REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, AT DURBAN

JUDGMENT

Reportable

Case no: D813/11

In the matter between:-

COCA-COLA (PROPRIETARY) LIMITED	**Applicant**
and	
JABULANI NGWANE N.O.	**First Respondent**
COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**Second Respondent**
ENOCK M NDLOVU	**Third Respondent**

Heard: 19 February 2013

Delivered: 07 May 2013

Summary: Review of award of reinstatement where position no longer in existence – whether reinstatement was competent. Whether failure of commissioner to consider whether severance pay should be tendered on reinstatement and back pay being award. Whether omission to make such order constitutes a reviewable irregularity.

JUDGMENT

CHETTY AJ

[1] The applicant seeks to review an award of the first respondent ('the commissioner') in which the latter ruled in favour of the third respondent, Mr Ndlovu, finding that his dismissal was unfair and reinstated him to the position that he had held prior to his dismissal. In the alternative, the commissioner ruled that the employee be reinstated to any other position which is equivalent in status and grade to the one he held prior to his dismissal on 31 December 2010. The commissioner further ordered the

applicant to pay the third respondent his salary for a period of seven (7) months, totalling R530 060,72. The applicant contends that the award is reviewable and should be set aside on essentially two grounds - that the retrenchment of the third respondent was substantively and procedurally fair, alternatively that the remedy of reinstatement be substituted with that of compensation. It was further contended that in the event of this Court finding that the award of the commissioner is not reviewable for those reasons, that the third respondent be ordered to repay to the applicant the amount of R1 300 920,00 paid to him as a severance package upon his retrenchment.

[2] At the commencement of the proceedings, Mr Boda, who appeared for the applicant, indicated that he would not be pursuing the ground of review which attacked the retrenchment of Ndlovu as being substantively and procedurally unfair. Instead, the applicant confined its grounds of review to whether the remedy of reinstatement granted by the commissioner was proper in law. One of the grounds relied on was that the position which the third respondent had previously occupied, no longer existed as at the time when the award was handed down. As such, it was contended that he could not be reinstated to a position which no longer existed as he had been employed on a fixed term contract which had since expired. Secondly, the applicant contended that the failure of the commissioner to order Ndlovu to repay the severance package upon assuming reinstatement constituted a reviewable irregularity in that the reinstatement order includes an order for back pay to the date of his dismissal. The contention of the applicant in essence is that the third respondent has sustained no loss which justifies him retaining his severance package.

[3] A brief factual background to the matter is that the third respondent was employed by the applicant in June 1997, and by February 2008 he rose to become Shopper Marketing Manager earning a salary of R75 722 per month. In July 2009 he accepted a secondment as the regional sales manager at Lionshare Holdings (Pty) Ltd in KwaZulu-Natal whose mandate it was to distribute and market the Mazoe beverage, a product falling under the Schweppes trademark, which ultimately falls under the ownership of Coca Cola, the parent company. The distribution agreement entered into between

the applicant and Lionshare was terminated in June 2010. In September 2010 the third respondent was advised of his retrenchment. It is common cause that after the termination of the Lionshare agreement, the applicant secured another partner in Smollans Sales and Marketing (Pty) Ltd, to market and distribute the Mazoe beverage, as well as other products. The applicant employed another employee, Paul Mahau, to manage this particular contract. Mahua, according to the applicant, was selected for this position because of his length of service as well as his experience in the franchise department. At the time when the third respondent was seconded to Lionshare, his position at the applicant was taken over by another employee, Mrs Ngcezulu. On this basis, the applicant contends that the reinstatement of the third respondent was not competent.

[4] The applicant further contends that the commissioner failed to apply his mind to the evidence and the facts of the matter when he concluded that the applicant had a duty to "bump up" the third respondent into the position of Mahau, and that no reasonable arbitrator would have interfered with the applicant's decision in the exercising of its prerogative to choose suitable persons for managerial and supervisory positions. The applicant's stance is that when the third respondent decided to accept the secondment to Lionshare, this secondment came "at risk", in that, once he accepted the appointment, he should have appreciated that his previous position at the company would have been taken over by someone else, and that in the event of his retrenchment, he could have had no expectation that his previous position would be available to him. Upon the termination of the Lionshare agreement, the applicant contends that due to operational requirements, it was necessary to retrench the third respondent as there were no suitable alternative positions where he could be employed. At the arbitration, the applicant contended that the retrenchment of the third respondent was fair, and that he, in any event, was paid a generous severance package, meaning that there was no loss that he had suffered. The argument advanced by the applicant is that, in accepting the severance package, the third respondent lost the right to challenge his retrenchment.

