

SOUTH AFRICA / JUDGMENT

Notley v Great North Transport (Pty) Ltd (HCAA10/2020) [2021] ZALMPPHC 27 (1 June 2021)

[2021] ZALMPPHC 27

COURT

Limpopo High Court, Polokwane

BEFORE

MF Kganyago, MG Phatudi, Makwela

CASE / FILE NUMBER

HCAA10/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

REPORTABLE:

NO/YES

OF

INTEREST TO OTHER JUDGES: NO/YES

REVISED.

1/06/2021

CASE

NO: HCAA10/2020

In

the matter between

LIONEL

MARWOOD NOTLEY

APPELLANT

AND

GREAT

NORTH TRANSPORT (PTY) LTD

RESPONDENT

JUDGMENT**KGANYAGO J.**

- [1] The appellant was employed by the respondent as a depot manager. The appellant was dismissed by the respondent on 30th November 2012 following a disciplinary hearing. The appellant referred his dispute to the CCMA. The CCMA found in favour of the appellant and ordered the respondent to reinstate the appellant in the position he occupied before his dismissal without any loss of benefits; that the respondent pay the appellant the sum of R204 840-40 as back-pay; and that the appellant to resume his duties on 15th May 2013 and the respondent to allow him to do so.
- [2] The respondent was dissatisfied with the outcome of the arbitration award and it decided to take that award on review to the Labour Court. The appellant seeing that the respondent was not complying with the arbitration award also referred the matter to the Labour Court in order to declare the award an order of court. On 4th February 2016 under the appellant's matter at the Labour Court, the parties settled their dispute wherein it was agreed that the respondent will withdraw its review application; that the respondent will reinstate the appellant in his former position of depot manager on terms that shall not be less favourable than those he enjoyed at the time of his dismissal in November 2012; that the appellant to report for duty at the respondent's head office in Polokwane on Monday 8th February 2016 at 8h00; that the respondent to pay the appellant the sum of R204 840.40 being back-pay as ordered by the CCMA, and R49 160-00 being interest on back-pay calculated at 9% per annum from 15 May 2013 to 31st January 2016; and that the respondent pay contribution towards costs in the amount of R25 000-00. The said settlement agreement was by consent made an order of court. The respondent reinstated the appellant and also paid the appellant as per the court order.
- [3] The appellant is of the view that the respondent is also liable to pay him salary and benefits for the period from the date of the CCMA award up to and including the date of the implementation of the award, which according to the appellant amounted to R1 777 887.57. The parties could not reach any agreement in relation to the appellant's alleged claim. That led to the appellant instituting action against the respondent claiming that the respondent is liable to him for that amount.
- [4] The respondent has defended the appellant's action. In its plea the respondent has raised two special pleas. The first being that of non-compliance with section 3(1) of the Institution of Legal Proceedings Against Organs of State Act 40 of 2002, and the second being that the High Court lacks jurisdiction to entertain labour disputes. However, the respondent abandoned both special pleas at the commencement of the trial in the court a quo.

- [5] The respondent in its plea on the merits has denied the appellant's claim. The respondent has further pleaded that the order of the Labour Court was in full and final settlement of the dispute, and therefore the appellant was not entitled to any other amount from the respondent as the reinstatement award or order cannot extend to a date beyond the date of the order, nor can it serve to form a basis of a common law contractual entitlement.
- [6] At the commencement of the trial, merits and quantum were separated. The court a quo made a ruling that the onus rested on the respondent to prove that the settlement agreement that was made an order of court was in full and final settlement of the dispute.
- [7] The respondent called its first witness Mack Ntuli. He testified that he is employed by the respondent as human resources manager. That the records of the respondent are kept at the human resources department. They are having the records of the appellant. According to their records, the appellant was dismissed on 30th November
2012. After his dismissal he referred his dispute to the CCMA. The CCMA ordered that the appellant be reinstated. The respondent took that award on review. That as per the CCMA award, the appellant was supposed to report for duty on 15th May 2013, but he did not report as he never saw the appellant. However, the witness went further and stated that it was possible that the appellant might have reported for duty on 15th May 2013 by going to the CEO's office without his knowledge. The witness stated that the appellant has never reported to him that he was coming back to work.
- [8] According to the witness, the appellant reported for duty on 8th February 2016 after the parties have reached a settlement agreement. The witness stated that after the appellant was dismissed by the respondent, the appellant was employed at Lowveld Bus Services from 1st October 2013 to 30th September 2015, and could therefore not being able to render his services with the respondent. The witness stated that he was not sure whether the previous employment terms before the dismissal of the appellant were still the same with that after his reinstatement, however, he thought that they were still the same. The witness further stated that the settlement agreement that was made an order of court was in full and final settlement of the dispute.
- [9] The witness was cross examined and he conceded that one Jabulani was also a human resources manager employed by the respondent. When it was put to the witness that on 15th May 2013 the appellant reported for duty to Jabulani who informed the appellant that he will not report for duty as they have commenced with the review application, the witness stated that he was not aware of that. The witness further stated that the appellant could have been informed that the matter has been taken on review as there were company secretary and IR manager who were dealing with that matter, and that these two will only update them. The witness conceded that he was not present at the Labour Court when the matter was settled, and he can therefore not tell what the parties have discussed and negotiated that the led to the matter being settled.

