



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 187/20

In the matter between:

NESU MAROVEKE

Applicant

and

SIPHO TALANE N.O.

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

FERMEL (PTY) LIMITED

Third Respondent

Neutral citation: *Maroveke v Talane N.O. and Others* [2021] ZACC 20

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J and Tshiqi J

Judgment: Mhlantla J (unanimous)

Decided on: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 06 July 2021.

Summary: Appeal from Labour Appeal Court — unfair labour practice — quantification of back pay — insufficient information before Labour Court — material mistake

ORDER

On appeal from the Labour Appeal Court, Johannesburg hearing an appeal from the Labour Court, Johannesburg:

1. Leave to appeal is granted.
2. The appeal is upheld to the extent that paragraph 3 of the order of the Labour Court is set aside and substituted with the following:
“Fermel (Pty) Limited must pay Mr Nesu Maroveke an amount of R146 767.20 within 15 days from the date of this order.”
3. Save as set out in paragraph 2, the appeal is dismissed.
4. Each party must pay its own costs.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Khampepe J, Jafta J, Madlanga J, Majiedt J, Pillay AJ, Theron J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against an order of the Labour Appeal Court.¹ That Court refused leave to appeal against parts of the judgment and order of the Labour Court.² The matter turns on the issue of the appropriate back pay due to an employee whose dismissal had been declared unfair.

¹ *Maroveke v Talane N.O.*, unreported judgment of the Labour Appeal Court, Johannesburg, Case No JA12/20 (04 August 2020) (Labour Appeal Court II). The applicant’s appeal lies against both the Labour Appeal Court’s refusal to grant leave to appeal against the judgment of the Labour Court as well as against parts of the judgment and order of the Labour Court.

² *Fermel (Pty) Limited v Talane N.O.* [2019] ZALCJHB 83 (Labour Court II).

Background facts

[2] The applicant, Mr Nesu Maroveke, was employed as an artisan and mine technician by Fermel (Pty) Limited, the third respondent, a company that provides technical services to mining companies.³ He commenced his duties on 15 October 2007. On 25 June 2009, the applicant received a distress signal to attend to a breakdown in a mine. He was with a colleague when he drove a company vehicle underground through a tunnel and it sank in an area covered with water. The motor vehicle could not withstand the depth of water and the applicant was unable to drive it out. As a result, the engine failed.

[3] Later that day, the vehicle was towed to the workshop. One of the officials, Mr Engelbrecht, who had concluded that the applicant was responsible for the damage to the vehicle, told him that the cost of the repairs to the engine would be approximately R100 000. He produced a loan form for the amount and instructed the applicant to sign it. The applicant refused and demanded that the engine be inspected. He also sought a report setting out the extent of the damage. The applicant was informed that due to his refusal to sign the document, he would be charged for misconduct and subjected to a disciplinary hearing. On 6 July 2009, a disciplinary hearing was held where he was found guilty on the basis that “he could have foreseen that there could be potential damage to the vehicle after he drove it into the water”. An expert report regarding the damage to the vehicle was not presented during the hearing nor was a copy given to the applicant. He was also not afforded an opportunity to deal with the report during his evidence. However, the chairperson of the hearing considered it during the determination of an appropriate sanction. On 16 July 2009, the applicant was dismissed.

[4] Two months after his dismissal, the applicant obtained employment at Gold Fields Limited (Gold Fields).

³ The first and second respondents are Advocate Siphon Talane N.O. and the Commission of Conciliation, Mediation and Arbitration. They did not participate in these proceedings.

*Litigation history**CCMA I*

[5] Aggrieved by the dismissal, the applicant lodged an unfair dismissal dispute with the Commission for Conciliation, Mediation and Arbitration (CCMA).⁴ This was on the basis that his dismissal was unfair and that it contravened the provisions of section 185(a) of the Labour Relations Act.⁵ In the CCMA's view, the failure to make the specialist report on the damage to the vehicle available to the applicant was procedurally unfair and rendered the dismissal substantively unfair. The Commissioner found that the dismissal was procedurally and substantively unfair and ordered that the applicant be reinstated.

Labour Court I

[6] The third respondent approached the Labour Court to review the arbitration award.⁶ On 20 April 2012, the Labour Court held that the Commissioner's reasoning was fundamentally flawed.⁷ It relied on *Sidumo*,⁸ and held that no reasonable decision-maker could arrive at the same conclusion on the available evidence.⁹ It thus set aside the arbitration award and substituted it with an order that the dismissal was procedurally and substantively fair.¹⁰

⁴ The dispute was heard before Commissioner Mafa N.O. who is not a party to these proceedings.

⁵ 66 of 1995. Section 185 of the Labour Relations Act provides:

“Right not to be unfairly dismissed or subjected to unfair labour practice

Every employee has the right not to be –

- (a) unfairly dismissed; and
- (b) subjected to unfair labour practice.”

