IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not reportable

Case no: DA18/2016

In the matter between:

SAMWU	**First Appellant**
A A DAWOOD	**Second Appellant**
and	
ETHEKWINI MUNICIPALITY	**First Respondent**
THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Second Respondent**
COMMISSIONER NDABA N.O.	**Third Respondent**

Delivered: 15 August 2018

Summary: Employee dismissed for refusing to comply with lawful and reasonable instruction of employer and failing to perform job responsibilities to the best of his ability. At arbitration dismissal found procedurally fair but substantively unfair for reason of inconsistency in that employer failed to furnish records of disciplinary steps taken against other employees. Continued employment found not to be reasonably practicable under s 193(2)(c) of the LRA given that other employees, including union members, had complied with employer's instruction and employee had failed to raise a grievance. Employee awarded 6 months' compensation. The Labour Court dismissed the employee's review application, placing reliance on s193(2)(b) to find that continued employment was intolerable. On appeal: found that Labour

Court erred in considering s193(2)(b) when the focus of the arbitrator had been on s193(2)(c). Award was found reviewable on the basis that the arbitrator had not taken into account relevant circumstances in finding reinstatement reasonably impracticable despite having found the dismissal substantively unfair. Having regard to all relevant facts and circumstances, primary remedy of reinstatement found appropriate. Appeal upheld with costs. Employee retrospectively reinstated into employment with a final written warning valid for 12 months for insubordination.

Coram: Waglay JP, Coppin JA and Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

[1] This appeal, with the leave of the Labour Court (Whitcher J), is against the judgment of that Court, in which the application to review the arbitration award of the third respondent (the arbitrator) was dismissed with no order as to costs.

[2] The second appellant, Mr A A Dawood (the employee), was employed as an electrical faultsman by the first respondent, the Ethekwini Municipality (the employer), on 3 January 1990. He had a clean disciplinary record for almost 20 years until his receipt on 21 October 2009 of a verbal warning, which he refused to acknowledge, for insubordination, following his failure to comply with an instruction to complete new formatted running sheets as part of the employer's electrical outage management system.

[3] On 11 November 2009, the employee was warned again by a senior manager, Mr Sharach Laban, that his continued refusal to comply with the instruction to complete the running sheets constituted gross insubordination for which he would be disciplined. The employee's response was that since other employees were not completing the running sheets, he would not

comply with the instruction. Shortly thereafter, on 17 November 2009, at a meeting with two further managers, Mr Segran Moodley and Mr Kubendran Nayager, the employee was again instructed to complete the running sheets. He indicated his deliberate refusal to comply with the instruction, in a manner which was described as rude, belligerent and disrespectful, and challenged his managers to "*go ahead, do whatever you want to do*". After persisting with his refusal to complete the running sheets, the employee was suspended from duty in March 2010. On 16 August 2010, following a disciplinary hearing, he was dismissed from his employment for refusing to comply with a lawful and reasonable instruction of the employer, and for failing to perform his job responsibilities to the best of his ability.

[4] The South African Municipal Workers' Union (SAMWU) referred an unfair dismissal dispute on behalf of the employee to the South African Local Government Bargaining Council (SALGBC). The evidence at the arbitration hearing was that other faultsmen had complied with the instruction to complete the running sheets, albeit with occasional lapses, such as those of two employees, Mr Majozi and Mr Khumalo, who, according to the employer, had been given verbal warnings for such conduct. Since the employer was unable to produce a record of these warnings, the arbitrator found the employee's dismissal procedurally fair, but substantively unfair because of inconsistency, in that the employer failed to "*furnish records of the purported discipline of other faultsmen*".

[5] Mr Moodley and Mr Laban testified at the arbitration hearing, that the employee's refusal to comply with the instruction and complete the running sheets, was deliberate and persistent; that he would not submit to the authority of his managers; and that his conduct had led to a breakdown in the trust relationship between the parties.