- [10] Mr David Mokoena testified as the respondent's second witness. He testified that the respondent had employed him as human resources manager. The respondent dismissed him on 21st December
2012. He appealed his dismissal and was not successful, and he then referred his matter to the CCMA. He was successful at the CCMA wherein the respondent was ordered to reinstate him. When he reported for duty based on the CCMA award, he was given a letter by the respondent informing him that the CCMA award has been taken on review to the Labour Court. At the Labour Court the matter was referred back to the CCMA to be heard afresh.
- [11] At the CCMA when the matter was supposed to be heard afresh, the parties settled the dispute on the basis that he was reinstated, and should report for duty on 1st June 2017. The offer of settlement that was made at the CCMA was in full and final settlement of his dispute. On 1st June 2017 he reported for duty to Jabulani Shingange the human resources manager. The witness stated that if an employee was supposed to report for duty but was prevented do so by the respondent, the respondent will instruct the human resources department to notify that employee in writing and also to give reasons why he/she was prevented from reporting for duty.
- [12] Under cross examination the witness conceded that he did not have any knowledge of the internal happenings at the respondent workplace between December 2012 and June 2017. The witness further conceded that in relation to the appellant's case, he had no knowledge whether a letter was written to the appellant, or whether the appellant had pitched up for work. That concluded the evidence for the respondent and it closed its case.
- [13] The appellant testified under oath. He testified that he was seeking payment of back-pay for the period between his CCMA award and when he was finally reinstated. That according to the CCMA award, he was supposed to report for duty on 15th May 2013. On that particular day, he reported for duty at the respondent's head office to Mr Jabu Shingange. When he reported for duty, Jabu told him to go back home as they have taken the award on review, and that they will let him know should they wish him to come back to work. He did not hear anything from the respondent and about two to three months later he went back to the respondent's workplace. On arrival he was told the same thing that they have taken the award on review and that they will let him know should they wish him to come to work.
- [14] He got employed at Lowveld Bus Services. Whilst employed at Lowveld Bus Services, he got a telephone call from the CEO of the respondent. The CEO made an offer to him, which he turned down. The CEO told him that she will contact him, but she never did that.
- [15] At the Labour Court he reached an agreement with the respondent wherein the respondent agreed to reinstate him, but they could not agree on the issue of back-pay. The Judge at the Labour Court told them that the Labour Court did not have jurisdiction to adjudicate a dispute relating to back-pay. That the Judge further told them that with regard to back-pay, they must go back to the company and negotiate it on a win-win situation, and if they are unable to agree, he may institute a civil claim against the respondent. The award of the

CCMA and wasted costs on attorney and client was made an order of court. However, that order of court was not in full and final settlement of the dispute between the parties as the Judge advised them to go back to the company to negotiate the issue of back-pay on a win-win situation.

