THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C290/2021

In the matter between:

THE OUDTSHOORN LOCAL MUNICIPALITY	**Applicant**
and	
TW TYTYA	**First Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Second Respondent**
COMMISSIONER C JACOBS NO	**Third Respondent**

Heard: **28 February 2024**
Delivered: **6 June 2024** (**This judgment was handed down electronically by emailing a copy to the parties. The 7 June 2024 is deemed to be the date of delivery of this judgment).**

JUDGMENT

RABKIN-NAICKER J

[1] This matter came before me as an opposed review and cross review of an Award under case number WCP041815. The Practice Note prepared by Applicant's Counsel included the following:

"d. **Issue for determination**

5. The Applicant's review has become moot because Mr Tyatya has, since 1 November 2021, been re-employed. In the circumstances the Applicant is no longer persisting with its review.

6. On the facts of this case, the Arbitrator did in fact reinstate Mr Tyatya retrospectively to the date of his dismissal, but circumscribed the compensation awarded on grounds that he was on paid suspension for 24 months.

7. Therefore only one issue arises for determination in the cross-review It is whether this Honourable Court can interfere with the Arbitrator's compensation award granting 6 months of back pay.

8. The Applicant contends that the first respondent has not made out a case compelling this Honourable Court's interference with the Arbitrator's Award."

[2] The relevant portion of the Award for the purposes of this judgment is Paragraph 91 of the Award which reads as follows:

" 91. Section 193(2) of the LRA confirms that the Labour Court or an arbitrator must require the employer to reinstate or re-employ the employee unless – (a) the employee does not wish to be reinstated or reemployed; (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 reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure. I find none of the above-mentioned are applicable and therefore retrospectively reinstate the Applicant on the same terms and conditions as he was on at the time of his dismissal with effect from 19 January 2018. The Applicant is to report for work on 17 May 2021 and the respondent must pay on the same day the equivalent of six (6) months backpay, namely R360 000.00 (Three Hundred and sixty Thousand Rands), calculated as follows: R60,000 per month x 6 = R360 000.00. I have decided to only award the Applicant six (6) months backpay, taking into consideration the time period that he was suspended with back pay."

[4] It was submitted by Mr Geldenhuys for the first respondent's member (the employee) that the crux of the cross-review application was that despite correctly applying section 193(2) of the LRA, the Arbitrator unreasonably found that he could not reinstate the employee with full backpay based on the fact that he was suspended on full pay for a long period before his dismissal. The suspension he submits was at the sole discretion of the Municipality, and furthermore the award finds that his dismissal was procedurally and substantively unfair.

[5] The submissions on behalf of the Applicant (the Municipality) are founded on the notion that this Court should not interfere with what is referred to as 'compensation' i.e. the six months' back pay. The Court's power it was argued is circumscribed in this respect. However, what this argument fails to grasp is the distinction between an award of compensation; re-employment; and reinstatement.

[6] It may be useful to revisit the judgment in *Tshongweni v Ekurhuleni Metropolitan Municipality*[1] in which Murphy AJA had the following to say in an unanimous judgment of the LAC:

> "[37] The unfair dismissal regime was introduced in the 1980s, following the recommendations of the Wiehahn Commission of Enquiry into Labour Legislation, precisely in recognition of the fact that contractual principles and remedies offered employees paltry protection. Since then employees can sue on a wider cause of action (unfairness rather than wrongful breach) and the statutory remedies of reinstatement, re-employment and compensation are available. In Equity Aviation Services (Pty) Ltd v CCMA & others, the Constitutional Court explained the meaning of the word reinstate as follows:

[1] (2012) 33 ILJ 2847 (LAC); this Judgment was recently relied on in SA Municipal Workers Union National Provident Fund (Pty) Ltd v Dihlabeng Local Municipality & others (2023) 44 ILJ 1479 (SCA) to elaborate on the distinction between reinstatement and re-employment.

'The ordinary meaning of the word "reinstate" is to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards worker's employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.' (Emphasis added.)