[5] As a starting point, Mr Boda referred me to the commissioner's award and particularly the order that the third respondent be reinstated

> *'. . . to the position he held before his secondment to Lionshare or any other position which is equivalent in status and grade to the one that he held before his dismissal on 31 December 2010*.'[1]

It was submitted that in making the order that he did, the commissioner failed to apply his mind to the evidence before him, notably that of Ms Gule, the applicant's employee relations manager. She testified that the third respondent was paid a "statutory payment" in terms of severance, calculated in terms of guideline of one week for each completed year of service. In addition, the third respondent received a "Coke payment", being a reference to the Eurasia Africa Group Severance Pay Plan in terms of which he received an additional payment calculated at 1 month's salary for each year of service, subject to a maximum of 18 months. The third respondent accordingly received a total of R1 292 790.00 which the applicant contends was never taken into account by the commissioner when ordering that the third respondent be reinstated with back pay totalling R530 060,72. The result of the commissioner's award is that the applicant is reinstated with back pay and is allowed to keep his severance package of approximately R1,3m.

[6] The first ground of attack against the decision of the commissioner is whether it was competent for him to reinstate the third respondent in light of the above circumstances. The commissioner ordered that the third respondent be 'reinstated to the position he held before his secondment'. Mr Boda contended that as Mr Mahau was appointed by the applicant to manage the Smollans agreement, the decision of the commissioner to order reinstatement was unreasonable, as no such position existed. It must be borne in mind that one of the main grounds advanced by the third respondent as to why his dismissal was unfair was his contention that the Smollans agreement should have been awarded to him to manage rather than Mahau. The applicant's witness, Mr Neves, testified that he knew of no reason why the third respondent would not have been suitable for the

[1] Arbitration award: Index to Pleadings, p 22.

position. Neves further stated that the applicant required a “resource”, and that the franchise department ultimately selected the candidate. The second aspect of the reinstatement order is that if the applicant was unable to accommodate the third respondent within the Lionshare agreement, they were required to reinstate him to ‘*any other position which is equivalent in status and grade to the one he held before his dismissal on 31 December 2010*.’ It is common cause that upon the third respondent taking up his position in July 2009 on secondment under the Lionshare agreement, his position as a shopper marketing manager was subsequently filled Ms Ngecezulu in October 2009.

[7] The third respondent was hard pressed during the arbitration to concede that if he was offered the position of shopper marketing manager, he would have declined it. The responses of the third respondent on this aspect do not reflect an unequivocal rejection of that position. It is also relevant that the order for reinstatement is fairly broad, permitting the applicant to install the third respondent to ‘*any other position’* of similar status. I agree with Mr Mgaga, who appeared for the third respondent, that the commissioner was probably persuaded in coming to this conclusion by the evidence of Ms Gule, who testified on behalf of the applicant at the arbitration that ‘*there are always positions available*’. (My emphasis.) Under cross examination, Ms Gule was also asked about the shopper marketing manager position, which the third respondent occupied prior to the Lionshare agreement. Upon reviewing the profiles of the shopper marketing manager position before and after the Lionshare agreement, Ms Gule conceded that the profiles in both positions looked the same. She further conceded that an argument that the third respondent would not have been able to function in the shopper marketing manager position, after the collapse of the Lionshare agreement, ‘*would not hold much water’*. On this basis alone, the commissioner’s award relating to reinstatement would appear to be rationally connected to the evidence presented at the arbitration.

[8] Counsel for the applicant placed much emphasis on the change in the job descriptions and the nature of the functions in the shopper marketing manager’s post, which the third respondent previously occupied. On that

basis it was contended that there could have been no expectation that the third respondent could have had to return to the same position. In this regard, Mr Boda relied heavily on the decision of Van Niekerk J in *Tshongweni v Ekurhuleni Metropolitan Municipality*[2] where the Court considered whether an employee could be reinstated in employment where the post he had previously held was under a fixed term contract, the period of which had expired due to effluxion of time. Under those circumstances, the Court held that an employee could not be reinstated into a new contract. Similarly, it was contended by counsel for the applicant that reinstatement is not competent if the *substratum* of the job previously performed is no longer available.

