatement of the First Respondent is reasonable and justifiable.'

[17] Discernibly, no proper reasons were provided why the Labour Court concluded that the decision to reinstate is justifiable or reasonable. Unfortunately, and with considerable regret, to simply concur with the judgments of a higher court is not reason enough to persuade a losing party that a judge grappled with the issues to satisfy its section 34 rights. The question whether reinstatement as a remedy is appropriate, as raised by the appellant, does not turn on the reasonability of the decision, but on whether the statutory requirements for the granting of the relief are met or not. It was thus incumbent on the Labour Court to provide adequate reasons why the exclusionary basis for the primary remedy were not demonstrated by the appellant. In due course, this Court shall revert to the issue whether it was appropriate to reinstate Ms Jaipal or not.

Before the Labour Appeal Court

[18] Before us, counsel for the appellant persisted with three challenges against the arbitration award, which the Labour Court upheld; namely; (a) the finding of not guilty in respect of the two charges was unreasonable; (b) interfering with the sanction of dismissal was equally unreasonable; and (c) the awarding of the remedy of reinstatement contrary to section 193(2)(c) exclusion constituted a material error of law. Mr Titus, who appeared on behalf of Ms Jaipal, defended the award and submitted that it falls within the elastic band of reasonableness, as such, the Labour Court did not err in not interfering with it. Regarding the remedy of reinstatement, he vigorously submitted that the

⁶ [2022] 1 BLLR 1 (CC).

alleged redundancy did not unseat the primary remedy of reinstatement as ordered by the commissioner.

Analysis

[19] This Court when faced with an appeal against an order either refusing or granting a review application, it must still itself answer the question whether the impugned arbitration award passes the constitutional muster or not. In essence, this Court must consider whether the Labour Court was correct when it concluded that the decision of Commissioner Charles Oaks is unassailable.

[20] In determining the correctness of the decision of the Labour Court, this Court must consider whether the Labour Court correctly performed its supervisory role as a Court of review or not. Since the advent of the LRA, the legislature decided that arbitration awards are not to be subjected to an appeal. This decision of the legislature must be respected. Courts must continually observe and appreciate the clear divide between a review and an appeal. This Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*⁷ aptly and succinctly laid out the following principles regarding a review of an arbitration award:

'[16] In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

[21] This Court in entertaining this appeal would equally have to consider whether (a) the principal issue – fairness of the dismissal - was considered; (b) the arbitrator evaluated the facts presented at arbitration; and (c) having done (a) and (b), the arbitrator reached a justifiable or reasonable decision. In terms of section 188(1)(a)(i) of the LRA, a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason related to the employee's conduct. The statutory duty to determine whether a dismissal is fair is that of a commissioner. Where misconduct is alleged, an employer must

⁷ [2014] 1 BLLR 20 (LAC) at para 16.

prove that indeed the dismissed employee is guilty of the misconduct that led to his or her dismissal. It has long been resolved that in performing this statutory duty, a commissioner should not defer to the decision of the employer.

The question of guilt

- [22] With regard to this question, the principal issue to have been determined by the commissioner was whether Ms Jaipal was guilty of charges one and two. It is by now rested law that an employer is not required to craft disciplinary charges with such meticulousness or perspicacity which will make a criminal court happy. All that is required is for the employer to set out its complaint in a clear manner that a charged employee will be able to understand and answer. Regarding charge one, the commissioner correctly located the basis of the complaint of the employer to be the contents of the email dated 20 July 2020. It became common cause at the arbitration hearing that the email was drafted by Ms Jaipal's sister, who happened to be a practising advocate.
- [23] In my view, it matters not as to whether the email was drafted by counsel or not. Nothing much turns on this. What is key being the contents thereof. The contention of the appellant in relation to charge one is that Ms Jaipal behaved inappropriately by making numerous allegations implying fraud having been committed by it. Such an inappropriate behaviour rendered her incompatible with the corporate culture, so it was contended. A further contention is that a failure to retract the serious allegations implying fraud makes her guilty of inappropriate behaviour. In dealing with charge one, the commissioner reached the following finding:

'60. Nonetheless, at issue in the present matter is whether the [this] (sic) made the Applicant incompatible. There is firstly no issue of incompatibility when one considers the aforementioned. The email pointed out factual discrepancies in the notice of motion which raised questions around its veracity. It was unreasonable for the Respondent to escalate questions raised in the email to the level of misconduct.'