[6] Although the employee sought retrospective reinstatement, the arbitrator found, in terms of s193(2)(c) of the Labour Relations Act 66 of 1995 (the LRA), that:

'*210. …taking into consideration that applicant consistently refused to comply with a lawful and reasonable instruction despite the fact that other employees were complying who belonged to his union, the fact that he failed to use the machinery of the act or a grievance procedure to challenge the change of the old practice renders reasonably impracticable for respondent to reinstate or re-employ the applicant.*

211. In the circumstances it is my finding that it is not reasonably practicable for the employer to reinstate or re-employ the employee.'

[7] The employee was consequently awarded "*just and equitable*" compensation of R115 866,88, being six months; remuneration, for his unfair dismissal.

[8] Dissatisfied with the arbitration award, and their failure to secure the employee's reinstatement, the appellants sought to review the award in the Labour Court on the basis that it was unreasonable because, in finding that the employer had acted inconsistently, the arbitrator had not considered the application of the provisions of s193 of the LRA in the appropriate manner, and had failed to award the primary remedy of reinstatement.

Judgment of Labour Court

[9] On review, the Labour Court found that the employee's conduct demonstrated "*a wilful and serious refusal by an employee to obey a lawful instruction and a direct challenge to the employer's authority*". This, according to the court *a quo*, amounted to gross insubordination in that he had no intention of complying with such instruction, making "*nonsense of his contention that he should have been issued with a series of written warnings prior to dismissal*".

[10] The court *a quo* had regard to the testimony of Mr Moodley and Mr Laban to the effect that they could not work with the employee and that the "*manner in which he had articulated his refusal to comply and his continuous refusal to submit to their authority had resulted in a breakdown in the trust relationship*". The court *a quo* held that, having regard to the "*factors justifying exception to reinstatement as listed in section 193(2) of the LRA; in this case, whether the circumstances surrounding the dismissal were such that continued relationship would be intolerable*", reinstatement would be inappropriate, in

that it would not be fair to the employer, in light of the evidence led at arbitration.

[11] As a consequence, the Labour Court concluded that the arbitration award not so unreasonable that no reasonable commissioner could have come to the same decision. The review application was consequently dismissed with no order as to costs.

Submissions on appeal

[12] The appeal turns on whether the court *a quo* erred in accepting that the employee was guilty of gross insubordination and that his conduct was distinguishable from that of other employees. The appellants contend that the arbitrator's finding that reinstatement was not reasonably practicable was unreasonable, given the finding of inconsistency and the lack of evidence that the trust relationship had been destroyed. Relying on *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v NUM obo Masha and Others* (*Xstrata),*[1] it was argued that the arbitrator could only refuse to reinstate if the evidence established that the circumstances surrounding the dismissal were such as to render continued employment intolerable (section 193(2)(b)), or if reinstatement was not reasonably practicable (section 193(2)(c)). But since there was no evidence before the arbitrator that reinstatement was not reasonably practicable, and no objective evidence that the trust relationship had broken down, there was no reason why the primary remedy of reinstatement, sought by the employee, was not granted.

[13] The employer did not cross-appeal against the finding of substantive unfairness. It persisted with the contention that the arbitrator's finding that the employee had committed misconduct was reasonable. Regarding the remedy, it was argued that the appellants had conflated considerations relevant to the finding of substantive unfairness with those relevant to the determination of an appropriate remedy, as contemplated in s193(2). With reference to *Billiton Aluminium SA t/a Hillside Aluminium v Khanyile and Others*[2] and the decision

[1] (2016) 37 ILJ 2313 (LAC) at paras 6 and 11.
[2] [2010] BLLR 465 (CC).

of *Equity Aviation v CCMA and Others*,[3] it was submitted emphatically that the approach to the application of the remedies in terms of s193 must be based on underlying fairness to both parties, without introducing "*unwanted and unnecessary rigidity to saddle an enquiry into fairness with notions of a legal onus*". The arbitrator had applied his mind to whether reinstatement was justified on the evidentiary material available, including the "*non-reinstatable conditions*" mentioned in s193(2).[4] It was submitted that the employee's combativeness and persistent refusal to comply with the instruction to complete the sheets, distinguished his case from that of the other employees, such as Mr Majozi and Mr Khumalo, who, according to the evidence, would only on occasion not complete the sheets, and that a continued employment relationship with the employee was unsustainable and impracticable. For those reasons, the employer sought that the appeal be dismissed with costs.

