IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C1125/2010

In the matter between:

LESLIE BABA Applicant

and

GENERAL PUBLIC SERVICE
SECTORAL BARGAINING COUNCIL First Respondent

MADELEINE LOYSON N.O. Second Respondent

DEPARTMENT OF HOME AFFAIRS Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an application to review an award made by the second respondent (the arbitrator) after she had found that the applicant's dismissal by the third respondent was both substantively and procedurally unfair. She ordered the third respondent to pay the applicant twelve months compensation. The review application relates to the award of compensation. The applicant contends that the arbitrator should have ordered the third respondent to reinstate him.

2. The application is opposed by the third respondent. The arbitrator's finding that the dismissal was both substantively and procedurally unfair is not being challenged on review. She had found that the third respondent had failed to prove the charges against the applicant on a balance of probabilities.

3. Since the arbitrator's finding that the applicant's dismissal was both substantively and

procedurally unfair, it becomes unnecessary to set out the facts in any great detail. The crisp issue for determination is whether the arbitrator's award for compensation as opposed to reinstatement can be sustained.

Background facts

4. The applicant was employed by the third respondent. On 10 June 2005 an incident occurred which gave rise to various charges being brought against him. In summary the charges involved the allegation that he had wrongfully assisted non-South African citizens to obtain identity and travel documents to which they were not entitled. On 13 June 2005, the incident was reported to higher authorities within the third respondent. On 5 August 2005 the applicant was suspended on other unrelated charges. No findings have been made against him in respect of those charges. On 8 March 2006, nine months after the incident, the applicant was charged with misconduct by the third respondent. During July 2007 his disciplinary hearing took place and he was found guilty on 9 October 2007. He immediately appealed and his appeal was dismissed on 31 January 2008. He was on suspension at the time. He then referred his dismissal to the General Public Service Sectoral Bargaining Council (GPSSBC) and an arbitration hearing was conducted before advocate Maritz on 4 July and 25 August 2008. An award was handed down on 8 September 2008 finding that his dismissal was fair. The applicant filed a review application on 13 November 2008 challenging the award on several grounds. The parties agreed that because of the defective record of the arbitration proceedings, the Maritz award should be set aside and the dispute remitted to the GPSSBC for a *de novo* hearing before a different arbitrator. The agreement was made an order of court on 15 April 2010.

5. The dispute was arbitrated by the arbitrator on 13 and 14 September 2010. Evidence was presented and both parties agree that the arbitrator has accurately set out the evidence in her award. The applicant submitted written argument. The two main points that the applicant argued was that the third respondent had not discharged the onus of proving that he was guilty of the misconduct complained of and that the applicant's unexplained delay in prosecuting the charges against him rendered his dismissal as unfair. Further that in the absence of any evidence to the contrary, he ought to be reinstated retrospectively to the date of his dismissal. The third respondent argued that the charges had been proved and that same warranted the sanction of dismissal. The arbitrator found that *inter alia* that the inexplicable and shocking delay had resulted in gross procedural unfairness and that the dismissal was substantively and procedurally unfair.

6. The arbitrator on the question of relief relied on *Republican Press (Pty) Ltd v CEPPWAWU & others* (2007) 28 ILJ 2503 (SCA) and said that she shared the view expressed that there is authority for the view that where there has been a substantial delay in prosecuting the dispute, the probability of resuming an employment relationship becomes increasingly 'not reasonably practicable'. She ordered the third respondent to pay the applicant compensation equivalent to twelve months renumeration.

The grounds of review

7. The applicant felt aggrieved with the award relating to compensation and brought this

review application. The applicant relies on the following grounds of review:

7.1 The arbitrator failed to apply appropriately or at all the peremptory provisions of section 193(2) of the Labour Relations Act 66 of 1995 (the Act) and accordingly exceeded her powers.

7.2 She took into account irrelevant considerations and ignored relevant considerations when determining that reinstatement was not appropriate.

7.3 She committed a gross error of law in finding that reinstatement was not appropriate.

7.4 Under all the circumstances, the arbitrator's determination of relief is a determination that no reasonable arbitrator could make.

Analysis of the facts and arguments raised

8. It is trite that the Act allows for any one three remedies to be granted to an employee who has been unfairly dismissed: the employer may be ordered to reinstate the employee, or the employer may be ordered to re-employ the employee, or the employer may be ordered to pay compensation. The legislatively preferred remedy is the restoration of the employee to employment either by reinstatement or by re-employment. Either of those remedies may be granted except in specified circumstances set out in section 193(2) of the Act, in which case compensation may be ordered, but to a maximum amount equivalent to 12 to 24 months remuneration depending upon the nature of the dismissal. An order for reinstatement restores the former contract and any amount that was payable to the employee under that contract necessarily becomes due to the employee on that ground alone.