- [24] The above finding is one that any reasonable decision maker may reach, regard being had to the contents of the email as well as the notice of motion, which indeed contained certain inaccuracies. Regarding the implication of fraud, the commissioner pertinently dealt with that contention and concluded that those allegations of fraud have not been proven. This Court must remark that the statement complained of is far from any implication of fraud. Again, the finding that implication of fraud was not proven is a finding that is reasonable regard being had to the contents of the statement in the email. Inasmuch as the Labour Court, as alluded to above, failed to provide adequate reasons, it is indeed correct that the findings of the commissioner with regard to guilt on charge one are not findings that a reasonable decision maker may not reach. When regard is had to the lengthy founding and supplementary affidavits of the appellant what is discernible is that the appellant was attempting an appeal which masqueraded as a review.
- [25] Regarding charge two, the contention is that Ms Jaipal displayed a disorderly behaviour that involved the usage of untrue and abusive language. The nub of these allegations is the usage of the word *balls*. The literal meaning of the word is spherical or rounded objects, typically used in sports, games and in a slang context it refers to testicles. In any interpretation exercise, the text, context and purpose of any item to be interpreted are to be considered unitarily. That notwithstanding, it is clear that the appellant viewed the usage of the word in a slang context. It is common cause that Ms Jaipal, with the benefit of the better sight of hindsight, regretted the usage of the word. Mr Itzkin submitted before us that the regret by Ms Jaipal should have led to a finding of guilt in relation to charge two.
- [26] In relation to charge two, it is thus important to consider what the commissioner found. The following is perspicuous from his award:
- '66 ... The Applicant did use the language in a message which was viewed as unacceptable by the Respondent. It must however not be confined to the plain meaning but viewed in the context it was made and must be viewed objectively when assessing its impact.'

[27] As pointed out above as a neutral word indeed the word does not carry an insulting meaning. In a slang context it does. That considered, the approach taken by the commissioner to locate the word within a particular context cannot be faulted. In dealing with the usage of the word, the commissioner reached the following finding:

'70 The Applicant testified that she was frustrated when she used the words in question and the literal meaning was not intended. She merely indicating (sic) that management should toughen up in the context of their (employees) request for safe passage into the workplace.'

[28] A Court of review is not entitled to stray with a finding guided by the evidence led at arbitration. It is apparent from the trail of the messages that the recipient of the message did not take issue with it at the time it landed. Instead, he passed the message to Rao, who in retort stated that '*need to follow the law*'. This meant that Ms Jaipal must call upon law enforcement officers to assist them instead of looking upon the appellant for help. This retort is not loaded with any abomination by Mr Rao. The words '*we are not enemies we are here to work*' used in the self-same message gives the word *balls* a different context and meaning. A reasonable commissioner would not have ignored the evidence of Ms Jaipal as to what she meant to convey and why. Again, the commissioner considered the allegation of falsity regarding the escort of management. He found that he had no reason to disbelieve Ms Jaipal. The evidence of Ms Jaipal was corroborated by Mr Cedric Govender.

[29] Ultimately, there existed no basis for the Labour Court to fault the finding that the dismissal of Ms Jaipal is substantively unfair.

The sanction argument

[30] In the heads of argument submitted on behalf of the appellant, this argument was articulated in the following manner:

'The commissioner erroneously found that the dismissal of the first respondent on the second charge offended against the recommended

sanction in the appellant's disciplinary code without having regard to the fact that the code is a guideline and that the policy contains the following provisions...'

- [31] In respect of charge two, I must remark, the arbitration award of the commissioner is not a model of clarity. It is unclear whether he made a finding that Ms Jaipal is guilty of charge two or not. On the submission of Mr Itzkin, the commissioner did not expressly make such a finding, when he ought to have made such a finding regard being had to the concessions made at the arbitration hearing. These are the type of process-related errors that do not vitiate the ultimate outcome⁸. Even if a proper reading of the arbitration award may be suggesting a finding of guilt, taking into account the terms of the disciplinary policy of the appellant, was an appropriate approach to adopt in determining the fairness of the sanction of dismissal. It remains the statutory duty of a commissioner to consider whether dismissal as a sanction is fair. A commissioner is not permitted to defer to the sanction imposed by the employer. A sanction of dismissal is appropriate only in respect of serious offences. If the appellant's internal code does not consider the use of abusive language to be serious enough to attract the ultimate sanction of dismissal, the finding that the dismissal of Ms Jaipal is substantively unfair remains reasonable notwithstanding the process-related error mentioned earlier. One of the issues to be determined by a commissioner is the appropriateness of the sanction of dismissal. If the sanction is not appropriate, then a dismissal that ensued is substantively unfair. Accordingly, there was no legal basis for the Labour Court to have interfered. Thus, the Labour Court did not err.