[10] The crucial distinction between *Tshongweni* and the current matter is that the former had already obtained alternative employment as the head of department in the Gauteng government at the time when the matter came before the Court, and he did not want to leave his present employment. The Court noted the nature of the order that the applicant sought was

> *'. . . not one that would reinstate him in the respondent's employ in any physical sense – he seeks reinstatement into a new contract on the basis of a reasonable expectation that after the contract in force at the time of his dismissal terminated on 31 March 2007, he would have been offered a new five year contract . . .'*[3]

The Court further noted that the applicant conceded that despite his claim to be reinstated, he had no intention of continuing an employment relationship with the applicant and in effect his claim for reinstatement was for remuneration that he would have earned for the unexpired portion of the fixed term contract, in addition to what he claimed he would have earned under the contract, but for his dismissal. In light of these factors Van Niekerk J concluded that

> *'All of the authorities referred to suggest that the remedy of reinstatement is confined to reinstatement into the contract of employment in existence on the date of dismissal. In my view, if the duration of that contract was limited, and*

[2] [2010] 10 BLLR 1105 (LC).
[3] Above 1113C-D.

the expiry of the contract precedes the date on which a finding of unfair dismissal is made, reinstatement is not a competent remedy. Even less can an employee claim reinstatement into a contract that he or she asks the court to create, and nor can the employee claim that the court should recognise that the contract would have been prematurely terminated. The applicant plainly does not seek the restoration of his employment relationship with the respondent – his claim is nothing less than a claim for compensation. That being so, the applicant's claim is subject to the limits on compensation prescribed by s 194 of the LRA.

Even if this is too narrow a view of the applicable legislation, it seems to me that in circumstances such as the present it cannot be said that reinstatement is a reasonably practicable remedy, and that the exception in s193(2)(c) is thus applicable. All of the circumstances described above (and in particular, the applicant having concluded a five year fixed term contract with his new employer, which he has no wish to terminate) render reinstatement impracticable.'[4]

[11] On appeal[5], Murphy AJA agreed largely with the views of the court *a quo*, also noting that the question as to whether reinstatement was competent in the circumstances of the case was not a question that needed to be answered in light of the applicant indicating he did not want to be reinstated[6]. The observations made by Murphy AJA are relevant to the outcome of this application.

'. . . In argument before us, counsel for the appellant submitted that notwithstanding such concession it would be permissible for the court to order reinstatement for the period between 5 July 2006 (the date of dismissal) and 31 January 2010 (the day before the appellant commenced employment with the Gauteng Provincial Government). He argued that reinstatement is "a multifaceted remedy" and that nothing in the LRA prevented the Labour Court from making a qualified order of reinstatement, which did not oblige the appellant to tender his services for the future. The effect of such an order, were it to be granted, would be that the appellant would be paid his remuneration for the stipulated period, but he would be excused from tendering his services.

[4] Above 2, p 1114E-I.
[5] *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC).
[6] Above para 34-35.

Counsel's submission is founded upon a fundamental misconception regarding the nature of the statutory remedies available for unfair dismissal in terms of the LRA. Reinstatement, re-employment and compensation, as the exclusive remedies for unfair dismissal, (now provided for in s 193(1) of the LRA), were introduced into labour legislation to remedy the absence of satisfactory relief for the unfair termination of the contract of employment by employers. At common law the only remedy available to a dismissed employee was an action for wrongful breach of contract. As in all cases of breach of contract, the injured party could elect to sue for specific performance or for damages. A claim for specific performance in terms of a reciprocal obligation will succeed only where the party claiming performance has performed or at least tenders performance. In the context of an employment contract, a claim for specific performance is a claim for reinstatement on the same terms and conditions of employment that existed at the date of dismissal and must be accompanied by a tender by the employee to resume services or at least to fulfil the principal obligation under the contract to make his or her services available. The employee's entitlements under a contract of employment are dependent on the availability of his or her services to the employer and not the actual rendering of services. (Johannesburg Municipality v O'Sullivan 1923 AD 201.)'

[12] Mr. Boda sought further to rely on the decision of the Constitutional Court in *Equity Aviation Services (Pty) Ltd v CCMA and Others*[7] (which referred to *Tshongweni*) for the contention that as the third respondent's previous position of a shopper marketing manager had transformed from the time that he had held the post, it was not competent for the commissioner to have considered him being reinstated to that position. In *Equity Aviation* the Constitutional Court explained the meaning of the word 'reinstate' as follows

'*The ordinary meaning of the word "reinstate" is to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards worker's employment by restoring the employment contract. Differently put, if*

[7][2008] 12 BLLR 1129 (CC).

employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.'[8] (My underlining)

[13] For the reasons which are set out above, counsel submitted that reinstatement was not competent in law and the decision of the commissioner falls to be reviewed and set aside. He submitted that the commissioner had no power to order reinstatement, and to the extent that this Court finds that the dismissal was nonetheless substantively and procedurally unfair, no compensation should be ordered as the third respondent had been paid a severance in excess of the statutory requirements. Alternatively, it was submitted if I were to find that reinstatement was competent, then I should order the third respondent to repay the amount of severance paid to him as a condition of his reinstatement. I deal with each of these aspects below.