Evaluation

[14] Where a dismissal is found to be unfair, the mutually exclusive remedies of reinstatement, re-employment or compensation in s193(1) are to be considered, having regard to s193(2).[5]

[15] S193(2) provides that the employer –

> *'… must … re-instate or re-employ the employee unless—*
>
> *(a) the employee does not wish to be re-instated or re-employed;*
>
> *(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
>
> *(c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or*
>
> *(d) the dismissal is unfair only because the employer did not follow a fair procedure.'*

[3] [2008] 12 BLLR 1129 (CC).
[4] *Mediterranean Textile Mills (Pty) Ltd v SACTWU and Others* [2012] 2 BLLR 142 (LAC) at para 30.
[5] *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2016] 3 BLLR 217 (CC) at para 135; *Equity Aviation* at para 42.

[16] The use of the peremptory "*must*" in s193(2) requires that reinstatement, or re-employment, must follow upon a finding of unfair dismissal, as the primary remedies under the LRA,[6] unless it is not sought by the employee, or where either, or both, of the "*non-reinstatable conditions*", referred to s193(2)(b) and s193(2)(c), exist, making an order of reinstatement, or reemployment, inappropriate.[7]

[17] There is no *onus* on the employer to prove the existence of these "*non-reinstatable conditions*". The approach is one of fairness to both employer and employee even when "…*no specific evidence was canvassed or submissions made during the trial on the issue of the non-reinstatable conditions".*[8] The court or arbitrator is "*obliged to take into account any factor which in the opinion of the court or the arbitrator is relevant*". The determination involves the exercise of a discretion, which is *"in part a value judgment and, in part, a factual finding*".[9] If none of the non-reinstatable conditions exists, the arbitrator has a discretion only as to the extent to which reinstatement should be made retrospective.[10]

[18] In *Xstrata,* it was held that the term "*not reasonably practicable*" in s193(2)(c) of the LRA, did not equate with "practical", but with 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*'.[11]

[19] In *Republican Press (Pty) Ltd v CEPPWAWU and Others,* [12] whether reinstatement was not reasonably practicable, was found to "*depend on the*

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[6] *Equity Aviation Services Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2008] 29 ILJ 2507; Also reported as [2008] 12 BLLR 1129(CC) at para 36.
[7] *Mediterranean Textile Mills (Pty) Ltd v SACTWU* (*supra)* at para 28.*Elliot International (Pty) Ltd v Veloo and Another* (2015) 36 ILJ 422 (LAC) at para 53.
[8] *Mediterranean Textile Mills (Pty) Ltd v SACTWU and Others* [2012] 2 BLLR 142 (LAC) at para 30.
[9] *DHL Supply Chain (Pty) Ltd v De Beer NO and Other* [2014] 9 BLLR 860 (LAC); (2014) 35 ILJ 2379 (LAC) at para 21; *Equity Aviation Services Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2008] 29 ILJ 2507 [2008] 12 BLLR 1129(CC) at paras 36 and 48.
[10] *Mediterranean Textile Mills (Pty) Ltd v SACTWU and Others (supra)* at para 8
[11] At para 11.
[12] [2007] 11 BLLR 1001 (SCA) at paras 20-22.

particular circumstances". In *Potgieter v Tubatse Ferrochrome,*[13] "*operational or similar grounds*" were held to make reinstatement not reasonably practicable. While in *Maepe v CCMA and Another*[14] reinstatement was found not to be reasonably practicable because the senior employee was no longer capable of performing his duties effectively after he had given false evidence under oath at an arbitration.

