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

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Signature Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: A2025-076352

In the matter between:

RAYMOND MOKAKATLA LESO **Appellant**

and

IMPERIAL LOGISTICS SA (PTY) LTD

t/a IMPERIAL LOGISTICS **First Respondent**

COMMISSIONER LETSEMA MOKOENA *N.O*. **Second Respondent**

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION **Third Respondent**

Heard: **5 May 2026**

Delivered: **31 July 2026**

Coram: **Van Niekerk JA *et* Nkutha-Nkontwana JA, Djaje AJA**

Summary: Practice and Procedure - Review proceedings - Court *a quo* raising issue *mero motu* - Commissioner awarding reinstatement despite employee seeking compensation - Whether Court *a quo* entitled to intervene on basis not specifically

pleaded - Principle of legality - Parties afforded opportunity during oral argument to address inconsistency between remedy sought and remedy granted - Court *a quo* not required to ignore material statutory irregularity apparent *ex facie* the record.

Dismissal - Unfair dismissal - Remedy - Reinstatement - Employee seeking compensation and not reinstatement - Commissioner nevertheless ordering retrospective reinstatement - Failure to engage with peremptory provisions of s 193(2)(a) of the Labour Relations Act 66 of 1995 - Commissioner misconceived the nature of the enquiry and rendered an unreasonable outcome - Court *a quo* entitled to substitute reinstatement with compensation.

JUDGMENT

NKUTHA-NKONTWANA JA

<u>Introduction</u>

[1] The appellant, Mr Leso, impugns the court *a quo's* decision to overturn the award rendered by the second respondent (commissioner), which retrospectively reinstated him consequent to the finding that his dismissal was substantively unfair. The court *a quo* upheld the commissioner's finding that Mr Leso's dismissal was substantively unfair, but substituted reinstatement with compensation on the basis that the appellant explicitly elected compensation as the preferred remedy during arbitration and that the evidence on the record demonstrated a breakdown in the employment relationship.

[2] The question for determination in this Court is whether the court *a quo* exceeded its powers when it, *mero motu*, raised and determined a challenge to the commissioner's decision to award reinstatement as a remedy, even though it was never pleaded, and allowed the outcome to turn on that issue. The appeal is by the leave of the court *a quo*.

<u>Background facts</u>

[3] Mr Leso was the second respondent (Imperial Logistics) as Fleet Manager, responsible for overseeing his designated drivers and signing their vehicle inspection checklists. Five charges of misconduct were brought against him, but Imperial Logistics eventually abandoned charge 4. He was found guilty of four charges and issued with a written warning in respect of charges 1 and 3 and summarily dismissed in respect of charges 2 and 5. Accordingly, the arbitration turned on charges 2 and 5, framed as follows:

> 'Charge 2: Dereliction of Duty in that during the period of 24, 25, 26, 27 June 2019, you failed to take corrective action when the driver Sifiso Shongwe reported the vehicle defects reg. JB67LYGP of brakes and battery fault to start the engine of the vehicle.
>
> Charge 5: Bringing the company name into disrepute, in that you failed on several occasions to make proper arrangements and plan with your junior employees when you will not be at work or arrive late, which was noticed by the client Makro.'

[4] Charge 2 was premised on the allegation that Mr Leso failed to ensure that the faults that had been identified and recorded on the vehicle's checklist by Mr Sifiso Shongwe (Mr Shongwe), the driver of vehicle registration number JB67LYGP, were attended to or promptly reported to his supervisor, Mr Brian Briggs, the Regional Operations Manager for the Massmart contract. The commissioner accepted Mr Leso's evidence that Mr Shongwe did not inform him that the brakes in his vehicle were faulty. He also found that Imperial Logistics failed to show that the brakes were indeed faulty and subsequently repaired, and that the failure to call Mr Shongwe as a witness was fatal to its case.

[5] The commissioner found that charge 5 was premised on a single email from Makro, dated 23 May 2019, which, without more, did not support the allegation that Mr Leso's conduct tarnished Imperial Logistics' reputation. He further accepted Mr Leso's explanation for his absence from work as reasonable, as he was either on annual leave, off sick, or at public protests on some of those days.

[6] Having found the dismissal substantively unfair, the commissioner ordered the retrospective reinstatement of Mr Leso, with back pay of R853 531.12.

<u>In the court *a quo*</u>

[7] Imperial Logistics sought to review and set aside the arbitration award on various grounds, including that the commissioner committed a gross irregularity by ignoring relevant and material evidence or misconstruing it. As a result, he reached an outcome that no reasonable decision maker could have reached in respect of the evidence before him. The grounds of review were based on the evidence set out in the founding affidavit. It is common cause that there was no explicit challenge to the remedy of reinstatement.

