



INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.135/16

In the matter between:

JABULANE ERIC MALALE

Applicant

And

BELL EQUIPMENT SWAZILAND (PTY) LTD Respondent

Neutral citation: Jabulane Eric Malale vs Bell Equipment
Swaziland (Pty) Ltd (135/2016) [2017] SZIC 26
(2017)

Coram: MAZIBUKO J,
(Sitting with A.Nkambule & M.Mtetwa
Nominated Members of the Court)

Last Heard: 11th April 2017

Delivered 20th April 2017

Summary: (1) Reinstatement of a dismissed employee. Reinstatement restores the dismissed – employee, in terms of arrear salary, benefits and his work, to the position he was in before dismissal – as if employment has never been terminated. The rule regarding reinstatement is subject to the exercise of discretion by Court or arbitrator.

(2) Discretion of the Court or, arbitrator: The Court or arbitrator has a discretion to reinstate the employee to any date not earlier than the date of dismissal. The Court or arbitrator may order reinstatement but deny the employee retrospectivity.

JUDGEMENT

1. The Applicant Mr Jabulane Eric Malale, is an employee of the Respondent. The Respondent is a company that operates business in Matsapha Swaziland.

2. Prior to the 7th November 2014 the Applicant was suspended from work on allegation of misconduct. The Applicant was called to a disciplinary hearing. The Applicant was found guilty of misconduct and was subsequently dismissed from work on the 7th November 2014.

3. The Applicant reported a dispute at the Conciliation, Mediation and Arbitration Commission. The dispute was referred to arbitration. On the 12th November 2015 the arbitrator issued an award which reads thus:

“The Respondent is hereby ordered to reinstate the Applicant from the date of this award;”

4. About the 16th November 2015 the Applicant reported for work and resumed his duties in compliance with the award. The Applicant is still in the Respondent’s employment.

5. The Applicant’s claim is that the Respondent failed to pay him his salary and benefits which he should have received from the time of dismissal to the date of the award. The Applicant computed his

salary arrears for the period 7th November 2014 to 12th November 2015 to E181, 446-00 (One Hundred and Eighty One Thousand Four Hundred and Forty Six Emalangeneni). In the replying affidavit the Applicant added that he is also entitled to payment in *lieu* of leave days which had accrued in the sum of E10 090.00 (Ten Thousand and Ninety Emalangeneni).

6. The facts of this case are not necessarily in dispute. The dispute between the parties is on the interpretation of the award.
7. The word reinstatement is defined in Section 2 of the Industrial Relations Act No. 1/2000 (as amended) as follows:

“reinstatement means an action or situation whereby an employee’s services or employment are treated as if the services or employment have never been terminated, including the payment of wages, salary and any remuneration payable by virtue of the services or employment;”

8. The definition of the word ‘reinstatement’ in Section 2 of the Act should be read with Section 16(1)(a) therein which provide as follows:

“16 (1) If the Court finds that a dismissal is unfair, the

Court may –

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

(b) ...

(c) ...

9. The Industrial Relations Amendment Act No. 3/2005 provides as follows regarding arbitration awards:

“17 (1) In hearing and determining any matter referred to arbitration whether by the President of the Court in terms of section 8(8) or of any other provisions of this Act, an arbitrator shall have all the remedial powers of the Court referred to in section 16.

(2) An arbitration award made under this Act shall be enforceable as if it was an order of the Court.”

10. In terms of Section 16(1) as read with Section 17(1) and (2) of the Act (as amended) the Court as well as the arbitrator has a discretion where it has determined that an employee has been unfairly dismissed and that he should be reinstated. The Court or arbitrator may order reinstatement to operate from a specific date which should not be earlier than the date of dismissal.

11. The Applicant’s argument is that reinstatement restores the status *quo ante* in that the employee concerned is restored to his position and paid arrear salary. According to the Applicant; once reinstatement is granted without qualification, invariably it means the Applicant is entitled to occupy his position and be paid arrear salary as if employment had never been terminated.

12. The Respondent has urged the Court to read the definition of ‘reinstatement’ in Section 2 of the Act together with Section 16(1) (a) therein, as the latter complements the former. According to the

Respondent the arbitrator exercised his discretion when he directed (in his award), that the reinstatement should operate with effect from the date of the award.

13. The relief of 'reinstatement' has two (2) components, namely: the employee's right to return to work and also the payment of salary and other benefits due to the employee as if employment has never been terminated. A reading of the definition of the 'reinstatement' in Section 2 of the Act, indicates that the rights of an employee who has been reinstated operate automatically with effect from the date of dismissal. That definition must however be read with Section 16(1) (a) and 17(1) of the Act for a detailed explanation on how the principle operates. Clearly the Court as well as the arbitrator has been given a discretion to determine the date the reinstatement order or award should operate.

14. When the Court or arbitrator makes a determination that an employee is being reinstated, there are two (2) competing interests that immediately arise. The employee has an interest in maximizing his arrear salary and the benefits. The employee's goal is to have

the effective date of the reinstatement pushed as far back as possible and preferably to the date of dismissal. On the other hand, the interest of the employer is to minimize the amount of money he has to pay for arrear salary and benefits. The employer's goal is to bring the effective date of the reinstatement as close as possible to the date of the order or award. The duty of the Court or arbitrator is to balance the competing interests of the parties taking into consideration the requirements of justice and fairness – and that is where the exercise of discretion comes into play.

