THE LABOUR COURT OF SOUTH AFRICA
AT JOHANNESBURG

Of interest to other judges/Not reportable
Case no: JR 850/2019

In the matter between:

SAMWU obo MOLOISANE AND OTHERS	**Applicant**
and	
CITY OF TSHWANE LOCAL MUNICIPALITY	**First Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Second Respondent**
TIMOTHY BOYCE, *N.O.*	**Third Respondent**

Heard: 30 August 2024
Delivered: 10 June 2025

Summary: (Rule 11 application to dismiss review application – Application to reinstate review application – Review application – Arbitrator deciding to award compensation instead of reinstatement – Decision not reviewable – arbitrator's finding not untenable that reinstatement was not reasonably practicable in the context of the lapsed fixed-term contract entered into under an EPWP project and subsequent unfair dismissal of applicants who had become indefinitely employed, owing to employees' refusal failure to conclude new fixed term contracts after their employment became indefinite – absence of permanent appointments available under pilot project an obstacle to reinstatement)

JUDGMENT

LAGRANGE, J

Nature of the application

[1] This is an opposed application dismiss a review application which is deemed withdrawn, a counter-application to reinstate it and, if the review application is revived, an application to condone the initial late filing of the review and the review application itself.

[2] On 9 September 2021, Prinsloo J struck all the matters off the roll, because the review application had been launched late by the applicant ('the union' or 'SAMWU') without an application for condonation. Accordingly, neither the review application nor applications to dismiss it and reinstate it on account of the review being deemed withdrawn were dealt with.

[3] The various applications were re-enrolled on 31 July 2024, as the union had subsequently filed its condonation application for the late filing of the review. By agreement, an order was made condoning the late filing of the review application and the matter was postponed until 30 August 2024, with the third respondent ('the municipality') paying the union's wasted costs. The hearing on 30 August was conducted virtually on Microsoft Teams.

[4] The award which the union seeks to set aside is one in which the arbitrator found that the dismissal of 151 volunteer community health workers working at a pilot NHI site was substantively and procedurally unfair because the employer did not prove the reason for the dismissals was a fair one and did not follow a fair procedure. The individual applicant employees were each awarded R 10,000 as compensation. The thrust of the applicants' argument is that the arbitrator was compelled to have

reinstated the employees in their former positions but as permanent employees.

Reinstatement application

[5] After the municipality applied to dismiss the review application, SAMWU has applied to reinstate the review application, coupled with an application to condone the late filing of the record. The review application was already deemed withdrawn in terms of clause 11.2.2 read with clause 11.2.3 of the Labour Court practice manual, on account of being filed more than 60 days when the municipality launched its Rule 11 application.

[6] For all intents and purposes the municipality's earlier application to dismiss the review application and the application to reinstate the application traverse the same issues. Arguably, an application to dismiss a review application which is deemed withdrawn might appear to be a redundant exercise, though the respondent remains potentially at risk of the applicant attempting to bring the application back to life at some indeterminate point in the future. In any event, as the party at fault in allowing the review to become dormant is the party responsible for justifying why it should be resurrected it is pragmatic to deal with both applications by considering if the application to reinstate the review application should succeed.

[7] The bargaining council lodged a record with the registrar of the court on 20 May 2019 and SAMWU collected obtained a transcript before the end of the month. the 60-day period elapsed around 13 August 2019. On 17 July 2019, the union filed 19 pages of a transcript under cover of a Rule 7A(6) notice. Despite knowingly filing a woefully inadequate record, the applicants' attorneys filed a Rule 7A(8)(b) notice on 5 August that the applicants stood by the founding affidavit and called on the municipality to file its answering affidavit. According to the founding affidavit deposed to by a candidate attorney in the reinstatement application this was done because the 60-day time limit was looming. I note that the candidate attorney deposed to the affidavit on the basis that he was authorised to and that he was "*involved in this matter on behalf of the Applicants*", not

on the basis that he had personal knowledge of what he was deposing to. In truth his 'affidavit' does not contain sworn evidence. There is a confirmatory affidavit from Mr Moloto, which can only pertain to events from September 2020, but no confirmatory affidavit from an attorney at the firm. Mr Moloto is a shop steward, who represented the individual applicants in the arbitration hearing.