[8] The court *a quo* upheld the commissioners' finding that the dismissal was substantively unfair. Yet, it raised, *mero motu,* the issue of the pertinence of the remedy of reinstatement, despite the fact that it was not ventilated in the papers before it. It sought counsel's submissions on the issue during oral argument, having gleaned from the arbitration record that reinstatement was never sought and that there appeared to be some relationship issues between the parties.

[9] On the strength of the dictum in *Standard Bank of SA Ltd v Leslie and Others*,[1] the court *a quo* found the remedy of reinstatement untenable as

> 'the commissioner failed to recognise that Mr Leso was solely seeking monetary compensation and that a continued employment relationship would be intolerable for both parties'.

It set aside the reinstatement and substituted it with compensation equivalent to 12 months' salary.

[1] (2021) 42 ILJ 1080 (LAC) at para 6.

In this Court

[10] Mr Leso submits that the court *a quo* erroneously embarked on a fact-finding mission to build a case for Imperial Logistics based on new issues that were not ventilated in the papers before it and raised only during oral argument. He further submits that, to the extent that the new dispositive issues were raised without prior notice and the outcome turned on them, he was subjected to trial by ambush. Even the court *a quo*'s finding on the intolerability of a continued relationship is premised on evidence irrelevant to the charges under scrutiny, he further submits.

[11] Imperial Logistics defends the court *a quo's* findings. It submits that it would have been remiss of the court *a quo* to ignore a point of law that was apparent *ex facie* (on the face of) the record and to decide the matter on an incorrect legal basis simply because it was not raised in the pleadings. Section 193(2)(a) of the Labour Relations Act[2] (LRA) provides that reinstatement must not be ordered if the employee does not wish to be reinstated. Thus, the court *a quo* cannot be faulted for finding the reinstatement legally incompetent in terms of section 193(2)(a) in the light of Mr Leso's explicit election not to be reinstated. Furthermore, the commissioner ignored the evidence on the intolerability of the continued employment relationship.

[12] The question for determination by this Court is whether the court *a quo* correctly set aside the order of reinstatement on the basis that the commissioner acted *ultra vires* section 193(2)(a). Given that the issue was raised *mero motu*, the enquiry turns on whether the court *a quo's* intervention constitutes judicial overreach, inconsistent with the principle articulated by the Constitutional Court in *CUSA v Tao Ying Metal Industries and Others*[3] (*Tao Ying*), that the parties are bound by their pleadings.

[2] Act 66 of 1995, as amended.
[3] 2009 (2) SA 204 (CC) at paras 67 and 132.

[13] While it is trite that litigants generally stand and fall by their pleadings, particularly in motion proceedings, that principle cannot be applied perfunctorily in review proceedings in terms of section 145 of the LRA where the reviewing court is confronted with a material irregularity, apparent *ex facie* the record, implicating the legality of the exercise of statutory power. *Tao Ying* accordingly instructs that the reviewing court cannot turn a blind eye to such a defect merely because the parties did not explicitly articulate it.[4] On the contrary, the reviewing court is enjoined to, *mero motu*, raise the material irregularity and allow the parties to address it in either written or oral argument.[5]

[14] In the present case, it is apparent, *ex facie* the record, that Mr Leso never sought a remedy of reinstatement. Conversely, as the following extract from the record shows, he unequivocally stated that he was seeking financial compensation, a statement he reiterated at the end of the arbitration in his closing argument.

> 'COMMISSIONER: Misconduct, we will get back to that shortly. Relief sought? What is it that you are seeking in terms of --- this matter? Reinstatement, re-employment, financial compensation.
>
> MR LESO: I need a financial compensation.
>
> COMMISSIONER: Compensation
>
> …
>
> MR LESO: I'm looking forward for the positive result of this case. From CCMA to take their right decision whereby they can pay me my money from where I started to stay until today. Therefore, I will be happy for that thing if the CCMA can do that.'

[15] It is telling that the commissioner disposed of the issue of remedy in terse and conclusory terms, stating that:

[4] Ibid.
[5] Id fn 3.

> '... as per the relief sought as well as per the provisions of section 193 read with section 194 of the LRA, the Respondent is ordered to retrospectively reinstate [Mr Leso] ...'

The record plainly belies that statement. Mr Leso did not seek reinstatement but compensatory relief. The commissioner not only failed to furnish any rational basis for awarding reinstatement but also incorrectly characterised the remedy as being consistent with the relief sought by Mr Leso. That he did, as correctly submitted by Imperial Logistics, in the circumstances where, in terms of section 193(2) of the LRA, reinstatement does not follow as a matter of course; and pertinently, where section 193(2)(a) precludes reinstatement where it is not sought.[6]

[16] This is not an inconsequential lapse. It strikes at the heart of the lawful exercise of the remedial power conferred by the LRA and reveals a failure to heed the cautionary injunction of the Constitutional Court in *Booi v Amathole District Municipality*[7] that, although section 193(1) confers a discretion to award reinstatement, re-employment or compensation, that discretion is constrained by section 193(2), which obliges the arbitrator or court to act within the limits expressly imposed by the statutory scheme. Properly construed, therefore, the remedial discretion under the LRA is not a carte blanche to impose what an arbitrator subjectively considers fair, but a structured statutory power that must be exercised in conformity with the constraints enacted by the legislature.