The remedy issue

- [32] At paragraph 77 of the arbitration award, the commissioner made the following finding:

'The Applicant has requested reinstatement retrospectively. I can find no reason not to reinstate her retrospectively.'

⁸ See *Goldfields* at para 17.

- [33] The appellant submits that the commissioner ignored the fact that reinstatement was not reasonably practicable regard being had to the “unchallenged” evidence of the position occupied by Ms Jaipal at the time of her dismissal being rendered redundant. This Court recently confirmed that ordering of reinstatement as an available remedy involves an exercise of discretion. The erudite Savage AJP, writing for the majority, in *Faeroes Properties (Pty) Ltd v SACTWU and others*⁹, expressed herself in the following terms:

‘The court or commissioner exercises a discretion when ordering reinstatement, even where there is no specific evidence or pleadings to that effect. Any factor considered relevant to the determination of whether or not such non-reinstatable conditions exists is to be taken into account.’

(Own emphasis)

- [34] In terms of section 193(1)(a)-(c) of the LRA, once a finding is made that a dismissal is unfair, a court or an arbitrator has in front of it or him or her a discretion to choose between three statutorily prescribed remedies (reinstate; re-employ; or compensate). The discretion is not necessarily a wide one. It remains a narrow one in a sense that a court or arbitrator is confined only to those three remedies. Choosing any one of them, once the jurisdictional requirement – finding dismissal to be unfair – is established, is not wrong. It is by now rested law that reinstatement is the primary remedy for a substantively unfair dismissal finding. The commissioner in this instance made a finding that the dismissal of Ms Jaipal is substantively unfair. Thus, in the exercise of his discretion, choosing reinstatement as a remedy was available to him. Having exercised his statutory discretion, his exercise of discretion is unassailable.

- [35] The Constitutional Court in *SACCAWU and others v Woolworths*¹⁰ sagaciously dispensed with the following guidance:

‘[43] It is by now axiomatic that reinstatement is the primary remedy that the LRA affords employees whose dismissals are found to be

⁹ [2025] 9 BLLR 901 (LAC) at para 44.

¹⁰ [2019] 4 BLLR 323 (CC) at paras 44 to 46.

substantively unfair. In *Equity Aviation* this Court held that the ordinary meaning of the word “reinstate” is:

“to put the employee back into the same job or position [that] he or she occupied before dismissal, on the same terms and conditions.”

[44] Accordingly, an employee that is reinstated will consequently resume their employment on the same terms and conditions which prevailed at the time of dismissal.

[45] Reinstatement is thus aimed at placing the employee in the position that they would have been in or that they would have occupied, but for the unfair dismissal. Furthermore, reinstatement is intended to safeguard employment by restoring the employment contract.

[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...

[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)

[36] In echoing similar sentiments expressed in para 50 of *SACCAWU*, this Court in *Faeroes*¹¹ expressed itself in the following clear and lucid terms:

‘[43] Whether reinstatement or re-employment “is not reasonably practicable” under section 193(2)(c) requires a determination of whether it is feasible or not. Where it is said not to be reasonably practicable, compelling evidence must be adduced that it is futile or impossible.’

(Own emphasis)

¹¹ Id fn 8 at para 43.

[37] A compelling evidence is one that is convincing and cogent. The Labour Court in *New Clicks SA (Pty) Ltd v CCMA*¹², whilst dealing with section 193(2)(b) of the LRA remarked as follows:

[17] All in all, I am saying for section 193(2)(b) to defeat the primary remedy, there must be convincing reasons for such...

[19] On the contrary, a decision to refuse the primary remedy is reviewable if no cogent reason supported by evidence is given for it. Such in my view would be an unreasonable award.'

[38] It seems to me that it is by now rested law that when reinstatement as a relief is ordered or chosen as one of the available remedies for an unfair dismissal finding, a court or a commissioner exercises a statutory discretion. The relevant question to be considered in this appeal is whether it availed to the Labour Court, as a Court of review, to interfere with the exercise of the statutory discretion. Differently put, is the Labour Court and by extension this Court empowered to say for instance, the commissioner ought to have chosen compensation or re-employment instead of reinstatement. The answer to this proposition was given by the Constitutional Court some 26 years ago in the matter of *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others*¹³. The Constitutional Court, with such perspicacity expressed the following oft-quoted statement of law:

'A Court of appeal is not entitled to set aside the decision of a lower court or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

¹² (JR1333/05) [2008] ZALCJHB 14 (27 February 2008) at paras 17 and 19.

