IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA77/19

IN THE MATTER BETWEEN:

REAL TIME INVESTMENTS 158 T/A CIVIL WORKS **Appellant**

and

COMMISSION FOR CONCILIATION, MEDIATION

& ARBITRATION **First Respondent**

MOHAMED JASSAT N.O. **Second Respondent**

SAMUEL RANTSIENG **Third Respondent**

Heard: **1 March 2022**

Delivered: **17 March 2022**

Coram: Coppin JA, Tokota *et* Phatudi AJJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the entire order of the Labour Court (Moshoana J) in terms of which it reviewed and set aside an award of the second respondent ("the arbitrator) to the effect that the dismissal of third respondent ("Mr Rantsieng") by the appellant was procedurally and substantively fair, and

substituting it with an order that the dismissal was substantively unfair and directing the appellant to reinstate Mr Rantsieng retrospectively to the date of his dismissal. Leave to appeal to this court was granted on petition.

[2] The issue that arises for decision in this appeal is essentially whether a court can grant an order of reinstatement in the absence of and without having notified the employer in circumstances where it was not sought by the employee in its application for review or initially.

[3] None of the respondents, including Mr Rantsieng, filed any papers or heads of argument in opposition to this appeal. It was thus assumed by the appellant's counsel and the court that the appeal was not opposed, until the morning of the hearing of this appeal when Mr Rantsieng appeared in person.

[4] Mr Rantsieng indicated that even though he did not file any documents, including any opposition or answering affidavit to the appellant's application for condonation/reinstatement of the appeal or any heads of argument, he was there to speak for himself and that he was well capable of doing so. He refused any offer of assistance from the court with legal representation and indicated that he did not seek any postponement or any further opportunity to file any such documents. He alleged that the appellant was not being truthful to the court, but was not prepared to commit anything to paper. Needless to say that in those untenable circumstances, Mr Rantsieng was not allowed to address the court further in respect of the appeal.

[5] At the outset, counsel for the appellant moved for an order condoning the appellant's late filing of a notice of appeal and of the record and to reinstate the matter on the roll in the event of it being found that the appeal had lapsed. In its written application, the appellant gives a full explanation why the said documents had not been filed within the time period stipulated in the rules. The appellant only became aware of the order granted on petition to this court on 29 April 2021. The delay, which is not extensive, was largely beyond the control of the appellant and essentially due to the failures of the previous attorneys of the appellant. The appellant though did not remain supine or lax and acted with diligence to mitigate any lateness. In light of the prospects of

success of the appeal itself, there is no reason to refuse the orders sought in this regard.

Salient Facts

[6] It is not in issue that Mr Rantsieng was employed by the appellant as a general worker until he was dismissed by it in connection with an incident that occurred just outside the gate of its workplace, shortly after closing time, where Mr Rantsieng was involved in a physical altercation with a co-employee about money. Mr Rantsieng had been charged with and found guilty of gross misconduct in that regard in a disciplinary hearing.

[7] Mr Rantsieng, assisted by his trade union at the time, had referred an unfair dismissal dispute to the first respondent ("the CCMA") in terms of the Labour Relations Act 66 of 1995 ("the LRA"). Following an unsuccessful conciliation, the matter proceeded to arbitration before the arbitrator who rendered an award on 14 July 2016 in terms of which he found that the dismissal of Mr Rantsieng was procedurally and substantively fair.

[8] On 16 August 2016, Mr Rantsieng launched an application in the Labour Court in terms of section 145 of the LRA in which he sought an order: (a) reviewing and setting aside the award; (b) referring the matter back to the CCMA for a hearing *de novo* before another arbitrator/commissioner; (c) directing the appellant to pay the costs; as well as (d) granting him "further and/or alternative relief". The CCMA, the arbitrator and the appellant were cited as respondents in that application in which Mr Rantsieng relied on at least five grounds of review.

[9] Mr Rantsieng averred, *inter alia*, in essence, that there was no procedural fairness in, both, his disciplinary hearing at the appellant, and in the arbitration proceedings in the CCMA before the arbitrator.