[8] It was claimed it had become apparent, around the time the Rule 7A(8)(b) notice was drafted, to the applicants' attorneys that the transcript received did not correspond with the evidence in the founding affidavit in the review application. However, no clarification was obtained from Mr Moloto before they decided to file the Rule 7A(8)(b) notice. It was only in September that he clarified that the transcript filed related to the initial proceedings which took place before another commissioner, Mr Koekemoer, who had issued an earlier jurisdictional ruling in the matter. The municipality points out that even before Mr Moloto came back into the picture the attorneys must have known that the transcript received did not correspond to the arbitration hearing, because it ought to have been obvious that it concerned an initial jurisdictional question determined by a different arbitrator.

[9] At no stage had the applicants requested an extension of time to file the record from the municipality, nor from the court, as they were entitled to under clauses 11.2.3 or 11.2.4 of the Practice Manual. No explanation is provided for not using this mechanism which was designed to deal with the problem of serving a record timeously.

[10] The municipality filed an answering affidavit on 20 August 2019 in which it raised a preliminary objection that the record was incomplete. At the same time, it pointed out that the union also needed to obtain condonation for the late filing of the review application. During August, the union advised the municipality that it was liaising with the bargaining council to obtain the correct transcript.

[11] On 27 September 2019, the council filed its application to dismiss the review application as the applicants had not filed a replying affidavit by 27 August 2019 addressing the municipality's *in limine* objection that no

proper record had yet been filed by 14 August 2019 and accordingly the review application was deemed withdrawn.

[12] The correct audio record was uplifted from the Registrar on 8 November 2019 and the transcript was available for collection on 4 March 2020, but allegedly Mr Moloto could only raise funds for payment of the transcript on 11 June and it was final delivered on 24 June 2020. Why it fell to him to raise money when SAMWU was acting on behalf of the applicants and how and when he eventually succeeded in obtaining funds, remains a complete mystery. The applicants complain that everything ground to a halt during the Covid-19 lockdown which took effect at the end of March until May 2020. No details are provided how this directly affected what needed to be done to advance the review. The filing of the correct transcript from the date the record was uplifted by the applicants was at least 130 days, so even if the 60-day period only commenced on 8 November 2019, the review would still have been deemed withdrawn on that basis.

[13] It is clear from the explanation provided that the process of filing the correct record timeously was poorly managed by the applicants' attorneys. It is very surprising in a case involving so many applicants that the only legal professional at the attorneys' firm person who purports to be able to explain what transpired was a candidate attorney who cannot even claim personal knowledge of all the events, nor even that he was employed by the firm at all relevant times. One would also have expected at least one of the attorneys at the firm to have been 'involved' and that they would have immediately sought an extension of time when it became apparent the transcript was not the correct one, rather than attempting to get around the 60-day limit by the clumsy expedient of filing a record that was clearly incorrect and compounding matters by prematurely filing a Rule 7A(8)(b) notice. It is distressing to note that no legal professional is identified as having been responsible for the application, or of having personal knowledge of what transpired. Conducting a review application in the way it was might be somewhat excusable in the case of a layperson ignorant of the rules and the Labour Court Practice Manual, but is not to be expected

of legal professionals. It is true there is a confirmatory affidavit by Mr Moloto, but he could only have had knowledge of his role in matters since he contacted the firm in September.