- [16] The appellant was cross examined, and he stated that for the first time when he reported for duty after the CCMA award, he reported to Jabu Shingange, and for the second time to the acting CEO Mr Hlongwane. The appellant stated that when he reported for duty, he was prepared to immediately start working. The appellant conceded that part of the order of the Labour Court was that the respondent was withdrawing its review application. The appellant further conceded that after he was reinstated as per the order of the Labour Court, he wrote a letter to the respondent seeking advanced payment of R60 000.00, and in that letter he further wrote “I accepted the reinstatement offer that was made by the court on 4th February 2016”. The appellant further stated that at that stage he accepted reinstatement to get back to work, and from there he would have started negotiations as advised by the Judge as the correct procedure to follow. That concluded the evidence of the appellant and he closed his case.
- [17] Muller ADJP dismissed the appellant’s claim on the basis that the settlement confirms that the parties were in agreement that the appellant’s contract should be reinstated from 8th February and not from the date of the award made by the CCMA. The court a quo further held that the Labour Court order superseded the CCMA award by agreement between the parties, and that the parties were in agreement that the contract that came to an end on the date of the appellant dismissal had not been reinstated. The appellant has appealed against the judgment and order of Muller ADJP. The appeal is with the leave of the Supreme Court of Appeal.
- [18] This appeal concerns the proper interpretation of the court order granted by the Labour Court on 4th February 2016. The question is whether that court order has substituted the award of the CCMA that was issued on 22nd April 2013, and also whether it was in full and final settlement of the dispute between the parties.
- [19] The proper approach in the interpretation of a court order has been set out in *Eke v Parsons*[1] in which it was held:

“Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is well-established test on the interpretation of court orders:

‘The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.’

- [20] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] Wallis JA said:

“Interpretation is the process of attributing meaning of words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all factors. The process is objective, not subjective. A sensible meaning is preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable and sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

- [21] It is common cause that after the appellant was dismissed by the respondent on 30th November 2012, he referred his dispute to CCMA wherein it was arbitrated by the CCMA Commissioner. The award was in favour of the appellant, and the respondent was ordered to reinstate the appellant in the same position he was before his dismissal without any loss of benefits. The respondent was further ordered to pay the appellant the sum of R204 840-40 as back-pay. The appellant was supposed to resume his duties on 15th May 2013 and the respondent was to allow the appellant to do so.
- [22] The respondent took that award on review, and that resulted in the appellant not resuming his duties as per the award. In terms of section 145(7) of the Labour Relations Act[3] (LRA), the institution of the review proceedings does not suspend the operation of an arbitration award. Seeing that the respondent was not complying with the award, the appellant instituted an application in the Labour Court in order to enforce that award. The appellant’s application was set down for the 4th February 2016. On that date the parties reached an agreement which by consent was made an order of court.
- [23] The court a quo found that this order of the Labour Court has superseded the CCMA award and that the contract that came to an end when the appellant was dismissed had not been reinstated. The respondent has pleaded that the order of the Labour Court was in full and final settlement of the dispute. However, the two witnesses which the respondent has called to testify, the court a quo found that they were not really of assistance to the court. That makes the version of the appellant to remain unchallenged. The version of the appellant was that the Judge at the Labour Court, told them that with regard to the issue of back-pay for the period May 2013 and February 2016 the parties must go back and negotiate at the company, and if they are unable to settle, the appellant reserves his right to institute a civil claim against the respondent.

- [24] It was the appellant contention that after he succeeded at the CCMA, he twice went to the respondent to tender his services as per the CCMA award but was prevented from doing so by the respondent, as the respondent had told him that they have taken his award on review. This version was not challenged. The court a quo found that if the appellant has tendered his services and the respondent had refused him an opportunity to work, that amounted to a wrongful repudiation of the contract which amounts to a dismissal. When arriving at that conclusion, the court a quo has overlooked that by taking the arbitration award on review, the respondent was exercising its statutory right provided for in the LRA. The respondent's refusal to permit the appellant to resume duties as per the CCMA award whilst the review application was pending did not amount to a repudiation of the contract as a live dispute was still pending.
- [25] The court a quo also found that when the appellant was finally reinstated on 8th February 2016, his employment contract prior to his dismissal was no longer in existence. The remedies provided for in the LRA for unfair dismissal are reinstatement, re-employment or compensation. For reinstatement you are placed in the same position you were prior to your dismissal. Re-employment you are employed afresh which might be on new terms and conditions. Compensation the term is self-explanatory. With regard to the meaning of reinstatement, the court a quo correctly referred to the case of *Equity Aviation Services (Pty) Ltd v CCMA and Others*[4] in which it was held:

“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. 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 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 the reinstatement will not run from a date after the arbitration award. Ordinarily then, if a Commissioner of the CCMA order 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 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 a direct result of the employer’s conduct in dismissing him or her unfairly.”

