

SOUTH AFRICA / JUDGMENT

Mabena v Road Traffic Management Corporation (J1422/20) [2022]

ZALCJHB 356 (15 November 2022)

[2022] ZALCJHB 356

COURT

Labour Court Johannesburg

BEFORE

Snider

CASE / FILE NUMBER

J1422/20

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: J1422/20

In

the matter between:

TREVOR

BAFANA MABENA

Applicant

and

ROAD

TRAFFIC MANAGEMENT CORPORATION

Respondent

Heard: 28

June 2022

Delivered: 15

November 2022

Summary: Application

in terms of section 77(3) of the Basic Condition of Employment Act,
1997 in terms of

which the Applicant claims remuneration for the

period of time that he was dismissed by the Respondent, less an
amount ordered

by the Commissioner in an unfair dismissal dispute

until date of reinstatement.

Consideration

of whether such a claim available to the Applicant bearing in mind the relevant jurisprudence in respect of claims for reinstatement and the nature of and requirements for such claims as contractual claims.

JUDGMENT

SNIDER, AJ

- [1] This is an application in terms of which the Applicant relies on section 77(3) of the Basic Conditions of Employment Act (“the BCE”) which clothes this Court with jurisdiction to hear certain claims in certain circumstances:

“(3) The Labour Court has concurrent jurisdiction with the Civil Courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.”

- [2] The Applicant claims that the Respondent, after dismissing the applicant, and having an arbitration award made against it, and losing a slew of litigation in an attempt to overturn the review, should pay all outstanding remuneration to the Applicant for the period from 15 June 2017 to 31 May 2020, the later date being the date on which the Applicant alleges that he was reinstated. The rationale for the period claimed is that the Applicant, having been dismissed by the Respondent on 17 October 2016, was successful in an unfair dismissal arbitration against the Respondent and the Arbitrator ordered the Respondent to reinstate the employee on 15 June 2017. As set out above the Applicant further alleges that he was in fact only reinstated by the Respondent on 1 June 2020, and it is this time frame that he uses to formulate and quantify his claim.
- [3] The litigation between the parties has a long and somewhat complex history, much litigation has ensued post the arbitration award, very little of which is relevant for the purposes of this judgment.
- [4] It is quite clear that there was significant dissatisfaction on both sides of the litigation. The Respondent being extremely dissatisfied with the award made by the Arbitrator, and the Applicant being extremely dissatisfied with the conduct of the Respondent in litigation pursued by it after the arbitration.
- [5] There has been a flurry of litigation including, inter alia:
- 5.1. A review of the arbitration award by the Respondent;
- 5.2. A successful application was made by the Applicant to have the arbitration award made an order of court which order was made on 30 April 2018;
- 5.3. Respondent’s review application was archived in terms of a court order dated 28 June 2018;

- 5.4. A retrieval application was brought and refused on 27 September 2018;
- 5.5. The arbitration award was quantified, and a writ was granted on 7 August 2018 to the Applicant;
- 5.6. An urgent application was made to stay the writ which application was dismissed; and
- 5.7. Leave to appeal was sought against the order refusing the stay of the writ, and the matter went so far as, via a failed attempt to petition the Labour Appeal Court, as far as the Constitutional Court where the petition was refused.

- [6] It is clear that the Respondent has done everything in its power to overturn the award. Unsuccessfully, however.
- [7] It appears to be settled law that the only claim that exists for the Applicant, if he is reinstated in terms of the arbitration award, but not reinstated by his employer in terms of the award, and the award is accordingly delayed while litigation ensues, is a contractual claim in terms of section 77(3) of the BCE.
- [8] The question then is what the requirements are for such a claim and whether they have been met.
- [9] It must first be pointed out that claims in terms of arbitration awards of the nature dealt with herein do not prescribe. However, this is not a claim based on an arbitration award. This is a contractual claim arising from the contract of employment itself, in terms of sections 77(3) of the BCE. The notice of motion was delivered to the Respondent on 2 December 2020 and as such the claim cannot stretch back further than three years from that date, that is to say the claim runs from 2 December 2017 until 31 May 2020.
- [10] The point of departure is the award that was made by the Arbitrator pursuant to the unfair dismissal arbitration between the Applicant and the Respondent. The arbitration hearing was heard between 25 January 2017 and 28 April 2017, on three non-consecutive dates.
- [11] It is not necessary to go into the detail of the dispute between the parties at the arbitration, save to say that the Applicant was accused of certain violent and insolent behaviour. The Arbitrator found that the Applicant had committed the offences with which he was charged but was of the view that dismissal was not a fair sanction.
- [12] The order made by the arbitrator was as follows -
- “[50] I found that the dismissal of the employee was procedurally fair but substantively unfair.*
- [51] I order the employer to reinstate the employee in the position he was before dismissal without loss of benefits.
- [52] I order the employer to pay to the employee backpay from the date of dismissal to the date of the award.