⁶ *Fermel (Pty) Limited v Mafa N.O.*, unreported judgment of the Labour Court, Johannesburg, Case No JR 3522/09 (20 April 2012) (Labour Court I).

⁷ *Id* at para 1.

⁸ *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC).

⁹ Labour Court I above n 6 at para 6.

¹⁰ *Id* at para 11.

Labour Appeal Court I

[7] The applicant appealed the decision of the Labour Court. On 1 July 2014, the Labour Appeal Court held that the record of the proceedings was in a “deplorable state”.¹¹ It held that the Labour Court ought not to have saddled itself with the task of evaluating the evidence, as not all the evidence that was before the CCMA was before it. Furthermore, there were material contradictions in the evidence of the witnesses. All these factors warranted a remittal to the CCMA. Therefore, the Labour Appeal Court set aside the order of the Labour Court and the arbitration award. It remitted the matter back to the CCMA to be heard afresh before a different commissioner.¹²

CCMA II

[8] On 14 October 2014, the Commissioner held that the applicant had, under the circumstances, acted like a reasonable driver and in keeping with company policy. Therefore, the requisite negligence for the charge of misconduct had not been established.¹³ The Commissioner concluded that the employer had failed to prove the misconduct, and, accordingly, the dismissal was substantively unfair.¹⁴ The Commissioner issued an award of reinstatement retrospective to 1 November 2013 with back pay equivalent to 12 months’ remuneration.¹⁵

[9] Shortly thereafter, the applicant applied for a variation of the award. This was on the basis that the back pay due was calculated on the same scale from the date of employment to the date of the arbitration award. This was acceded to by the

¹¹ *Maroveke v Fermel (Pty) Limited*, unreported judgment of the Labour Appeal Court, Johannesburg, Case No JA7/2013 (1 July 2014) (Labour Appeal Court I) at para 21.

¹² *Id* at para 23.

¹³ *Maroveke v Fermel (Pty) Limited*, arbitration award of the CCMA, Case No MP 4969-09 (14 October 2014) (CCMA II) at para 35.

¹⁴ *Id*.

¹⁵ CCMA II above n 13 at paras 39-40.

Commissioner. Thus, the back pay due to the applicant increased from R135 536.28 to R469 256.88.

Labour Court II

[10] The third respondent launched an application to review and set aside the arbitration award.¹⁶ On 4 April 2019, the Labour Court handed down its judgment in which it agreed with the Commissioner's findings that the dismissal was substantially unfair and that an order of reinstatement was appropriate.

[11] In determining the extent of retrospectivity, the Labour Court held that the Commissioner did not make a decision that a reasonable commissioner would make as it was known that the applicant was unemployed for only two months after his dismissal and was thereafter gainfully employed. Relying on *Toyota SA Motors*,¹⁷ the Labour Court held that the award of 12 months' back pay was unreasonable and not in keeping with the established principle that reinstatement ought to neither impoverish nor enrich the employee but restore them to the position they would have been in but for the dismissal.¹⁸ It held that the Commissioner should have considered the fact that the applicant was employed and fashion the reinstatement award having regard to the period that the employee was able to tender his services. Furthermore, retrospective reinstatement should have been limited to two months, which was the period when the applicant was unemployed. It thus set aside the CCMA award and replaced it with an order reinstating the applicant with effect from 14 October 2014, being the date of the arbitration award, with back pay equivalent to two months' wages at R11 294.69 per month.

¹⁶ *Fermel v Talane N.O.*, unreported judgment of the Labour Court, Johannesburg, Case No JR 2545/14 (4 April 2019) (Labour Court II) at para 2.

¹⁷ *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* [2015] ZACC 40; (2016) 37 ILJ 313 (CC); 2016 (3) BCLR 374 (CC).

¹⁸ Labour Court II above n 16 at para 26.

Labour Appeal Court II

[12] The applicant sought leave to appeal from the Labour Appeal Court. On 4 August 2020, the Labour Appeal Court dismissed his application for leave to appeal against the order of the Labour Court.¹⁹

In this Court

[13] The applicant lodged an application for leave to appeal against the portion of the Labour Court's order where it held that the Commissioner's award of 12 months' back pay was unreasonable.

[14] Upon consideration of the matter, a discrepancy was discovered in the arbitration award, in that it recorded that the applicant earned R1 500 per month at Gold Fields. This appeared to be substantially lower than the applicant's salary when he was employed by the third respondent. This discrepancy caused this Court to issue directions calling upon the parties to make written submissions on whether the Labour Court had all the facts relating to the actual earnings of the applicant. In particular, the applicant's earnings before his dismissal and what he earned at the new place of employment after his dismissal.

[15] The applicant and the third respondent filed written submissions and the matter was determined without oral argument.