¹³ 2000 (2) SA 1 (CC) at para 11.

- [39] Undoubtedly, where an exercise of discretion is involved, there is a very confined space for a Court above to wiggle. In choosing reinstatement as a remedy, the commissioner was not wrong nor did he misdirect himself or acted unreasonably. It is a remedy available for choice, the same way as the other two available remedies would be. Had the commissioner chosen compensation for instance, such would not have been a wrong choice to make, but he chose to reinstate instead.
- [40] This Court must hasten to distinguish between exercise of statutory discretion in section 193(1) and the exclusion provided for in section 193(2). Section 193(2) does not afford a court or an arbitrator a discretion. If there is evidence in support of any of the provisions of section 193(2)(a)-(d), there is a statutory gag, as it were, not to reinstate or re-employ. Differently put, reinstatement or re-employment as primary remedies are unavailable in law if any of the situations contemplated in sub-sections (2)(a)-(c) arises.
- [41] Properly located, the peeve of the appellant regarding reinstatement is not that the discretion available in section 193(1) was improperly exercised, but that statutorily, the chosen remedy is not available, hence the challenge was characterised as an error of law committed by the commissioner. The Labour Court in *Mosiane v CCMA and others*¹⁴ stated the following:
- [26] Having considered all the factors considered by the second applicant [respondent], I must consider whether the second respondent nonetheless acted lawfully by denying reinstatement. In other words, his application of section 193(2)(b) was justified regard being had to the proper meaning of the section. In my view, the second respondent wrongly interpreted the purpose and import of the subsection. Secondly, he took into account irrelevant factors, *which conduct amounts to a material error of law that vitiates the award.*
- [42] In order to carefully consider the gripe of the appellant in this regard, it is of first importance to consider its pleaded case at the Labour Court. Additionally, consider what compelling evidence was led at arbitration, which would have

¹⁴ [2019] ZALCJHB 164 (27 June 2019) at para 26.

ousted the primary remedy of reinstatement. It is trite law that a party cannot plead one case and present a different case at the trial. Perhaps, the appropriate place to start is to consider the evidence tendered seeking to unseat reinstatement as a remedy. The only testimony arose from Mr Moidheen, the Human Resources Manager. Whilst testifying about reporting lines, the following evidence, almost fortuitously, it would seem, emerged:

MR MUNSAMY: So who did she report to?

MR MOIDHEEN: Another Manager which was the Financial Controller.

MR MUNSAMY: Who was that?

MR MOIDHEEN: Mr Vivek Sharma

MR TITUS...

MR MOIDHEEN: Okay there was a *bit of change in structure along the way, so the reporting structure changed* as and when people came and went (inaudible).

MR MUNSAMY: Just go over it slowly not everybody is taking notes.
That the reporting structure changed?

MR MOIDHEEN: As personnel had come in and gone.

MR MUNSAMY: And in respect of the Applicant's position currently on the organisational structure...

MR MOIDHEEN: Mhm.

MR MUNSAMY: ... who would she be reporting to? Or what is the status of the position?

MR MOIDHEEN: There is no position. The position has become redundant.

MR TITUS: Can I just understand your question?

MR MUNSAMY: If the Applicant were to be reinstated would she...

- MR TITUS: Oh, oh okay. Oh okay
- MR MUNSAMY: ... who will she be reporting to, what would she be doing or what is the status of the position? Can you just expand on that for the Commissioner?
- MR MOIDHEEN: Yes. So, because the position has become redundant *the workload which was done by Ms Jaipal has been spread across various people within the organization.* So there is no one person dealing with (inaudible).
- MR MUNSAMY: What work was it?
- MR MOIDHEEN: Procurement.
- MR COMMISSIONER: ...
- MR MUNSAMY: You say the position had become redundant. Who decided that?
- MR MOIDHEEN: Management.
- MR MUNSAMY: And when was that decision made?
- MR MOIDHEEN: I'm not 100% sure but this – because of the strike that had taken place there were a few positions which had become redundant.
- MR MUNSAMY: So has anybody been employed in this position since the Applicant's dismissal?
- MR MOIDHEEN: No.