[20] Since the finding that the dismissal of the employee had been substantively unfair for reason of inconsistency had not been challenged by the employer, it was only a review of the sanction that was before the Labour Court. The particular factors relied upon by the arbitrator to find that reinstatement was not reasonably impracticable under s193(2)(c) were that other employees, including union members, had complied with the instruction and that the employee had not lodged a grievance to challenge the instruction. Yet, the Labour Court relied on s193(2)(b) in its consideration of the matter, to find that a continued employment relationship was not tolerable. This occurred in circumstances where the Labour Court was tasked with reviewing the arbitrator's exercise of his discretion. It was not open to the court *a quo* to simply exercise its discretion afresh on the issue of remedy, without finding that the decision of the arbitrator, in light of all the relevant facts and circumstances, was unreasonable. This was so since the court *a quo* was not dealing with an appeal. It follows, therefore, that in its approach to the matter, the Labour Court erred.

[21] Having found the dismissal substantively unfair for reason of inconsistency, the arbitrator was to consider whether the peremptory reinstatement should not be awarded in light of the particular circumstances of the matter. This required the arbitrator to have regard to s193(1) and (2), and in doing so, also take into account all the relevant circumstances before him. These included, that the employee sought reinstatement as the primary statutory remedy available to him in his unfair dismissal dispute;[15] the employee's long service and previously clean disciplinary record; the short period left before his

[13] 2014) 35 ILJ 2419 (LAC) at para 37.
[14] [2008] 8 BLLR 723 (LAC) at para 19.
[15] *Equity Aviation* 2009 (1) SA 390 (CC) at para 36.

retirement; the nature and extent of the misconduct; whether the principle of progressive discipline could reasonably be applied; the fact that the dismissal had been found to have been substantively unfair due to inconsistency; the operational and other circumstances of the employer; the extent to which the evidence supported a conclusion that the trust relationship have been severed.

[22] The finding that it was not reasonably practicable to reinstate the employee was based on two reasons: that other employees, including union members, had complied with the employer's instruction; and that the employee had not used the machinery available to him to lodge a grievance. It is not apparent that the arbitrator had regard to all relevant factors in arriving at the conclusion that the non-reinstatable conditions were extant. The arbitrator relied on unduly narrow considerations, while disregarding, or placing insufficient emphasis on, the other relevant considerations which had been placed before him. In the result, without a careful and thorough consideration of these other relevant considerations in the exercise of his discretion, the arbitrator arrived at a decision which fell outside of the ambit of reasonableness required. It followed for these reasons that the decision of the arbitrator fell to be set aside on review.

[23] Had the arbitrator considered appropriately all relevant facts and circumstances, I am satisfied that a reasonable person in such position would have arrived at a different conclusion on sanction. The employee sought reinstatement as the primary remedy. He had an extended period of long service, with a previously clean disciplinary record. A limited period of time remained before his retirement. The employer was found to have been inconsistent in the application of discipline and the evidence supported a finding that progressive discipline could reasonably have been applied. The nature and extent of the misconduct was such that the trust relationship had not been shown to have been severed by the employee's conduct when the rude, belligerent and disrespectful behaviour committed related to a time when there was general workplace unhappiness with the operational change proposed. Furthermore, the operational and other circumstances of the

employer provided no bar to the reinstatement of the employee. Having regard to all of these relevant facts and circumstances, I am satisfied that the employee is entitled to the primary remedy reinstatement, with a final written warning valid for 12 months to be imposed in respect for insubordination. This warning will provide an appropriate caution to the employee to maintain appropriate respect for his superiors into the future.

[24] For these reasons, the appeal succeeds. Having regard to considerations of law and fairness, it is appropriate that each party pays its own costs.

Order

[25] For these reasons, the following order is made:

1. The appeal succeeds with no order as to costs.

2. The order of the Labour Court is set aside and substituted as follows:

"(1) The application for review succeeds.

(2) The dismissal of the employee, Mr A A Dawood, is found to be substantively unfair.

(3) The employee is to be retrospectively reinstated into his employment with Ethekwini Municipality by 27 August 2018, with a final written warning valid for twelve (12) months for insubordination.

(4) The employee must be paid the back pay due to him by no later than 31 August 2018".

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Savage AJA

Waglay JP and Coppin JA concur in the judgment of Savage AJA.

APPEARANCES:

FOR THE APPELLANT: Mr M M H Titus

MacGregor Erasmus Attorneys

FOR THE FIRST RESPONDENT: Ms L R Naidoo

Instructed by Hughes-Madondo Attorneys