Applicant's submissions

[16] The applicant submits that this matter implicates a constitutional right, namely the right to fair labour practices.²⁰ The applicant further submits that this matter raises an arguable point of law of general public importance which ought to be considered by this Court. This is whether the subsequent securing of employment by a dismissed

¹⁹ Labour Appeal Court II above n 1.

²⁰ Section 23 of the Constitution.

employee precludes him from receiving full back pay from the time of his dismissal to the date of a reinstatement award in his favour.

[17] The applicant submits that the Labour Court did not have all the relevant facts before it to determine an appropriate remedy. For instance, there was no evidence about his income at his new post and the dismissal as a supervening impossibility in the way of tendering his services was not considered. He also submits that monies earned from other sources in the calculation of the back pay due to the dismissed employee should not be deducted.

[18] In response to this Court's directions, the applicant submits that the Labour Court had incorrect information regarding his earnings. The error was caused by the Commissioner during the CCMA proceedings, where the applicant had testified that his gross salary was R26 750 but the Commissioner incorrectly had regard to his net salary, which was R11 294.69. The latter figure was varied in a subsequent ruling by the CCMA. For some unexplained reason, however, the Labour Court did not have this information and used the original (and incorrect) figure of R11 294.69 in its judgment. Consequently, the Labour Court did not have the correct information on which to determine the appropriate back pay. In addition, the applicant earned R15 000 at Gold Fields and this was substantially less than what he earned at his previous employer.

Third respondent's submissions

[19] The third respondent submits that there are no prospects of success in this matter, and, therefore, it would not be in the interests of justice for this Court to grant leave to appeal. It further submits that it has always intended to comply with the reinstatement order made by the Labour Court but could not do so without the applicant being in possession of a valid work permit. It tendered payment of the two months' salary to which the applicant was entitled, however, due to the appeal processes being underway the applicant did not accept same.

[20] In response to our directions, the third respondent submits that the Labour Court had the record and transcript of the review proceedings when it determined the back pay due to the applicant. It also submits that: (a) the gross salary of the applicant on the date of termination of his services was R24 730.64 per month; (b) the applicant was, after his dismissal, without employment for two months; (c) in September 2019, he secured employment at Gold Fields in a similar position to that which he had held at its business; (d) his salary at Gold Fields was R15 000 per month, although, it is not clear on the evidence whether this is the gross or net pay; in this regard, the relevant parts of the transcript of the evidence of Mr Kobus Kotze who testified that the applicant was paid R15 000 per month, was attached to the written submissions; and (e) the third respondent reiterated that it had tendered payment of the two months' back pay on the correct remuneration level of the applicant.

Issues

[21] The following issues must be determined:

- (a) Does this matter engage this Court's jurisdiction?
- (b) Is it in the interests of justice to grant leave to appeal?
- (c) If it is, what is the appropriate back pay due to the applicant?

Jurisdiction

[22] This application involves a constitutional matter as it implicates the right to fair labour practices as enshrined in the Constitution. Therefore, this Court's jurisdiction is engaged.

Leave to appeal

[23] The next question is whether it is in the interests of justice that leave to appeal be granted. In *NEHAWU*, it was held that this determination requires the consideration of several factors, one of which is the matter's prospects of success.²¹ In this regard,

²¹ *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 25.

the main consideration is whether there are reasonable prospects that this Court will materially reverse or alter the decision of the Labour Court.

[24] Further, an appeal court is enjoined to interfere with a discretionary decision of the court whose order is appealed against, where it reached a decision which in the result could not have been reasonably made by a court that had properly directed itself towards all the relevant facts and principles.²² In this matter, the applicant does not enjoy reasonable prospects of success in respect of the claim relating to his retrospective reinstatement for the reasons set out below.

Merits

[25] I am satisfied that the Labour Court was correct when it held that the award of 12 months' back pay was unreasonable and not in keeping with the established principle that reinstatement ought to neither impoverish nor enrich the employee beyond the extent to which he would have been but for the dismissal.²³ Furthermore, the Commissioner should have considered the fact that the applicant was employed and formulated the reinstatement award by having regard to the period that the employee was without employment.

[26] The Labour Court did not misdirect itself in the exercise of its discretion to reduce the period of retrospective reinstatement to accord with the time spent without employment. It must be borne in mind that reinstatement is intended to restore the employee's position to that which she would be in but for the dismissal. In this instance, the applicant could not be restored to that position because he obtained employment shortly after his dismissal. He was unemployed for two months; therefore, the reinstatement order should have been for that period only. The Labour Court was thus

²² *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 CC; 2000 (1) BCLR 39 at para 11.