[14] Nevertheless, the chain of events can largely be gleaned from the rest of the documentary record and the facts confirmed by the municipality. What is absent is any explanation why there were no communications between the attorneys and the applicants between 20 May 2019 and some unspecified date in September that year when Mr Moloto made contact with the attorneys, a period of at least four months. The failure to apply for an extension of time once it became clear the transcript was the wrong one, is completely unexplained. In relation to the correct record, it is unclear why it took nearly two weeks to deliver it once it had been obtained. I accept that it was not the applicants' fault that the incorrect recording was provided by the bargaining council, but even when the correct audio record was provided, it took more than twice as long as it should have to file the transcript. Apart from the vaguely described lack of funds advanced as the reason why the transcript could not be collected once it was available, there was no explanation for the period from 8 November 2019 until 4 March 2020 when the transcript became available, bearing in mind that preparation of the 56-page transcript should not have taken long. As to the lack of fund, Mr Moloto did not take the court into his confidence as to how much was required or why it only became available in June 2020.

[15] It was only on 31 July 2020 that the applicants applied to reinstate the review application and applied for condonation for the late filing of the record. It is important to mention that only the transcript was filed. Documentation which was referred to during the argument at the arbitration hearing was not filed, though the content of some of the documentation can be gleaned from the undisputed oral submissions made.

[16] All factors considered, the periods of delay are significant and the explanation for material periods of delay are either absent completely or in part, and where an explanation is proffered, it is lacking in sufficient detail.

Despite these serious lapses and the careless way in which the review has been prosecuted, I believe the issues the award raises are important enough to outweigh these factors and warrant the review being considered. Accordingly, it will be reinstated.

The condonation application

[17] The award was handed down on 12 March 2019. On 15 March 2019, and was sent to SAMWU.

[18] Mr Moloto claimed he only received the emailed award on 20 March and could only convey it to the other applicants on 23 March.

[19] On the basis of the last-mentioned date the application should have been filed by 4 May 2019, but in relation to the date the award was received at SAMWU's office, the final date for filing was 26 April. The review application was launched by the union on 29 April 2019 when it was served on the municipality, but only filed with registrar on 2 May 2019, which is the date on which application is delivered in terms of the Labour Court Rules. Based on these dates the review application was a few days late.

[20] The union argued that the application was not late because the six-week period should only have commenced when the members, who were also parties to the dispute, were notified. Although SAMWU acts on behalf of the individual applicants in the review application, it was not a party in the arbitration proceedings. However, Mr Moloto, who did represent them in the arbitration, used SAMWU's address for the purposes of the arbitration. Accordingly, that address was used when the award was issued. Thus, the date of service on Mr Moloto, and that of the individual applicants, was 15 March 2019 when it was emailed to SAMWU. The fact he only saw it later and had to convey it to the individual applicants are factors which might be relevant to the explanation for the delay, not to the date when the six-week period commenced.

[21] Having initially objected to the lack of a condonation application, the municipalit withdrew its opposition to condonation being granted in the

interest of finalising the matter. Nevertheless, the court must still determine if condonation should be granted.

[22] In summary, the delay is slight and the explanation not unreasonable. Consequently, it is not necessary to delve into the prospects of success as well. Accordingly, the late filing of the review should be condoned.

[23] The merits of the review application can now be addressed.

The award

[24] The parties conducted the arbitration on the basis of a stated case, though there was not complete unanimity on every point, as evidenced by the transcript. Even so, none of those points of factual contention ultimately have a bearing on the merits of the award.

[25] The arbitrator noted that the applicants had been employed as volunteer community health workers in terms of a pilot site for the National Health Insurance ('NHI') scheme. They were each employed on two consecutive fixed term contracts on various dates between Jan 2014 and 30 April 2016. The contracts were renewable annually. They were not employed in terms of the municipality's normal recruitment and staffing policy and were not part of the staff establishment. They were paid R 2,500 per month at the time of termination.