[43] Observably, what changed was the reporting structure for reasons that people come in and go. Most importantly, the functions of Ms Jaipal did not disappear, her functions were simply spread over. In her own testimony she refuted the assertion that her functions dissipated. Thus, it cannot be said that the procurement functions dissipated at the appellant. The decision to render the position (label) and not the functions redundant is that of management.

The “management” did not testify to give compelling evidence on the details and justification of that decision.

[44] I now turn to the pleaded case. In its founding affidavit, the appellant testified thus:

‘In the circumstances of this dispute the Applicant testified and confirmed that it was not reasonably practicable to reinstate the employee where such reinstatement would result in the employee’s reinstatement to a redundant position. The *employee’s role as a Procurement Supervisor has been dissolved and redistributed amongst its administrative workforce*. The object of Section 193(2)(c) is to permit the employer relief when it is not practically feasible to reinstate; where the employees job no longer exist, or the employer is facing liquidation, relocation or the like. 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.’

[45] It cannot be correct that the job of Ms Jaipal no longer existed. It existed but the “management” of the appellant merrily decided to, during the absence of Ms Jaipal, disentangle her functions and distributed that across the workforce. The situation created by the appellant is no different from one where an employer risks by replacing a dismissed employee whilst the dismissed employee is challenging the fairness of his or her dismissal. In *Mashaba v SA Football Association*¹⁵, the erudite Lagrange J correctly expressed himself as follows:

’10. An employer may not thwart a dismissed employee’s bid for reinstatement by replacing him and then argue that it cannot reinstate the dismissed employee because there is someone occupying his former position. That is an eventuality the employer must take into account when it replaces a dismissed employee who is challenging their dismissal. In other words, if the employer does not take suitable steps in its contract with the replacement, it ought to realise it runs the risk that it will be faced with the possibility of terminating that

¹⁵ (2017) 38 ILJ 1668 (LC) at paras 10 - 13.

relationship or of trying to renegotiate the replacement's contract if the former incumbent is reinstated.

13. The right which the LRA provides by virtue of section 193(2) is the right of an employee to be reinstated if their dismissal is found to be substantively unfair and provided none of the subsections are applicable. As discussed above, an order of reinstatement pays no heed to other contractual arrangements that might have come into existence between the employer and a replacement, that is of no concern to the arbitrator or the court and the employer is left to its own devices to sort out the mess it finds itself in having employed someone and then being ordered to re-engage someone in the same position.'

[46] Much was made by Mr Itzkin that Ms Jaipal and her legal counsel failed to challenge the evidence that the position was made redundant. This is a submission unhelpful to the appellant. On the evidence of Mr Moidheen, the disentangling of the functions and rendering of Ms Jaipal's position to be redundant happened after she was dismissed. She bore no knowledge of the "management" unilateral and unjustified decisions to disentangle her position. How then does she even remotely begin to challenge the unknown? What version of hers will she be capable of putting to Mr Moidheen? Nevertheless, when the assertion was put to her that her functions are gone, she refuted such an assertion.

[47] As stated, the situation is no different to the one discussed in *Mashaba*. However, more pointedly, the evidence of Mr Moidheen was not convincing and lacked the necessary cogency to fit the situation contemplated in section 193(2)(c). Unlike in *Faeroes*, where detailed evidence about the economic conditions of the employer was led extensively to convince the Labour Court that reinstatement ought to be ousted, no such compelling and convincing evidence was led by Moidheen. The right to be reinstated is a solid statutorily guaranteed one. It cannot be unseated by the say-so of an employer's witness with no corroboratory evidence. Mr Moidheen testified about the redundancy by chance when dealing with the reporting line issue. No

supporting documents were presented to the commissioner. This appears to be an afterthought machination to attempt unseating the primary remedy, which the appellant knew Ms Jaipal was seeking.

[48] In *New Clicks*¹⁶, the Labour Court issued a stern warning to the following effect:

'15 ... of course given the fact that reinstatement is a primary remedy, the commissioners should sparingly and after careful consideration of all the circumstances invoke the provisions of section 193(2)(b) of the LRA to deny the remedy.'