15. The dispute regarding the interpretation of the award has led the Applicant to file an application before Court for relief as follows:

“I Directing the Respondent to pay the sum of E181, 446.00 (One hundred and eighty one thousand four hundred and forty six emalangeni) to the applicant being in respect of arrear salaries for the period between 7th November 2014 to the 12th November

2015. *Subsequent to the reinstatement of the Applicant to his position by the Respondent [sic].*

3. *[sic] Further and or alternative relief.”*

16. The Applicant’s argument is that the award should be interpreted to mean that the Applicant was entitled to resume work with effect from the date of the award namely the 12th November 2015, but that the arrear salary and benefits should be effective from the date of dismissal. It is common cause that the Applicant resumed work with effect from the date of the award and that the Applicant was not paid any arrear salary or benefits.

17. The Respondent argued that if the arbitrator intended the Applicant to be paid area salary he should have reinstated the Applicant with retrospectivity. The words ‘... *with effect from the date of this award*’ meant that the arbitrator has exercised his discretion in denying the Applicant retrospectivity.

18. The Act has made a distinction between reinstatement and re-engagement. Re-engagement is defined in Section 2 as follows:

“re-engagement” means an action or situation whereby the employee is engaged or re-engaged by the employer in the same or comparable or identical work to that which the employee was engaged in before the termination or purported termination of the employee’s work or service or employment, or such other reasonably suitable work or employment, from such date and on such terms of employment as may be agreed upon by mutual consent or by order of the Court or of an arbitrator;”

19. It is fair and logical to presume that the arbitrator (at the time he issued the award) was familiar with the definition of ‘reinstatement’ and the extent of his discretion as stated in the act. In the matter of KROUKAM VS SA AIRLINK (PTY) LTD (2005) 26 ILJ 2153 (LAC) his Lordship DAVIS AJA explained ‘reinstatement’ as follows:

“If an order of reinstatement is made, then the contract is restored and any amount due would necessarily be part of the employee’s entitlement. If a lesser period than

reinstatement to the date of dismissal were ordered, that would be exhaustive of the extent to the employee's relief."

(At page 2214 paragraph 59)

This Court accepts that DAVIS AJA has stated the correct legal principle. The Court or arbitrator (exercising its discretion) can reinstate a dismissed employee but deny him retrospectivity.

20. In the matter of MENZI NGCAMPHALALA VS SWAZILAND BUILDING SOCIETY SZIC case no 50/2005 the Court granted the Applicant (the dismissed employee) reinstatement or re-engagement with effect from 1st July 2007. The Order of Court reads as follows:

"(a) The Respondent is ordered to reinstate the Applicant to his position as branch controller, or any other similar position of equivalent rank and remuneration in the Respondent's undertaking, with effect from 1st July 2007."

(b)...

The employment contract had been terminated on the 10th May 2004. In this case the Court exercised its discretion and imposed a date from which arrear salary and benefits are payable. In other words the Applicant did not get full retrospective reinstatement. The Industrial Court's judgment was taken on review. The review application was unsuccessful.

21. In the matter of SWAZILAND ELECTRICITY BOARD vs COLLIE DLAMINI SZICA case no. 2/2007 the Industrial Court of Appeal made an order as follows at page 16:

“We order that the Respondent be reinstated with effect from the 1st April 2008.”

This order was issued on the 27th February 2008. The effect of the Order was that the employee (Respondent) was reinstated but was denied arrear salary.

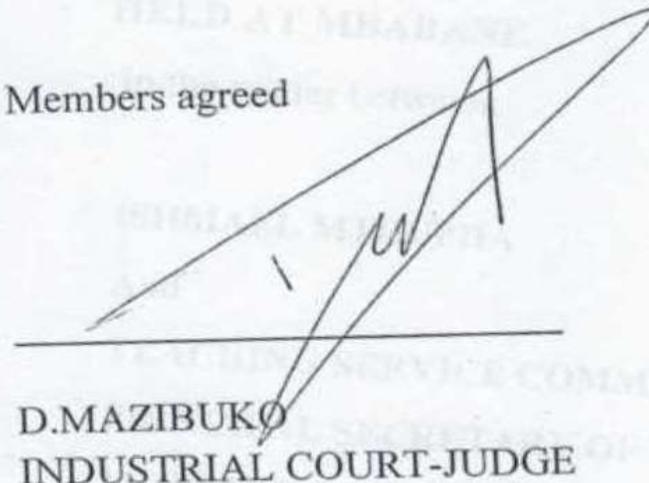
22. In the matter before Court the arbitrator has granted the Applicant reinstatement with effect from the date of the award- namely 12th November 2015. This order means that the Applicant has been denied arrear salary. The Applicant would be entitled to payment of salary as from the 12th November 2015 provided he rendered his

service. The definition of ‘reinstatement’ as stated in Section 2 of the Act does not apply in this case because the arbitrator – in the exercise of his discretion has denied the Applicant retrospectivity. Consequently the arrear salary that the Applicant is claiming has no legal basis and is accordingly dismissed.

Whether or not the arbitrator was justified in denying the Applicant full or partial retrospectivity, is an inquiry which is beyond the mandate of this Court. Fairness requires that each party should pay its costs.

22.1 Prayer 1 of the Notice of Motion is dismissed.

22.2 Each party is to pay its costs.



Members agreed

D. MAZIBUKO
INDUSTRIAL COURT-JUDGE

The image shows a handwritten signature in black ink over a printed name and title. The signature is written in a cursive style. The printed text below the signature reads 'D. MAZIBUKO' and 'INDUSTRIAL COURT-JUDGE'. Above the signature, the words 'Members agreed' are printed. The background of the document is slightly blurred, showing some faint text from the reverse side.

Applicant’s Attorney

Mr M. Ndlangamandla

Of Mkhwanazi Attorneys

Respondent's Attorney

Mr D. Jele

Of Robinson Bertram