[17] Mr Leso's complaint that he was subjected to a trial by ambush accordingly has no merit. The court *a quo* did not decide the matter on a basis hidden from the parties. However, during oral argument, the court *a quo* openly raised the inconsistency between the remedy sought and the remedy granted and invited counsel to address it. Both parties were heard on the point. Counsel for Mr Leso initially suggested that Mr Leso, a lay person, may have altered his election and

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[6] See: *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 *ILJ* 97 (CC) at para 44; *Standard Bank of South Africa Ltd v Leslie and others* (2021) 42 *ILJ* 1080 (LAC) at para 17.

[7] (2022) 43 *ILJ* 91 (CC) at paras 34 – 43.

pursued reinstatement. But that contention is, correctly in my view, not persisted with. The commissioner did not record that Mr Leso changed his election at any stage of arbitration, nor did the award disclose that reinstatement had become the remedy ultimately sought.

[18] In any event, it is not Mr Leso's case that he had further arguments that could conceivably have altered the position that reinstatement had not been sought, and that section 193(2)(a) expressly precludes the remedy granted by the commissioner. That being the case, the matter transcended the ordinary confines of pleading principles and engaged the legality of the commissioner's exercise of statutory power in terms of section 193(2)(a). Therefore, Mr Leso's reliance on *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*[8] and *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality*[9] is misplaced. These authorities address the unfairness occasioned by trial by ambush, and where hidden issues of the pertinence of the remedy of reinstatement emerged for the first time in the judgment. The present case is distinguishable in that the issue emerged from the record itself, was expressly raised by the court *a quo*, and was fully addressed by the parties.

[19] Equally without merit is Mr Leso's contention that the court *a quo's* intervention amounted to judicial overreach. The principle of legality does not permit the reviewing court to ignore a manifest irregularity. To do so would allow a material defect to be disregarded based on pleading formalism, elevating form over substance, and ultimately amount to a failure by the reviewing court to discharge its constitutional duty to guard against the unlawful exercise of public power.

[20] Viewed through the prism of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[10] and consistent with the principles articulated in *Head of Department of Education v Mofokeng and Others,*[11] the error committed by the

[8] (2008 (2) SA 184 (SCA).
[9] 2018 (1) SA 391 (SCA).
[10] (2007) 28 ILJ 2405 (CC) at paras 78-79; *Makuleni v Standard Bank of SA Ltd and Others* (2023) 44 ILJ 1005 (LAC).
[11] *Head of Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at paras 30-33.

commissioner extends far beyond a mere flaw in reasoning; it constitutes a fundamental misconception of the nature of the enquiry itself. The commissioner failed to determine whether reinstatement was legally competent in the light of the employee's election and the constraint imposed by section 193(2)(a). The award is, for that reason, disconnected from both the undisputed facts on the record and the mandatory statutory constraint for the exercise of remedial power. As a result, the court *a quo* was not only entitled but also obliged to intervene to fulfil its constitutional and statutory mandate.[12]

[21] To the extent that this finding is dispositive of the matter, I am not inclined to deal with the issue of the intolerability of the relationship between the parties.

<u>Conclusion</u>

[22] In sum, the judgment of the court *a quo* is unassailable. The commissioner misconceived the nature of the enquiry, disregarded Mr Leso's election, and awarded a remedy expressly precluded by section 193(2)(a), without furnishing any rational basis for doing so. As a result, the outcome reached by the commissioner fell outside the range of decisions that a reasonable commissioner could have reached. In the circumstances, the court *a quo* correctly set aside the award in respect of the reinstatement and replaced it with compensation. The appeal must accordingly fail.

<u>Costs</u>

[23] Considering the tenets of law and fairness, it would be just for each party to pay their own costs.

[24] In the premise, the following order is made:

<u>Order</u>

1. The appeal is dismissed.

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[12] *Id* fn 3 at para 67; *Booi* above fn7 at para 44.

2. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Appeal Court of South Africa

Van Niekerk JA and Djaje AJA concur.

APPEARANCES:

For the appellant	:	Adv M.V Sehunane
		Instructed by : Sehunane Inc Attorneys
For the respondent	:	Adv P Maharaj-Pillay
		Instructed by : Thomson Wilk Incorporated