Reinstatement may be ordered from a date later than the date of dismissal (s 193(1)(a) of the LRA) and thus may be of limited retrospectivity. Re-employment implies termination of a previously existing employment relationship and the creation of a new employment relationship, possibly on different terms both as to period and the content of the obligations undertaken. In both instances, as in the case of the common-law remedy of specific performance, the employee must make his services available if the remedy is to be maintained; there must be a willingness to resume employment. Aside from the requirements of the common law, that much follows in part, it would seem to me, as the corollary arising from the provision in s 193(2)(a) of the LRA that reinstatement or re-employment should be ordered unless the employee does not wish to be reinstated or re-employed.

[38] Compensation is the remedy available to an employee who is found to be unfairly dismissed but not granted the remedy of reinstatement or re-employment. As alluded to earlier, in terms of s 193(2) read with s 193(1)(c) of the LRA, compensation is payable where the employee does not wish to be reinstated or re-employed, where the continuation of the employment relationship would be intolerable, where reinstatement or re-employment is reasonably impracticable or where the dismissal was only procedurally unfair. Importantly, the LRA does not grant an employee a remedy to sue for damages for unfair dismissal. In most cases an award of compensation (capped at 12 months' remuneration for unfair

dismissals, and 24 months' remuneration for automatically unfair dismissals) will be more than an award of damages at common law, especially where the contract is for an indefinite period. On the other hand, it could be less in the case of a fixed-term contract, depending on the balance of the period remaining after dismissal. An employee seeking damages for termination of employment in excess of the statutory amount of compensation will accordingly have to sue the employer for a wrongful breach of contract."

[7] It is evident that the above distinctions provided for in section 193 of the LRA, did not inform the Municipality's opposition to the cross-review. The Arbitrator *in casu* also failed to comprehend what reinstatement retrospective ***to the date of dismissal*** means. He ordered same, but with limited 'back-pay' which is a contradiction in terms. It is the Court's view that he further compounded this decision by taking irrelevant considerations into account, i.e. the fact that the employee was suspended on back pay for a prolonged period.[2]

[8] The Municipality has decided not to persist with the review of the Award and clearly stated that it has become moot given that the employee is back at work for the Municipality and has been since 1 November 2021. It is further conceded by the Municipality that he was reinstated as from the date of his dismissal. Thus, any ground for limiting the quantum of backpay he has received, is reliant on a mistake of law that regards the 'backpay' as compensation. In all these circumstances, the cross-review must succeed. The cross-review was three days late and condonation is granted in respect of the short delay and the merits of the cross-review. I make the following order considering that there is an ongoing relationship between the parties:

[2] See also *Mthethwa v Commission for Conciliation, Mediation & Arbitration & others (2022) 43 ILJ 1786 (LAC) paragraph* 28 "In casu, the court a quo, therefore, erred in awarding compensation in circumstances where the factors envisaged in s 193(2)(a), (b) and (c) of the LRA were not established by the evidence and on a balance of probabilities. Moreover, the arbitrator did not, in deviating from the primary relief sought, furnish reasons for granting the remedy not pleaded by the appellant. He, instead, applied his 'thinking', which is subjective, in holding that 'the applicant's tenure would be unsafe and insecure', should the appellant be reinstated."

Order

1. The Award under WCP 041815 is reviewed and substituted only to the extent that the following words contained in Paragraph 91 of the award are *deleted*:

"and the respondent must pay on the same day the equivalent of sic (6) months backpay, namely R360 000.00 (Three Hundred and sixty Thousand Rands), calculated as follows: R60,000 per month x 6 = R360 000.00. I have decided to only award the Applicant six (6) months backpay, taking into consideration the time period that he was suspended with back pay."

2. The Applicant Municipality must remunerate Mr TW Tyatya in accordance with his retrospective reinstatement from date of his dismissal on 19 January 2018.

3. There is no order as to costs.

HRabkin-Naicker
Judge of the Labour Court of South Africa.

Appearances:

For the Applicant Municipality:
Brenton Joseph SC instructed by Oosthuizen Marais & Pretorius Inc
For the First Respondent:
Macgregor Erasmus Attorneys Inc