[26] In terms of the consent order obtained at the Labour Court, the first order is that the respondent will withdraw its review application. The respondent's review application was never heard, and the award rendered by the Commissioner of the CCMA on 22nd April 2013 was at no stage set aside. When the respondent withdrew its review application on 4th February 2016, the award remained extant. The Labour Court order did not set aside the award or substitute it. The award remained valid and enforceable.

[27] As per the award of 22nd April 2013, the appellant was supposed to report for duty on 15th May 2013. That date had passed and was therefore impossible for the appellant to report for duty as per the date of the CCMA award. According to the Labour Court order, the appellant was supposed to report for duty on 8th February 2016. The Labour Court order also dealt with interest accrued to the back-pay awarded by the CCMA, that the appellant's

reinstatement was on the same terms prior to dismissal, contribution towards costs, when and where payment for back-pay should be made.

[28] In implementing the order of 4th February 2016, the respondent issued the appellant with an appointment letter dated 8th February 2016. In that letter the appellant was notified that he was reinstated with effect from 8th February 2016. The appellant and respondent have also signed a new employment agreement on 8th February 2016 which also state that the appellant was reinstated with effect from 8th February 2016.

[29] The reasoning of the court a quo in dismissing the appellant's claim was that the parties have agreed at the Labour Court that the appellant's contract be reinstated with effect from 8th February 2016, and that the reinstatement was not retrospective. The court a quo also held that the appellant has failed to establish a properly completed contractual claim. The court a quo further held that reinstatement cannot serve as a common law contractual

entitlement. What the court a quo overlooked was that the award of the CCMA was never set aside, the parties did not abandon it, and it remained valid and enforceable. The court a quo also overlooked that the Labour Court order state that the appellant was reinstated to his former position on terms that shall not be less favourable than those he enjoyed at the time of his dismissal on November 2012. As per the Labour Court order, the 8th February 2016 was the date on which the appellant was supposed to report for duty, and not the reinstatement date.

[30] The appellant was not even supposed to have signed a new employment contract, and it was also unnecessary for the respondent to issue the appellant with a new appointment letter. The date of the 8th February 2016 on both the new employment contract and new appointment letter as the date of reinstatement of the appellant is misleading as it was not what the Labour Court order has stated. In *Equity Aviation Services* case supra, the court held that the ordinary meaning of the word "reinstatement" means that the reinstatement will not run from a date after the arbitration award. The court *Equity Aviation Services* case further held that ordinarily then, if a Commissioner of the CCMA order reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render reinstatement

retrospectively.

- [31] In the case at hand the CCMA Commissioner has already awarded the appellant full back-pay, which literally mean that the reinstatement of the appellant was retrospective. It can therefore not be correct that the appellant was reinstated from the 8th February 2016 as that is a date after the award. That would be contrary to the principle set out in the Equity Aviation Services case which held that reinstatement will not run from a date after the award. In my view the court a quo erred in holding that the appellant's reinstatement was not retrospective and that the order of the Labour Court stated that the appellant will be reinstated at a future date which is the 8th February 2016.
- [32] The award state that the appellant is reinstated in the position he was before his dismissal without any loss of benefits. The Labour Court order state that the appellant be reinstated on terms that shall not be less favourable than those he enjoyed at the time of his dismissal in November 2012. In my view, the award and the Labour Court order refer to one and the same thing. What it entails is that the appellant must not be placed in less favourable terms than the one he enjoyed prior to his dismissal. That will entail that if during the period which the appellant was out of work, conditions of service were improved, or there were salary increment for other employees, the appellant will also be entitled to benefit from that despite his dismissal. It was not through his fault that he was not at work. In my view, the order of the Labour Court was amplifying the CCMA award, and not substituting it.
- [32] As held in Equity Aviation Services case supra, reinstatement is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. The appellant because of the unfair dismissal did not earn salary, or the equivalent he would have earned from the respondent as at some stage he was employed at Lowveld Bus Services. The court order, appointment letter and employment contract does not state that the appellant reinstatement was without back-pay. In Natal Joint Pension Fund case supra, it was held that where more than one meaning is possible, each possibility must be weighed in the light of all factors. In that case Judges were warned to be alert to, and guard against, the temptation to substitute what they regard as reasonable and sensible or businesslike for the words actually used. In the appellant's case, if it were the parties' intention that the appellant's reinstatement was without back-pay for the period after the award whilst the respondent was still exercising its right of review, they would have stated so in the draft order of 4th February
2016. The court a quo was reading into the Labour Court order what was never agreed by the parties at the Labour Court when it held that the appellant's reinstatement was not retrospective and that the parties agreed that the appellant will be reinstated from 8th February 2016. The Labour Court order did not state that the appellant was reinstated with effect from 8th February 2016, but has stated that the reinstatement of the appellant must not be on less favourable terms than the one the appellant enjoyed prior to his dismissal, and that the 8th February 2016 was the date on which the appellant was supposed to report for duty. The proper and favourable interpretation of the order of the Labour Court is that

