

HELD AT MASERU

In the matter between:

NIEN HSING INTERNATIONAL (PTY) LTD

APPLICANT

and

MORERO MOHLAHATSA
DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

DATE: 25/11/13

Review of an arbitral award - Reinstatement versus compensation - Employer contending that the Arbitrator failed to consider the practicality of reinstatement as he is enjoined by Section 73(1) of the Labour Code 1992 (as amended) before he could make an order of reinstatement - The employer deemed compensation to have been an appropriate remedy because there was a serious breakdown of relations between the parties - Matter remitted to the DDPR for hearing of evidence on the practicality of reinstatement as required by Section 73 (1).

1. The applicant is before this Court to seek the review, correction and setting aside of the award of the Directorate of Dispute Prevention and Resolution (DDPR) in A0227/11. In terms of this award 1st respondent's dismissal was found to have been substantively unfair and reinstatement was ordered. The 1st respondent had only challenged the substantive fairness of his award and had indicated that he had no qualms about the procedure. According to the applicant, the learned Arbitrator made an order of reinstatement without applying his mind to it as required by *Section 73(1) of the Labour Code Order, 1992 (as amended)*.

2. Applicant's Counsel contended that besides failing to consider the said Section, it was erroneous him to have ordered reinstatement in a case where it was clear that the employment relationship had irretrievably broken down. The applicant has approached this Court to have this order of reinstatement quashed. He feels an appropriate relief in the circumstances of the case is that of compensation.

BACKGROUND TO THE DISPUTE

3. The 1st respondent had been charged with negligence following the disappearance of jacks from two trucks belonging to the applicant with the following registration numbers - A8923 and M2003 respectively. He was found guilty over the disappearance of the jack belonging to M2003 and acquitted on the other charge. It was alleged that the 1st respondent had been the last one to drive M2003 on Friday, 14th January, 2011. It was testified on behalf of the applicant that no one had driven M2003 besides the 1st respondent after its Durban trip. The other two drivers, Ts`eliso Mohale and Motlatsi Mothobi testified that when they parked the vehicle upon arrival from Durban on the evening of Thursday, 13th January, 2011, the jack was still there.

4. The 1st respondent had acceded to having left the truck unlocked with the key still left on the ignition. He averred that this was a normal practice at applicant's company as there was security around. It was also established that the applicant fell ill on the particular day, and the learned Arbitrator found that he could not have been in a position to carry a truck jack. It was on the basis of these considerations that the learned Arbitrator concluded that on a balance of probabilities, the loss of the jack could not squarely be blamed on the 1st respondent. He issued an order of reinstatement, and it is this order that the applicant is before this Court to challenge. Applicant's Counsel submitted that the learned Arbitrator ought to have ordered compensation instead.

REINSTATEMENT

5. Applicant's Counsel argued that an order of reinstatement was not justified in that the trust relationship had been broken down between the parties. He argued that reinstatement is not automatic upon a finding of unfair dismissal as it is conditional upon other factors such as its practicality. It is applicant's Counsel's contention that reinstatement is not practicable in the circumstances of this case.

6. In motivating his case against the order of reinstatement applicant's Counsel cited the decision of this Court in ***Seotlong Financial Services v `Makhomari Morokole and the Directorate of Dispute Prevention & Resolution LC/REV/32/09*** (reported in SAFLII). This was a case in which this Court had decided that the learned Arbitrator had erred in ordering reinstatement where he had found the dismissal to have been substantively fair but only detected some procedural impropriety; Secondly, that the employment relationship between the parties had been impaired and lastly; that Seotlong Financial Services was a

rather small undertaking in which the ties are closer between the employer and the employee. The applicant was a money lender.

7. Applicant's Counsel went further to implore the Court to be mindful of the fact that both parties were not legally represented at the DDPR and as laypersons, they did not know that they had to traverse the issue of the practicability of reinstatement as required by Section 73(1) because it had been prayed for. Indeed, the applicant had been represented at the DDPR by Mr Ntlhabo, its Human Resources Manager whilst the 1st respondent had been represented by Mr Mokhele, his trade union representative.

8. 1st respondent's Counsel's reaction to this application was that it was misconceived as no evidence was led before the DDPR to show that reinstatement was impractical. In opposing the application, he argued that the applicant was quite aware that the 1st respondent had sought reinstatement. According to him, the onus was on the employer to prove that reinstatement was impracticable. He submitted that it was incumbent upon them to have advanced evidence before the DDPR to motivate their claim, and they failed to do so. He prayed that in the circumstances, the review application be dismissed with costs at a higher scale.

9. Reinstatement is an order of specific performance. Earlier, Courts were reluctant to grant orders of specific performance in employment contracts because it was felt it in a way forces a person to work with another against their will. Courts have moved away from this approach. Promotion of security of employment seems to be the norm. Thus, in keeping with the modern trend, as soon as a dismissal is found to be unjustified, the Labour Court or the DDPR has to first and foremost consider granting an order of reinstatement. It is a primary remedy for unfair dismissals. Reinstatement guarantees job security in that it allows an employee to revert to his or her employment, and to retain the rights he or she has acquired during his or her years of service. Security of employment is therefore a core value of the Labour Code. The importance of retaining one's job cannot be overemphasised.

10. The *Labour Code Order, 1992 (as amended)* provides in *Section 73(1)* that:-

If the Labour Court or the Arbitrator holds the dismissal to be unfair, it shall (emphasis added), if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been

no dismissal. The Court or the Arbitrator shall (emphasis added) not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.

The Section is couched in peremptory terms. According to Section 14 of the Interpretation Act, 1977, the word “*shall*” in the Section is imperative in meaning.

11. Although reinstatement is a prime remedy, its grant is conditional upon an assessment of whether reinstatement is practical regard being had to the circumstances of each case. The provision on reinstatement is therefore flexible. Hence, the Section further provides that “[t]he Court or the Arbitrator shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.” Before an order of reinstatement can be made, the Arbitrator has to apply his/her mind on whether reinstatement is practical to the case before him or her. It is a question of evidence. The Labour Appeal Court in *Pascalis Molapi v Metro Group Ltd & 3 Others LAC/CIV/R/09/03 para. 26 p. 12* interpreted the words “in light of the circumstances” as used in the Section to confer a judicial discretion which of course must be exercised judicially. The Court went on to say that:

The proper approach in cases of unfair dismissal is that, it is incumbent on the Court when deciding what remedy is appropriate to consider whether in light of proved circumstances (underlining mine) there is reason to refuse reinstatement

12. The words ‘*proved circumstances*’ from the above quotation underscores the legal requirement that the Arbitrator hears both sides on the practicality of reinstatement before making an order. As pointed out by applicant’s Counsel this issue was never traversed before the DDPR. In view of this Section, the learned Arbitrator is ordered to exercise his discretion in terms of the Section in DDPR for it to hear evidence on the practicality of reinstatement as required by law.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 25th DAY OF NOVEMBER, 2013.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT (a.i)

L. MATELA
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

FOR THE APPLICANT: ADV., T. KAO

FOR THE 1ST RESPONDENT: ADV., M.S. RASEKOAI