[10] On 10 October 2016, the appellant filed a notice of intention to oppose that application (the notice itself is dated 29 August 2016, in which it indicated, *inter alia*, that it would seek an order dismissing Mr Rantsieng's review application with costs and upholding the impugned award of the arbitrator.

[11] In a document deposed to on 30 August 2016 styled a “founding affidavit” and filed in the Labour Court in respect of the same matter, Mr Gareth Crookes, on behalf of the appellant, proceeded, in essence, to answer the averments made by Mr Rantsieng in his founding affidavit in the review application. In paragraph 3 of the document, Mr Crookes specifically states “this founding affidavit is deposed to in support of a notice of opposition to the review and setting aside in terms of section 145, alternatively section 158(1)(g), of the LRA of an arbitration award issued by the second respondent under case number GAVL 1560–16 dated 14 July 2016.”

[12] The document filed on behalf of the appellant is otherwise strikingly brief. In it, Mr Crookes, in essence, denies Mr Rantsieng’s version and defends the award of the arbitrator. In the final paragraph of the document, Mr Crookes asks that the relief sought by Mr Rantsieng in his notice of motion be dismissed.

[13] The record further shows that a copy of the record of the arbitration proceedings before the arbitrator and a Rule 7A(8)(b) notice was filed on 4 May 2017. In terms of the latter notice, Mr Rantsieng notified the appellant that he stood by his notice of motion. The notice further indicated that if the appellant intended to oppose the review application, it should do so within 10 working days from the date of receipt of the notice failing which Mr Rantsieng would request the matter to proceed on an unopposed basis.

[14] In an affidavit of service deposed to by Mr Rantsieng on 3 May 2017, he attests to having delivered the transcribed record by hand to the appellant on 28 April 2017.

[15] It is common cause that nothing further was filed by either Mr Rentsieng or by the appellant and that no one on behalf of the appellant appeared at the hearing of the application before the court *a quo*. It is averred on behalf of the appellant, that acting on advice from its employers’ organisation representative and an advocate it decided not to appear to oppose the review since Mr Rantsieng, if he was to be successful in the review, at worst for the appellant, sought an order that the matter be remitted to the CCMA for a

hearing *de novo*. The appellant assumed that its decision in that regard would save it from incurring unnecessary costs.

[16] It appears from the judgment of the court *a quo* that it dealt with the matter as an unopposed one. No reference is made in the judgment to any notice of opposition, or to the affidavit filed on behalf of the appellant in answer to Mr Rantsieng's review application. However, of importance, the court *a quo* held that the award was reviewable.

[17] The court *a quo* held, in essence, that this was particularly so because the fight happened outside the appellant's premises after working hours and could therefore not have constituted a contravention of any workplace rule. It further held that since there was no evidence that the business of the appellant had in any way been affected by the fight involving Mr Rantsieng and the other employee it was not reasonable for the arbitrator to have found that Mr Rantsieng had committed any misconduct.

[18] The court *a quo* went on to find that since there was no evidence why Mr Rantsieng should not be reinstated, and reinstatement was "the primary remedy" it had to be ordered in circumstances where Mr Rantsieng was not guilty of any work-related misconduct. The court *a quo* seemed oblivious of the fact that Mr Rantsieng never sought an order for reinstatement in his notice of application and no notice had been given to the appellant that he would be seeking such relief from the court *a quo* or that the court *a quo* was contemplating the grant of such relief.

[19] The court *a quo* made an order: (a) reviewing and setting aside the award of the arbitrator; (b) replacing it with an order that the dismissal of Mr Rantsieng by the appellant was substantively unfair; (c) ordering the appellant to reinstate him without any loss of benefits effectively from the date of his dismissal; and (d) making no award of costs.

[20] According to Mr Crookes, on behalf of the appellant, the appellant got to know of the court *a quo*'s order through a Mr Roode, the employer's organisation representative. It is then that it brought an application before the court *a quo* for leave to appeal that order. The court *a quo* dismissed the application for

leave on 9 May 2019, causing the appellant to petition this court for leave to appeal. Leave to appeal was granted on petition on 4 August 2020.