9. It is common cause that the arbitrator found that the applicant's dismissal was both substantively and procedurally unfair. Once an arbitrator has found that a dismissal is substantively unfair, the arbitrator is then enjoined to consider the factors set out in section 193(2) of the Act. These provide as follows:

"The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless:

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonable 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."

10. It is clear from the evidence led that the applicant sought an order for reinstatement. No evidence was led by the third respondent that the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable. No evidence was led by the third respondent that it would not be reasonable practicable for the employer to reinstate or re-employ the applicant. Since the arbitrator found that the dismissal was both substantively and procedurally unfair, the arbitrator was obliged to consider whether there was compliance with section 193(2) and decide whether the applicant should have been reinstated or compensated.

11. It is trite that an employer bears the onus to prove the existence of the exceptions

contained in section 193(2) of the Act. It has failed to do so. The arbitrator has despite the third respondent's failure to prove the existence of the aforesaid exceptions, found that an order for compensation as opposed to reinstatement was appropriate. She relied on the *Republican Press (Pty) Ltd* matter and said the following at paragraph 6.35 of her award:

"Finally, there is authority for the view that where there has been a substantial delay in prosecuting the dispute, the probability of resuming an employment relationship becomes increasingly "not reasonably practicable." Republican Press (Pty) Ltd v CCPPWAWU & others (2007) 28 ILJ 2503 (SCA). I share that view."

12. The following was said in *Republican Press (Pty) Ltd* at page 2514 at paragraphs D - H:

"While the Act requires an order for reinstatement or re-employment generally to be made a court or an arbitrator may decline to make such an order where it is 'not reasonably practicable' for the employer to take the worker back in employment. Whether that will be so will naturally depend on the particular circumstances, but in many cases the impracticability of resuming the relationship of employment will increase with the passage of time. In my view the present case illustrates the point.

.... In the ordinary course it will clearly be progressively prejudicial with the passage of time for an order to be made that has that effect, both to the employer who must arrange its affairs, and to other workers who are being prone to being selected for dismissal. In the present case the problem is exacerbated by the fact that by the time the Labour Court made its order there had been further retrenchments and some of the company's operations had been restructured.

That is not to suggest that an order for reinstatement or re-employment may not be made whenever there has been delay, nor that such an order may be made more than 12 months after the dismissal. It means only that the remedies were probably provided for in the Act in the belief that they would be applied soon after the dismissals had occurred, and that in a managerial fact to be borne the mind in assessing whether any alleged impracticability if implementing such an order is reasonable or not. In the present case the passage of six years from the time the workers were dismissed, all of which followed consequential upon the failure of the union to pursue the claim expeditiously, was sufficient in itself to find that it was not reasonable practicable to reinstate or re-employ the workers. In my view it was entirely inappropriate for such an order to be granted."

13. The facts *in casu* are distinguishable from those in *Republican Press (Pty) Ltd.* The appellant had contended that the reinstatement of the 28 workers after the lapse of a period of six years was wholly inappropriate. It pointed out that, amongst other things, a number of the jobs concerned had since been out sourced, considerable business restructuring had occurred, and there had subsequently been further retrenchments. The arbitrator clearly did not consider the facts of the case that she was required to decide on whether reinstatement was not applicable.

14. In *Equity Aviation Services (Pty) Ltd v CCMA & others* (2008) 29 ILJ 2507 (CC) it was held at page 2522 at paragraph as follows:

"The ordinary meaning of the word 'reinstate' is to put the employee back into the same 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 workers' 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. As the language of s 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation is that in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word 'reinstate' means that reinstatement will not run from a date after the arbitration award. Ordinarily then, if a commissioner of the CCMA orders the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was as a direct result of the employer's conduct in dismissing him or her unfairly.

And at page 2524 at paragraph 39:

"The context, on the contrary, support the view that the ordinary meaning of s 193(1)(a) does not offend the right to fair labour practices. Fairness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment. In this regard, it is important to bear in mind

that where a court or commissioner has decided that reinstatement is the appropriate remedy, it will also have to be decided that the worker has been unfairly dismissed. The workers will thus have been deprived of wages, unfairly, as a result of the conduct of the employer. The importance of security of employment was affirmed by this court in NEHAWU:

'Security of employment is a core value of the LRA and is dealt with in chap[ter] VIII. The chapter is headed "Unfair Dismissals". The opening section, s 185, provides that "[e]very employee has the right not to be unfairly dismissed". This right is essential to the continuation of the relationship between the worker and the employer on terms that are fair to both. Section 185 is "a foundation upon which the ensuing sections are erected"'.