[26] Employees whose last fixed term contracts had expired, continued working and received the same remuneration, but without written contracts until 31 December 2015. In January 2016 some of them received termination letters confirming their termination of their employment on 31 December 2015 as Ward Based Outreach Team Community Health Care Workers. None of the applicants were paid for January 2017. The arbitrator found the last fixed term contracts expired at the end of December 2015, 31 January 2016, 31 March 2016 and 30 April 2016 respectively.

[27] The disputed issues were whether they were dismissed and, if so, whether their employment ended with the expiry of the fixed term contracts or when they refused to sign new contracts.

[28] In April 2016, employees whose contracts expired in December 2015 and January 2016 were issued with fixed term contracts for the period 1 Feb 2016 to 31 Jan 2017, which they did not accept on the union's advice. It appears that all the applicants were asked to sign new fixed term contracts at some stage before or after the expiry date of their last contract, but none did and continued working after that date.

[29] In my view, the arbitrator rightly concluded that when they continued to work after refusing to sign the new fixed term contracts they were remained employees in terms of the definition of an employee in s 213 of the Labour Relations Act, 66 of 1995 (the LRA') but were no longer employed on limited duration contracts (LDC's), but were employed on an indefinite or permanent basis. Accordingly, their services could only be terminated by an act of dismissal on the part of the employer, and not by the effluxion of time.

[30] Even though it seems that some of the contracts were only due to expire at the end of January, February and March 2016, the parties agreed that all the applicants continued working after their contracts expired and they all refused to agree to the new fixed term contracts they were offered in April, which would have run from 1 January to 31 December 2016.

[31] The arbitrator concluded that since none of the applicants were paid after 31 December 2015, they were dismissed either then or during January 2016. There was no evidence of a fair reason being advanced for the dismissals and the dismissals were not preceded by any kind of procedure. Hence, he found the dismissals substantively and procedurally unfair.

[32] In determining an appropriate remedy, the arbitrator rejected the applicants' contention they should be reinstated on the basis that it was clearly inappropriate in the circumstances. He found that both the applicants and the municipality were acutely aware there was never an intention to employ them permanently, and it was simply a result of the municipality 'slipping up' by allowing them to continue working after the expiry of their respective fixed term contracts, which occurred on various dates during 2015.

[33] He decided that the only appropriate relief he could grant them was just and equitable compensation. He decided on a sum of compensation of R 10,000 each, considering the circumstances of their dismissal, their limited lengths of service and the fact that the parties were in agreement that their employment would be limited to specific periods. The amount was equivalent to four months' wages.

Grounds of review

[34] The applicants wish to review and set aside the award of compensatory relief and replace it with an order of reinstatement.

[35] The applicants' central concern with the award is the arbitrator's failure to order their reinstatement in the positions they occupied under the NHI pilot project, but as permanent employees. They contend no reasonable arbitrator could have found that their reinstatement in that capacity was inappropriate merely on the basis that the municipality had blundered administratively in allowing the applicants to continue to work, without them signing new fixed terms contracts.

[36] They argue, as a matter of law, that the fact that it was never the municipality's intention to employ them permanently cannot be a basis for refusing reinstatement.

[37] The applicants submit the arbitrator committed a mistake of law in failing to comply with an obligation to reinstate them under section 193(2) of the LRA because there was no basis on any of the grounds of exception in that section for deviating from the prescribed remedy of reinstatement. Moreover, the arbitrator's failure to have regard to the provisions of s 193(2) was unreasonable.

Evaluation

[38] The crux of the review concerns whether the arbitrator's award of compensation was both competent and not unreasonable relief, based on the facts of the dispute. In the case of a substantively unfair dismissal, the decision to award compensation can only be competent if it was feasible

for an arbitrator to conclude, as a matter of fact, that one of circumstances envisaged in sub-sections 193(2)(a),(b) or (c) applied[1].