[49] This Court reverberates the warning herein. It cannot take an unsubstantiated say-so of an employer that by the way whilst an employee was gone his or her position was simply rendered redundant. This Court agrees with the forceful submission by *Mr Titus, appearing for the respondent*, that if that were to be the case, every employer by a mere say-so would effortlessly unseat the primary remedy. This will not dutifully serve the intention of the legislature in inserting section 193(2) in the LRA. A similar contention of redundancy of a position was rejected by the Constitutional Court in *SACCAWU*. The Court after sagaciously stating that the term "*not reasonably practicable*" means *more than mere inconvenience and requires evidence of a compelling operational burden*, it went on to share the following vista:

'52 Counsel for Woolworths contended that the positions were no longer available and had ceased to exist upon the dismissal of the employees. He therefore submitted that the applicants' employment contracts could not be revived as full-time employment contracts. I do not agree that the positions in which the applicants were employed no longer exists. They were employed as cashiers and there has been no suggestion that the number of cashiers has decreased. It is the conditions of employment that changed and not the positions themselves. Cashier positions do still exist within various Woolworths

¹⁶ Id fn 11 at para 15.

stores. Woolworths would not be able to be fully functional and operational as it is...'¹⁷

[50] Similarly, the testimony of Mr Moidheen simply suggested that the functions of procurement continued to exist, but “management” in their ebulliently held view found it necessary to spread those existing functions to various employees. The appellant is a big operation, which provides an essential service in the food industry. It simply cannot function without procurement functions.

[51] Last but not least, the Constitutional Court after confirming reinstatement suggested to the parties that they may revive consultation around the flexi-time. Accordingly, there is nothing that will prevent the appellant from engaging in a section 189 process in order to fairly deal with the alleged redundancy of Ms Jaipal. Such a situation obtained in *Oosthuizen v Telkom SA Ltd*¹⁸ where this Court stated the following:

[25] The appellant can be reinstated – not in the position which he occupied before he was put in the redeployment pool – but to the position that he was in when he was in the redeployment pool. ... Upon reinstatement the appellant can be dealt with in the same way that was or could have been dealt with when he was in the redeployment pool. That means the appellant can be put in a certain position and if he is happy with such position that would be the end of the matter.'

[52] One last aspect to mention on this topic is that the word ‘reinstate’ employed in section 193(1) does not necessarily mean reinstatement to a position but it means revival of an employment contract. Should it happen that upon revival, the position held before dismissal was rendered truly redundant, that is not necessarily a bar to a reinstatement order – revival of a contract of

¹⁷ Id fn 9 at para 52.

¹⁸ [2007] 11 BLLR 1013 (LAC) at para 25.

employment. A similar situation obtained in *Pillay v Santam Limited and Another*¹⁹.

- [53] Briefly, in *Pillay*, the Labour Court ordered Santam to reinstate Mr Pillay. Unhappy with the order, Santam sought to appeal the order of the Labour Court. Some years later, after Santam failed to overturn the Labour Court order, it relented and opted to comply with the order by reinstating Mr Pillay. However, at that time due to restructuring, the position which Mr Pillay held before dismissal became redundant. Santam offered to reinstate Mr Pillay to another position. Mr Pillay objected and insisted on being reinstated to his previous non-existent position. His view being that reinstatement means being put back to his old position even if that position by name no longer existed. Santam attempted to persuade Mr Pillay to take up reinstatement in the new position.
- [54] After all attempts failed, Santam opted to invoke the section 189 process against Mr Pillay. Such process culminated in Mr Pillay being dismissed for operational reasons. Mr Pillay challenged the fairness of his second dismissal. At the same time, he launched contempt proceedings against Santam for the alleged failure to comply with the reinstatement order of the Labour Court. The Labour Court dismissed the contempt application. In dismissing the contempt application and after a detailed discussion of the meaning of *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*²⁰ judgment of the Constitutional Court, the Labour Court stated the following:

[13] Accordingly, it is my firm view that where an employer is put back the contractual relation and pay or offer to pay an employee, such an employer complies with a reinstatement order, even if he does not physically put the employee to his or her old position, particularly, as in the case herein, where the position ceased to exist. Where the

¹⁹ (2020) 41 ILJ 2695 (LC).

²⁰ (2008) 29 ILJ 2507 (CC).

position is declared redundant, it is not uncommon for a Court to issue a reinstatement to a non-existent position...'²¹