And at page 2526 at paragraph 43:

"In the case of re-employment or reinstatement, the statute provides two mechanism for the management of such concerns. First, s 193(2)(c) provides that the remedies of reinstatement or re-employment need not be ordered if the court of commissioner is satisfied that it would not be 'reasonably practicable' for the employer to reinstate or re-employ the employees. Secondly, the statute provides that a court or commissioner has a discretion to determine the extent of the retrospectivity of the order of reinstatement or re-employment. In exercising the discretion a court or an arbitrator may address, among other things, the period between the dismissal and the trial as well as the fact that the dismissed employee was without income during the period of dismissal, ensuring however, that an employer is not unjustly financially burdened if retrospective reinstatement is ordered or awarded."

And at page 2528 at paragraph 48:

"It is trite law that the power to grant a remedy in s 193 is by its very nature discretionary and that the discretion must be exercised judicially by a court that enjoys that unfettered discretion.

And at page 2529 at paragraph 51 and 53 - 54:

"As to the criticism that Mr Mawele will benefit unjustly from the delay of 19 months in proseuting the review, it is common cause that the delay was caused by the unavailability of the record of the proceedings before the CCMA. The tapes seemingly went missing. The delay was therefore not due to any deliberate, wilful or flagrant disregard for the express provisions and underlying purpose of the LRA. In the circumstances it would be unfair to lay the blame for the delay on Mr Mawelele.

Equity argues that the order of perceived retrospectivity is unduly harsh on its business, not least as it (Equity) has not benefitted from Mr Mawelele's services in the interim period. Equity seems to lose sight of the fact that a remedy of reinstatement is always granted to an employee wishing to offer his or her services to his or her employer. There is no evidence that Equity offered the employee a job and no contention to that effect has been made. Moreover, it is not suggested that there is any evidence which is relevant that ought to have been, but was not included in the record.

The principle of the right of election is a fundamental one in our law. Equity made an election not to ask Mr Mawelele to render his services, nor did they offer him alternative employment. When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the volte face is prejudicial or unfair to another. As long as an employee makes himself or herself available to perform his or her contractual obligation in

terms of the contract of employment, he or she is entitled to payment despite the fact that the employer did not use his or her services. Mr Mawelele cannot, in the circumstances, be prejudiced by reason of the manner in which Equity exercised its election.

15. It is clear from the aforesaid that the arbitrator did not did not exercise her discretion judicially when it related to the issue of reinstatement. Her award for compensation is not one that a reasonable decision maker could have made. Her award on compensation stands to be reviewed and set aside.

16. All that remains to be decided is whether this Court should refer the dispute to the first respondent for a determination of the issue of reinstatement. As pointed out above, the applicant was dismissed on 31 January 2008 after he had exhausted his internal appeal. He referred a dispute to the GPSSBC and an arbitration hearing took place on 4 July and 25 August 2008. An award was handed down on 8 September 2008 which went against him. He filed a review application on 13 November 2008. The record of the arbitration proceedings were defective and the parties agreed to refer it to arbitration. The agreement was made an order of court on 15 April 2010. The dispute was arbitrated for a second time on 13 and 14 September 2010. An award was issued. The applicant brought this review application on 10 December 2010. Pleadings were exchanged and the matter was argued on 7 June 2011. Both reviews were prosecuted with the necessary haste. Since the applicant was dismissed on 31 January 2008, no purpose will be served to refer the dispute to the GPSSBC for arbitration to consider the issue of retrospectivity. The delays in the matter were not

caused by the applicant. He was simply exercising the remedies provided to him in terms of the Act. The period of delay is not six years as was the case in the *Republican* matter.

17. An appropriate order is to replace the commissioner's award for compensation with an order that the applicant is reinstated from the date of his dismissal, which in this case was 31 January 2008.

18. There is no reason why costs should follow the result. The applicant had to suffer at the instance of the third respondent. He waited for almost six years for the dismissal dispute to be finalised. He has received no payment for the period during which he was unemployed. In my view, considerations of the interest of justice and fairness dictates that the third respondent should pay his costs.

19. In the circumstances I make the following order:

19.1 Paragraphs 7.2 and 7.3 of the arbitration award dated 5 October 2010 under case number PSGA 1240.07/08 is reviewed and set aside and is replaced with the following order:

"The respondent is ordered to reinstate the applicant from 31 January 2008".

19.2 The third respondent is to pay the applicant's costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	J WHYTE OF CHEADLE THOMPSON & HAYSOM
FOR THIRD RESPONDENT:		N MANGCU-LOCKWOOD INSTRUCTED BY STATE ATTORNEY
DATE OF HEARING	:	31 MAY 2011
DATE OF JUDGMENT	:	2 JUNE 2011