²³ *Mediterranean Textile Mills (Pty) Ltd v SA Clothing & Textile Workers Union* [2011] ZALAC 23; (2012) 33 ILJ 160 (LAC) at paras 26-7. See also *Grogan Dismissal 2* ed (Juta & Co (Pty) Limited, Cape Town 2014) at 615.

correct in reducing the period for which reinstatement was due. It follows that there are no prospects of success on this issue.

Remedy

[27] However, the applicant's claim for appropriate back pay stands on a different footing and there are reasonable prospects that this Court will materially alter the decision of the Labour Court. The compensation to the wronged party is intended to "offset" the financial loss suffered as a result of a wrongful act. What must be determined is the extent of the loss, while considering the nature of the unfair dismissal. Underlying this is the intent to restore the applicant to the position he would have been in but for the wrongful act by the employer. That restoration must not assume a punitive character. This view is properly enunciated in *Dauids* as follows:²⁴

"The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."²⁵

[28] In restoring the applicant to his previous position, this Court ought to consider both the amount he would have earned but for his dismissal and what he earned while working at Gold Fields. As far as this is concerned, the Labour Court did not set out the facts it considered about the earnings of the applicant. It merely issued an order in the following terms:

"The [applicant] is to be reinstated with effect from the date of the Arbitration Award, being 14 October 2014. The [applicant] is entitled to be reinstated from 14 August 2014. For the avoidance of doubt, the employer shall pay the employee

²⁴ *Dauids v Boland Rugby (Pty) Ltd* [2011] ZALCCT 69 at para 14. There the Labour Court agreed with the enunciation of the principle on reinstatement as set out in *Le Monde Luggage CC t/a Pakwells Petje v Dunn N.O.* [2007] ZALAC 9; (2007) 28 ILJ 2238 (LAC) at para 30.

²⁵ *Dauids id.*

back pay equivalent to 2 months' wages (R11 294.69 x 2 = R22 589.38) on or before 30 April 2019."²⁶

[29] In this Court, the parties have clarified the applicant's earnings in their written submissions. The third respondent has admitted that the Labour Court had incorrect figures and that the applicant's actual salary was R24 730.60 per month. It has also tendered payment of the two months' back pay at R24 730.60 per month. We also know now that the applicant earned R15 000 per month at Gold Fields. It is clear that the applicant mitigated his loss by obtaining employment within a short period after his dismissal.

[30] The Labour Court misdirected itself in two respects. Firstly, in its quantification of the actual back pay. The Labour Court did not have the ruling of the CCMA where its order was varied. Therefore, it relied on incorrect facts. Secondly, it did not have the details of the applicant's salary at Gold Fields. Thus, the Labour Court arrived at a decision that could not have been reasonably made by a court that had directed itself to all relevant facts and principles. Accordingly, this Court is enjoined to intervene.

[31] A determination whether an employee has been put in a better position than she would have been in had she remained employed requires an enquiry into what that employee earned at the new place of employment. In this matter, that information was not before the Labour Court and it did not conduct the enquiry. The applicant's actual salary was R24 730.60 per month. The Labour Court relied on incorrect figures when it made its determination for the two months' back pay. This mistake must be rectified.

[32] The Labour Court also committed a material error in that it did not consider the difference in earnings. In this regard, the applicant's salary at Gold Fields was substantially less than his previous salary. Whilst employed by the third respondent, the applicant earned R24 730.60 per month. At Gold Fields he earned R15 000 per

²⁶ Labour Court II above n 16 at para 43.

month. The difference between the salaries is R9730.60 per month. This would mean that the total difference in earnings for the period of 10 months is R97 306. In my view, the applicant's diligence and good fortune in finding employment should not prejudice him from receiving what is due to him. Had the Labour Court conducted this exercise, it would have concluded that the applicant earned substantially less at Gold Fields. The difference between the two salaries is a substantial amount that cannot be ignored.

[33] The Labour Court should have taken the difference into account when determining the back pay. Therefore, the applicant ought to be compensated for this difference in the remaining 10 months for which back pay is permissible. In my view, this would not have a punitive effect, but instead, serve to restore the applicant to the position he would have been in but for the dismissal.

[34] In the result, the applicant is entitled to payment of R49 461.20, which is two months' back pay, and R97 306, being the total difference between what he earned whilst in the third respondent's employ and his earnings at Gold Fields for the period of 10 months. This means that paragraph 3 of the order of the Labour Court must be set aside and replaced with an order that the third respondent should pay the applicant an amount of R146 767.20.

Order

[35] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld to the extent that paragraph 3 of the order of the Labour Court is set aside and substituted with the following:
"Fermel (Pty) Limited must pay Mr Nesu Maroveke an amount of R146 767.20 within 15 days from the date of this order."
3. Save as set out in paragraph 2, the appeal is dismissed.
4. Each party must pay its own costs.

For the Applicant:

Ndumiso Voyi Incorporated

For the Third Respondent:

Weavind and Weavind Incorporated