



CONSTITUTIONAL COURT OF SOUTH AFRICA

Maroveke v Talane N.O. and Others

CCT 187/20

Date of judgment: 06 July 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 06 July 2021 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Labour Appeal Court. That Court refused an application for leave to appeal against parts of the judgment and order of the Labour Court. The applicant in this matter is Mr Nesu Maroveke. He was employed by the third respondent, Fermel (Pty) Limited as a mine technician. The first respondent is Mr Sipho Talane N.O. cited herein in his official capacity as the Commissioner in the proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA). The second respondent is the CCMA. The first and second respondents did not participate in these proceedings.

On 25 June 2009, the applicant received a distress signal to attend to a breakdown at a mine. He drove in a company vehicle to the mine. While driving underground, the vehicle became stuck in an area covered with water. It could not withstand the depth and the applicant could not drive it out. The engine then failed. That same day, the vehicle was towed to the workshop. One of the officials, Mr Engelbrecht, concluded that the applicant was responsible for the damage and estimated the repair cost to be R100 000. The applicant was instructed to sign a loan form for the amount. The applicant refused to do so and requested that the engine be inspected first. Because of his refusal, he was charged for misconduct and a disciplinary enquiry was held. During the hearing, an expert report was considered in the determination of an appropriate sanction. However, this report was not presented or furnished to the applicant for his consideration. On 16 July 2009, the applicant was found guilty of misconduct and dismissed. Two months later, the applicant found new employment at Gold Fields Limited.

Aggrieved by the dismissal, the applicant lodged an unfair dismissal dispute with the CCMA. The CCMA held that the failure to provide the applicant with the expert report on the vehicle damage was a procedural irregularity and rendered the dismissal procedurally and substantively

unfair. The CCMA ordered that the applicant be reinstated. The third respondent approached the Labour Court for the review of the CCMA award. The Labour Court held that the Commissioner had, on the available evidence, made a decision that no reasonable decision-maker could arrive at. Accordingly, it set aside the arbitration award and substituted it with an order that the dismissal was fair. The applicant appealed the decision. The Labour Appeal Court found that the record of the proceedings was in a deplorable state and the Labour Court ought not to have saddled itself with the task of evaluating the evidence as not all the relevant evidence was before it. In addition, there were material contradictions in the evidence of the witnesses. The Labour Appeal Court set aside the order of the Labour Court and the arbitration award. It remitted the matter to the CCMA to be heard afresh before a different commissioner.

On remittal, the Commissioner held that the applicant had, under the circumstances, acted like a reasonable driver and in keeping with the third respondent's policy. As a result, negligence for the charge of misconduct had not been established and the dismissal was substantively unfair. The Commissioner issued an award of retrospective reinstatement with back pay equivalent to 12 months' remuneration. Shortly after, the applicant applied for a variation of the award on the basis that the back pay due was calculated without regard for his annual salary increment. The application was granted, thus increasing the back pay to R469 256.88.

Dissatisfied, the third respondent launched an application in the Labour Court for the review of the arbitration award. The Labour Court held that the Commissioner did not make a reasonable decision in that, after his dismissal, the applicant was unemployed for only two months, therefore, the award of 12 months' back pay was unreasonable. The award was not in line with the principle that reinstatement ought not to impoverish or enrich the employee but restore them to the position they would have been in but for the dismissal. The Court held that the award of reinstatement should have been limited to the period during which the applicant was unemployed. Thus, the Labour Court set aside the arbitration award and replaced it with an order reinstating the applicant with effect from the date of the arbitration award with back pay equivalent to two months' wages at R11 294.69 per month. Thereafter, the Labour Appeal Court dismissed an application for leave to appeal.

Before the Constitutional Court, the applicant sought leave to appeal against the order of the Labour Court. Upon consideration of the matter, a discrepancy was discovered in the arbitration award where it was recorded that the applicant earned R1 500 a month. As this was substantially lower than his income working for the third respondent, this Court issued directions calling on the parties to make written submissions on whether the Labour Court had all the facts relating to the applicant's earnings before and after his dismissal. The parties filed written submissions and the matter was determined without oral argument.

The applicant submitted that the matter implicated the right to fair labour practices and constituted an arguable point of law that ought to be considered by this Court. This is specifically regarding the question whether attaining employment after dismissal precludes an employee from receiving full back pay calculated from the date of dismissal until the date of the reinstatement award. The applicant further submitted that the Labour Court did not have evidence on his income at Gold Fields. In response to this Court's directions, the applicant submitted that the Labour Court had incorrect information before it regarding his earnings. The

error was caused by the Commissioner mistakenly considering the applicant's net salary of R11 294.69 instead of his gross salary in the amount of R26 750. This was compounded by the fact that the Labour Court was not furnished with the variation ruling of the CCMA. Lastly, the applicant submitted that he earned considerably less at Gold Fields.

The third respondent submitted that the applicant had no prospects of success and that, it would not be in the interests of justice for this Court to grant leave to appeal. The third respondent also submitted that the Labour Court had the record and transcript of the review proceedings while determining the back pay due to the applicant. It submitted that the applicant earned R24 730.64 while in its employ, and agreed that the applicant was without employment for two months. Concerning the applicant's earnings at Gold Fields, it accepted that the applicant earned R15 000 per month and not R1500 as was recorded in the CCMA. Lastly, the third respondent submitted that it had tendered payment of the two months' back pay at the correct remuneration level.

In a unanimous judgment penned by Mhlantla J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Pillay AJ, Theron J and Tshiqi J concurring) the Constitutional Court held that the matter engaged its jurisdiction as it implicated the constitutional right to fair labour practices. On the merits, this Court held that the applicant had no prospects of success in respect of the claim for retrospective reinstatement. It reasoned that the CCMA award of 12 months' back pay was unreasonable and departed from the established principle that reinstatement should not impoverish or enrich the employee beyond the extent to which he or she would have been but for the dismissal. Further, the CCMA did not consider the period during which the applicant was unemployed in formulating the reinstatement award. It held that the Labour Court was correct in reducing the period of reinstatement to two months, as the applicant had secured employment two months after his dismissal. Thus, reinstatement ought to be restricted to two months only.

This Court held that there were prospects of success in respect of the applicant's claim for the back pay. Further, that compensation to an unfairly dismissed employee ought to offset the financial loss she suffered to restore her to the position she would have been in but for the unfair dismissal. To restore the applicant to his previous position, this Court considered the amount he would have earned but for the dismissal and the comparatively lower amount he earned at Gold Fields. It held that the Labour Court did not consider these factors and had simply ordered reinstatement without the correct figures, or the CCMA variation ruling before it, and had thus relied on incorrect facts. The parties' submissions clarified the correct amounts relating to the applicant's earnings. Therefore, this Court held that the Labour Court misdirected itself on the quantification of back pay. Accordingly, it did not arrive at a conclusion that a court that had addressed itself to all the relevant facts and principles could arrive at.

Regarding remedy, this Court held that the applicant was entitled to payment of R146 767.20. This amount is comprised of R49 461.20 which is two months' back pay, and R97 306, being the difference between what the applicant earned whilst in the third respondent's employ and his earnings at Gold Fields for the period of 10 months. In the result, this Court issued an order where leave to appeal was granted and the appeal upheld to the extent that the order of the Labour Court was substituted with an order that the third respondent must pay the applicant the sum of R146 767.20. Each party was ordered to pay its own costs.