[21] The principal argument of the appellant is that it did not oppose the application because of the relief sought by Mr Rantsieng in his application for review. As far as it was concerned, and acting on the advice from Mr Roode and an advocate, at worst, the court *a quo*, if it had set aside the award, would have referred the matter back to the CCMA for a fresh hearing before a different commissioner/arbitrator. In essence, its argument is that the court *a quo* should not have ordered Mr Rantsieng's reinstatement in circumstances where (a) he did not seek such order in his notice of motion or review and (b) where the appellant had not been notified that such relief would be sought by him at the hearing of the application or that the court *a quo* was considering granting such relief and (c) it was not given an opportunity to be heard in respect of such relief.

[22] The appellant's notice of opposition and "answering affidavit" bear the stamp of the Labour Court which indicates that it had been filed in that court on 10 October 2016 under case number JR 1553/16, which is the case number originally assigned to Mr Rantsieng's review application. It is not clear whether the court *a quo* did consider that document. It does not mention it at all. But in any event, it seems unlikely that the contents of that document, per se, would have caused the court *a quo* to arrive at a different conclusion in respect of the merits of the review.

[23] Nevertheless, the unfairness of what occurred is obvious. The court *a quo* should have taken into account before granting the order of reinstatement, that in his notice of application (or notice of motion), Mr Rantsieng did not seek reinstatement and that the appellant had not been notified that such an order would be sought. The court could not grant such an order without at least being certain that the appellant was aware that such relief was sought, or was contemplated and had been given a (reasonable) opportunity to react thereto.

[24] Without such notification the appellant could reasonably have concluded that at worst for it the matter was to be remitted to the CCMA for a fresh hearing. It was not unreasonable for the appellant to assume that an order for reinstatement would not be granted in circumstances where (a) Mr Rantsieng did not seek that relief in his application for review and (b) it was not notified that such relief was contemplated, and (c) allowing it an opportunity to react thereto. The request in Mr Rantsieng's application for "further and/or alternative relief" could hardly have served that purpose. The notice of application possibly required an amendment to indicate that such relief was to be sought and, in such instance, the appellant would have had to be given notice of such amendment.

[25] It is trite that the notice of motion or application and the founding affidavit in application proceedings constitute both the pleading and the evidence. They serve to define the issues which are to be adjudicated upon by the court. An applicant is to not only state the relief sought, but to make out a case for such relief. In this instance, Mr Rantsieng specifically did not ask for reinstatement in those founding documents, and thus did not raise it as an issue that was to be adjudicated upon by the court[1]. A pleading is intended to enable the other party to fairly and reasonably know the case it is called upon to meet.[2]

[26] Fairness is paramount[3], and, the so-called, "trial by ambush" has always been deprecated. The order of reinstatement was unfairly sought and or granted in this matter and for that reason, the court *a quo*'s order of reinstatement cannot stand. Not only because the review was decided on grounds not raised by Mr Rantsieng in his application, which was unfair, but for reasons of practicality and because the consideration reinstatement depends on all the relevant facts and circumstances, the entire order of the court *a quo* must be set aside and the matter is to be remitted to the Labour Court to be reheard afresh as an opposed matter.

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[1] See, inter alia, *Molusi and others v Voges NO and others* 2016 (3) SA 370 (CC) para 28; *GCC Engineering (Pty) Ltd and others v Maroos and others* 2019 (2) SA 379 (SCA) para 22.
[2] See, inter alia, *Home Talk Developments (Pty) Ltd and others v Ekuruleni Metropolitan Municipality* 2018 (1) SA 391 (SCA) para 28.
[3] See, inter alia, *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC) paras 130-131.

[27] In the result, the following is ordered:

27.1 The late filing of the notice of appeal and of the record is condoned and the appeal is reinstated on the roll.

27.2 The appeal is upheld with costs;

27.3 The entire order of the court *a quo* is set aside and the matter is referred back to the Labour Court as an opposed matter for a fresh hearing before a different judge.

27.4 There is no costs order.

P Coppin

Judge of the Labour Appeal Court

Tokota and Phatudi AJJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:	GJ Scheepers SC and EJ Steenkamp
	Instructed by Thyne Jacobs Attorneys
FOR THE RESPONDENT:	Third respondent in person.