[53] I order the employer to reinstate the employee on 15 June 2017.

[54] The above amount shall be paid on or before 30 June 2017.

[55] If the parties are unable to agree on the above amount either of them may approach the CCMA to determine same.”

[13] There are three key features of the award that must be considered:

13.1. the Commissioner exercised a discretion in determining what the Respondent was obliged to pay the employee, and in terms of that discretion he ordered backpay from the date of dismissal being the 17 October 2016 to the date of the award being 15 May 2017, a period of approximately seven months;

13.2. the Commissioner did not reinstate the employee retrospectively, he simply stated “I order the employer to reinstate the employee on 15 June 2017”;

13.3. The Arbitrator ordered prospective relief when he stated: “I order the employer to reinstate the employee in the position he was before dismissal without loss of benefits”. My understanding of this part of the Arbitrator's award is that upon

reinstatement, and this concurs with the prevailing jurisprudence, the employee must be employed on the same terms and conditions as pertained to him prior to his dismissal.

[14] The exercise of this discretion by the Arbitrator was never challenged by the Applicant and it is common cause between the parties that the Respondent complied with the terms of the order in that it paid the Applicant the amount owed in terms of the order.

[15] This leaves the Applicant with only his contractual claim.

[16] The arbitration award, as set out above, does not provide the Applicant with any additional relief regarding the whole intervening period between his dismissal and reinstatement.

[17] The award does nothing other than grant the Applicant certain payments, which were made to him, and makes an order to the effect that after reinstatement the Applicant's terms and conditions of employment should be the same as they were before his dismissal.

[18] It is then necessary to determine whether the Applicant has made out a claim in contract against the Respondent in terms of Coca Cola (*supra*). It must be borne in mind that the Applicant has elected to proceed on notice of motion and the determination of the matter must accordingly be made in terms of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.

[19] There are several common cause facts in this matter, alternatively facts that cannot be denied by the Respondent.

[20] The primary issue for determination in this matter is whether the Applicant was reinstated. The most pertinent allegations in this regard are in the founding and answering affidavits. At paragraph seventy-two of the founding affidavit on page sixteen thereof, the Applicant

alleges that the Respondent only reinstated him on 1 June 2020. In answer to this the Respondent, at paragraph thirty-three, page fifteen of the answering affidavit, states that there was reinstatement of the Applicant, but it did not include “retrospective effectiveness”. This it would seem to me is a legal, not a factual question in these circumstances.

[21] Oddly the Applicant seems to deny the reinstatement at paragraph one hundred and forty-six of his replying affidavit. My view is this is not a denial of the reinstatement, but a denial of the allegation that the reinstatement was not retrospective. It is the only sensible understanding of this passage.

[22] The vague and unsubstantiated allegations by the Respondent that the Applicant wouldn’t, didn’t or couldn’t report for duty, are given the lie by the admission that he was reinstated and the allegation of a second dismissal, which would also necessarily involve a reinstatement, thereby acknowledging that the contract was extant at the time. The existence of other income producing income on the part of the Applicant would, in any event, not preclude him from making a claim. No postponement or device was suggested at the hearing of this matter whereby any “set-off”

could be determined. The endeavour by the Respondent to obtain documentation has not borne fruit and, given the length of time that this matter has endured, cannot further delay it.

[23] The Applicant has produced a salary slip, on page eighteen of the pleadings, dated 15 October 2015 in terms of which his remuneration is calculable and clearly covers his various claims including his claim for leave pay.

[24] Accordingly, the following order is made:

Order

1. The Respondent is ordered to pay the Applicant his remuneration as at the date of his dismissal from 2 December 2017 until 31 May 2020.
2. There is no order as to costs.

Snider, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Respondent: Advocate P Verveen

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