the reinstatement of the appellant was with effect from the date of the award since back-pay prior the award being issued has already been dealt with by CCMA Commissioner and was no longer an issue.

- [33] The appellant's claim is based on back-pay for the period from the date of the award up to, and including the date of the implementation of the award. In *Coca Cola Sabco (Pty) Limited v Van Wyk*[5] Musi JA said:

"Therefore if an employee, after the reinstatement order and during the time that employer exercises its review and appeal remedies to exhaustion tenders his/her labour he/she does so in terms of the employment contract. She/he is therefore entitled to payment in terms of the contract of employment. The claim is therefore a contractual one, wherein the employee would have to set out sufficient facts to justify the right of entitlement to judicial redress. The employee would inter alia have to prove that the contract of employment is extant; that she/he tendered his/her labour in terms of thereof and that the employer refuses or is unwilling to pay him/her in terms of that contract. The employer on the other hand would have all the contractual defences at her/his disposal."

- [34] The appellant's employment contract that prevailed before his dismissal on 30th November 2012 was revived by the CCMA award rendered on 22nd April 2013 which ordered the respondent to reinstate the appellant in the position he was before his dismissal without any loss of benefits. There is uncontested evidence that after the award was rendered, the appellant twice went to the respondent in order to report for duty and was prevented from doing so by the respondent who told the appellant that they were still exhausting their right to review the award at the Labour Court. When the appellant went to the respondent to tender his services, he did so on the basis of his employment contract that was revived by the CCMA award.

- [35] At the commencement of the trial, the court a quo made a ruling that the respondent bore the onus to prove that the Labour Court order was in full and final settlement of the dispute between the parties. The court a quo found that the respondent's only two witnesses were not of assistance to the court. If the two witnesses for the respondent were not of assistance to the court, it follows that the respondent has failed to prove that the Labour Court order of the 4th February 2016 was in full and final settlement of the dispute between the parties. The respondent has failed to raise any contractual

defences to the appellant's claim. That left the version of the appellant to be unchallenged, and the court a quo did not find the appellant's version to be untruthful and uncreditworthy. In my view, the appellant has established a contractual claim against the respondent for back-pay for the period from the date of the award up to, and including the date of implementation of the award. The court a quo therefore erred in dismissing the appellant's claim, and it follows that the appeal stands to succeed.

- [36] In the result I make the following order:

36.1 The appeal is upheld with costs.

36.2 The order of the court a quo is set aside and substituted with the following:

“The plaintiff’s claim succeeds 100% on merits on proven, or agreed damages”

36.3 The matter is remitted to the court a quo to proceed on quantum.

MF KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

I agree

MG PHATUDI J

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA, LIMPOPO

DIVISION, POLOKWANE

I AGREE

MAKWELA AJ

ACTING JUDGE OF THE HIGH COURT

SOUTH AFRICA, LIMPOPO

APPEARENCES

FOR THE APPELLANT : ADV Z SCHOEMAN

INSTRUCTED BY

: ESPAG MAGWAI ATTORNEYS

FOR THE RESPONDENT : ADV ZF KRIEL

INSTRUCTED BY

: VENTER DE VILLIERS ATTORNEYS

DATE HEARD

: 21ST MAY 2021

DATE OF JUDGMENT : 1ST JUNE 2021

[1] 2016 (3) SA 37 (CC) at para 29

[2] 2012 (4) SA 593 (SCA) at para 18

[3] 66 of 1995

[4]

[2008] ZACC 16; 2009 (1) SA 390 (CC) at para 36

[5]

[2015] ZALAC 15; [2015] 8 BLLR 774 (LAC); (2015) 36 ILJ 2013 (LAC) (5 May 2015) at para 24

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