[39] I agree that the arbitrator failed to articulate which, if any, of the exceptions in s 193(2) he relied on to reject reinstatement as a remedy. He ought to have expressly articulated this, even though it would seem he might have had s 193(2)(c) in mind. His train of reasoning appears to have been that, since the terms on which the applicants had been engaged had always been on a fixed term basis, they could not be reinstated on a permanent basis. The applicants argue that because he correctly accepted that they were permanently employed at the time of their dismissal, there was no obstacle to him reinstating them in that capacity.

[40] Could no reasonable arbitrator have disagreed with this argument and reached the same conclusion as the arbitrator? The only potential basis on which reinstatement could have been refused was if s193(2)(c) applied, namely if it was not reasonably practicable to do so. In *Equity Aviation Services (Pty) Ltd v CCMA*, the Labour Appeal Court held that it was not sufficient to refuse reinstatement on this ground merely because it would

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[1] ***193 Remedies for unfair dismissal and unfair labour practice***

(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.

(2) 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 reasonably 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.

be "*inconvenient, troublesome or uncomfortable*" [2]. To be reasonably practicable reinstatement must be reasonably feasible[3].

[41] What the applicants sought was to be re-employed as volunteer community health workers on the NHI pilot project, but as permanent employees. The NHI pilot project was part of the Extended Public Works Programme, a broad and multifaceted development scheme of government first initiated in 2003.

[42] In his submissions in argument at the arbitration hearing, the municipality's representative referred to the events which led to the impasse and the eventual termination of the applicants' employment. He explained that volunteer community health workers under the auspices of the NHI pilot project were employed on fixed term contracts. The applicants refused to sign replacement fixed term contracts after their previous ones had lapsed, because they were now working on an indefinite basis. He had argued that they could only have been employed on a permanent basis if they had a reasonable expectation at the end of their last fixed term contracts that they would be employed permanently. Their employment as volunteer community health workers was linked to the NHI pilot project which had a fixed life span of four years and employment under the project required them to enter fixed term contracts. It was not disputed that if the applicants had not refused to sign the new fixed term contracts, which were given to them belatedly, they would have been employed on another twelve-month contract.

[43] The municipality argued that it could not have been possible for the arbitrator to reinstate the applicants on a permanent basis in jobs that were fixed term appointments in terms of the pilot project EPWP scheme. The applicants contended that all of this was irrelevant, given that they had become permanent employees.

[44] However, it is difficult to see how the applicants could be reinstated *permanently* in the position of volunteer community health workers

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[2] (201d1) 32 ILJ 590 (LC), [2010] JOL 26456 (LC) at par 36

[3] Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers obo Masha and others (2016) 37 *ILJ* 2313 (LAC) at paragraph 11.

attached to the NHI pilot project if those posts were only available as fixed term appointments. The only way the applicants could be 'reinstated' on a permanent basis would necessitate altering a significant feature of those jobs by converting them into permanent posts. It bears mentioning that the posts had been offered to the applicants on the normal fixed term basis, but they declined to accept them even when it became clear the employer was not prepared to continue to employ them on an indefinite basis, which was incompatible with the nature of the positions under the pilot project.

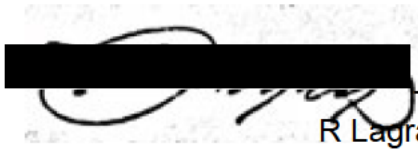
Conclusion

[45] In light of the discussion above, in my view, it would not be untenable for an arbitrator to conclude that to reinstate the applicants permanently in volunteer community health worker jobs would not be reasonably practicable and that compensation as an alternative remedy was therefore warranted. Accordingly, it cannot be said no reasonable arbitrator could have awarded the same relief as the commissioner did in this case.

[46] On the question of costs, I am not persuaded this is a case in which the normal principle of not making a cost award should be departed from.

Order

1. The review application is reinstated.
2. The Applicants' late filing of the review application is condoned.
3. The review application is dismissed.
4. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa.

Representatives:

For the Applicant:	Z Feni instructed by Qhali Attorneys
For the Third Respondent:	W Bekker instructed by Rambevha Morobane Attorneys