- [55] Declaring a position redundant does not spell a dismissal of an employee. Such simply implies that an employee is a candidate for dismissal for operational reasons²². Since it takes the unilateral act of an employer, as it was the case herein, to declare a position redundant, it would be incongruent with the spirit and purport of section 193(2) of the LRA to then use its unilateral act to fend of the primary remedy by using section 193(2)(c). If it were to be allowed, it will be more like allowing a party to benefit out of its own wrongdoing. Often times, the question whether a position is redundant, is a highly contested terrain. By another name, declaring a position redundant equates unilateral change of terms and conditions of a contract of employment. To my mind, an astute employer faced with a claim for reinstatement can easily declare the contested position redundant for any whimsical reasons in order to fend off a reinstatement order. If this is allowed by courts and arbitrators, the project of protecting fair labour practices in section 23(1) of the Constitution will dismally fail.
- [56] To my mind, employers should steer far from using redundancy of positions to hoist section 193(2)(c) exclusion for the primary remedy order. Since it does not spell automatic dismissal for operational reasons, to steal from the words of the erudite Madam Justice Khampepe in *SACCAWU*, it is not evidence of a compelling operational burden.
- [57] As I draw to a close on this topic, the arbitrator and by extension the Labour Court did not err by ordering the appellant to reinstate Ms Jaipal. In paragraph 1 of the award, the commissioner stated this:

‘1. The Respondent, Bakhresa SA (Pty) Ltd is ordered to reinstate the employee Roshelle Jaipal in its employ on terms and conditions no less favourable to her than those that governed the employment relationship immediately prior to her dismissal.’

²¹ Id fn 18 at para 13.

²² See: *SAA V Bogopa and others* [2007] 11 BLLR 1065 (LAC) and *South African Breweries (Pty) Ltd v Louw* [2018] 1 BLLR 26 (LAC).

- [58] It is to be observed that the appellant is not specifically ordered to reinstate Ms Jaipal to the position of Procurement Supervisor. I may point out, in passing though, that the award made by the commissioner herein is consistent with section 193(1)(a) read with 193(2) of the LRA. As pointed out in *Pillay and Oosthuizen*, the word reinstate does not necessarily mean being place to the same position by name. What matters is the same terms and conditions which are no less favourable. Positions naming is cosmetic and capable of evolution over a period of time.

Could the Labour Court or this Court order compensation instead?

- [59] This question emerged and was argued before us. In line with *Spillhaus Property Holdings (Pty) Limited and others v MTN and another*²³, this Court must deal with the question. As a departure point, as indicated above when a commissioner chooses a remedy, he or she exercises a discretion. Such a discretion is not easily interferable on review and or appeal. The only time when a Court of review may interfere with a choice of reinstatement is when such a remedy is prohibited by the provisions of section 193(2)(a)-(c) of the LRA. In this matter, I have already found that the situation contemplated in section 193(2)(c) did not arise. Then, in my view that should be the end of the matter for the appellant.
- [60] Would the fact that Ms Jaipal used what was considered to be insulting and abusive language deprive her of reinstatement remedy to a point that this Court must order payment of compensation instead? In my considered view, this Court cannot do so. Mr *Itzkin* argued that the insulting or abusive language usage rendered a continuation of employment intolerable, as such reinstatement as a remedy was inappropriate. Regrettably, the only pleaded basis for the exclusion of reinstatement is one in section 193(2)(c), in the circumstances where section 193(2)(b)²⁴ was available to be used by the appellant.

²³ 2019 (4) SA 406 (CC).

²⁴ S 193(2)(b) provides, the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.

[61] Instead, the appellant pleaded as follows:

‘The relief sought is also unacceptable because the employment relationship has for all intents and purposes irretrievably broken down. The Arbitrator was required to consider whether in the circumstances, the employee’s misconduct was grave or contravened public policy, thus rendering such a remedy “not reasonably practicable”.

The First Respondent accused her employer of fraudulently producing Court documents and fabricating a Court Order. Further her use and direction of the terminology to her senior management that “*they don’t have the balls*” contravenes public policy...’

[62] More recently the Constitutional Court in *Vodacom (Pty) Ltd v Makate and Another*²⁵, correctly berated the SCA for having decided a case that was not before it and which Vodacom was not called upon to answer²⁶. In similar vein, this Court and more especially the Labour Court was not called upon to decide whether the situation in section 193(2)(b) had arisen or not. It was not the case Ms Jaipal was required to meet. The case of the appellant was largely pegged on the redundancy of the position. During cross-examination of Ms Jaipal at the CCMA, she flatly disagreed with a proposition that the appellant could function without purchasing and dealing with stock.

[63] Despite the fact that section 193(2)(b) situation was not pleaded, no compelling evidence was led at arbitration to support that situation. In *New Clicks*, the Labour Court quoted with approval what Pillay J stated. It said:

‘[20] Such similar argument was rejected by this court in *Amalgamated Pharmaceuticals supra*. At para 13 of the judgment the following was said:

“The mere fact that the applicant does not trust the individual respondents cannot without more be a basis for holding that employment relationship has broken down. To punish the individual respondents with unemployment, even if this is accompanied with

²⁵ 2025 (10) BCLR 1174 (CC).

²⁶ Paragraph 99 *Vodacom*.

some compensation, without finding them guilty of any wrongdoing is grossly unfair.²⁷

(Own emphasis)

[64] This Court in *Afgen (Pty) Ltd v Ziqubu*²⁸, relying on its earlier decision expressly stated the following:

[26] The other relevant matter is that of *Glencore Holdings (Pty) Ltd and Another v Gagi Joseph Sibeko and Others* (Glencore) where the Court properly accepted that an employee's behaviour can be taken into account to determine if reinstatement or re-employment must be awarded, more particularly where an employee behaved offensively against the employer. Whether the bad behaviour was pre- or post-dismissal is irrelevant. This Court in Glencore stated that an employee's behaviour no matter how abominable, cannot automatically deny him/her an award of reinstatement or re-employment. Consideration should be given to the degree of relationship contact between the employee and his superior. The lack of "functional role" performed by the employee in Glencore including the lack of "functional rapport with superiors" meant that they could be no real obstacle in the continued employment of the employee by Glencore notwithstanding the employee's abominable behaviour.

(Own emphasis)

[65] Clearly, the usage of abusive or insulting language, although abominable, does not of itself deprive Ms Jaipal of the primary remedy. More is required in a form of compelling evidence to prove intolerability of continued employment. As I round off, the appellant is faced with three colossal quandaries on this issue. Firstly, section 193(2)(b) situation was not pleaded. Secondly, no compelling evidence was led to support the section 193(2)(b) situation. Thirdly, a two-pronged one is that (i) this was not dealt with at the Labour Court and cannot for the first time be dealt with on appeal, (ii) this Court is precluded from dealing with an unpleaded case.

²⁷ Id fn 11

²⁸ (2019) 40 ILJ 2276 (LAC).

- [66] As a final point, section 193(1) discretion on the choice of remedies, is to be exercised by an arbitrator or a Court which makes a finding that a dismissal is unfair²⁹. This Court at this stage of an appeal cannot exercise the discretion already exercised by the arbitrator. It can only do so, if it sets aside the exercise of discretion, in which case, the situation contemplated in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another*³⁰, where ordering compensation will be a forgone conclusion, arises.
- [67] Section 145(4) of the LRA, names only the Labour Court, that once it sets aside an award it may (a) determine the dispute in a manner it considers appropriate; or (b) make an order it considers appropriate about the procedures to be followed to determine the dispute. In this instance, the Labour Court did not set aside the award, as such the powers in section 145(4) were not available. This Court exercises appeal powers in terms of section 166(4) of the LRA. Ultimately, this Court will reach an order dismissing the appeal. Such means that the order of the Labour Court remains undisturbed. However, section 19(d) of the Superior Court Act³¹ empowers the Supreme Court and a Division of a High Court when exercising appeal jurisdiction to (a) confirm; (b) amend or (c) set aside the decision which is the subject of the appeal and render any decision which the circumstances may require. Similar powers are availed to this Court in section 174(d) of the LRA. To my mind, the power to amend is to be directed to the order of the Labour Court. The order of the Labour Court was to dismiss the review application. The only thing this Court can do, in my view is to confirm or set it aside and not amend. In law, the word amend means to formally change, correct, add to, or subtract from. In my view, it would be incongruent with effectiveness to confirm the dismissal of the review application and still order compensation without finding that any of the situation contemplated in section 193(2) of the LRA obtained. The answer to the question is that the Labour Court and

²⁹ Para 30 of *Mosiane* (id fn 13) and the authorities cited in footnote 12 of the judgment.

³⁰ 2015 (5) SA 245 (CC).

³¹ Act 10 of 2013.

similarly this Court could not and cannot order payment of compensation as a remedy. A case for such an order was not made.

Conclusion

[68] Because of all the above reasons, the order set out below is made.

Order

1. The appeal is dismissed with no order as to costs.

G N Moshwana

Acting Judge of the Labour Appeal Court of South Africa

Tokota AJA and Collis AJA concurring.

APPEARANCES:

For the Appellant : Mr R Itzkin

Instructed by: Edward Nathan Sonnenbergs, Umhlanga.

For the Respondent : Mr M Titus

Instructed by: MacGregor Erasmus Attorneys, Durban.