[14] Mr Mgaga on the other hand submitted that if I were to find that the commissioner's decision that the third respondent was unfairly dismissed survives the threshold for review set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others,*[9] then the commissioner was enjoined by s 193(1) of the Act to consider reinstatement as a primary remedy unless any of the conditions set out in s 193(2)(a)-(d) were raised, and are sustained as defences to reinstatement. There is nothing on record where the applicant raised the criteria set out in s 193(2) as a basis for the commissioner not to award reinstatement. In his replying affidavit in this Court, the third respondent states that the applicant did not lead any evidence at the arbitration to indicate that it was not reasonably practicable to reinstate him, or that the fact that the shopper marketing manager position was occupied by Ms Ngcezula was a bar to his reinstatement to that position. Counsel for the applicant conceded in his heads of argument that the issue of reinstatement not being a competent remedy was not argued before the first respondent, but that it was permissible to be raised as a point of law on review**.**[10]

[8] Above at para 36.
[9] (2007) 28 ILJ 2405 (CC).
[10] See *CUSA v TAU Ying Metal Industries & others* [2009] 1 BLLR 1 (CC) where Ngcobo J stated at para 67-68 'Subject to what is stated in the following paragraph, the role of the reviewing court is

[15] Support for the argument of the applicant is also to be found in *Cash Paymaster Services Northwest (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others*[11] where the Court dealt with a case of a fixed term contract that was to terminate within a month of the arbitration hearing. The Court held that the commissioner had a duty to establish the nature of the contract when fashioning a remedy, and that by making an order of reinstatement, and effectively extending the contract beyond its fixed term, the commissioner had exceeded her powers. The award was accordingly set aside and substituted with an award of compensation for the unexpired portion of the fixed term contract. The LAC in *Tshongweni* however affirmed that re-instatement or re-employment should be ordered, unless the employee does not wish to be re-instated or re-employed. The Court further held that

> *'The appellant's claim for reinstatement, in the guise he wants it, cannot be maintained because he is not prepared to make his services available to the employer and he does not want to be put back in the job.*
>
> *What the appellant really wants is not reinstatement (the resumption of his employment) but his salary for the period he was unemployed between July 2006 and February 2010, that is 43 months' salary which would be an amount in excess of R2 million. …The foremost problem with granting such a remedy is that, as already said, the LRA does not provide for damages for unfair*

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limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.

These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the Commissioner's jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings in fact did not reach the stage where the question of jurisdiction came into play.'

[11] (2009) 30 ILJ 1587 (LC)

dismissal. Where reinstatement is not granted, the court is limited to granting compensation in a maximum amount of 12 months.'[12]

The views expressed in *Tshongweni* in the Labour Court and in the Labour Appeal Court were cited with approval *SA Post Office v CCMA & others*[13].

[16] The crucial distinction between the authorities relied on by the applicant and the facts of the matter before me, is that the third respondent has never given any indication of not wanting to pursue a claim for reinstatement, nor was this the case before the arbitrator. Moreover, I do not regard the decision of the commissioner as being inconsistent with the decision of the Constitutional Court in *Equity Aviation*. The evidence presented by Ms Gule clearly states that the applicant is a large employer, and 'there are always positions available'. She further conceded that there was no impediment to the third respondent being re-employed in the shopper marketing manager post, even though the position had transformed in its outlook. I am accordingly persuaded by the argument on behalf of the third respondent that the finding of the commissioner to award reinstatement in the circumstances of the matter was not unreasonable. I am further of the view that the applicant had not managed to establish the existence of any of the factors set out under s 193(2) of the Act which would militate against reinstate. I am equally satisfied that the arbitrator's decision of reinstatement to an alternate position was reasonable, particularly in light of the evidence of Ms Gule.

[17] I now turn to the applicant's attack with regard to the third respondent being permitted to retain his severance package, while at the same time benefitting from the award of reinstatement with back pay. Mr Boda submitted that the basis of review is to be found in the award where the commissioner states the following

'I am aware that the applicant was paid a generous severance and that is not in dispute.

[12] Above 5, para 39-40.
[13] Unreported judgment of Steenkamp J, C1147/10, 25 July 2012 citing *Director-General: Office of the Premier of the Western Cape & ano v SAMSA obo Broens & others* Unreported, case no CA 5/2011 (26 April 2012) [coram Davis JA, Molemela AJA and Murphy AJA concurring] paras 13-15.

Though the severance package, by operation of law, flows from the employer's operational requirement but since that is not the case before me I elect not to make any determination in this regard.'[14]

[18] Mr Magaga submitted that the commissioner's decision not to pronounce on the issue of the return of the severance package was not an unreasonable decision and not one open to review. In substantiation of this argument, I was referred to the parties opening statements at the arbitration and the pre-arbitration minute. In the pre-trial minute the following is recorded

'Objection to relief sought

The respondent has raised an objection to the relief sought by the Applicant in that he was paid a more favourable severance than his statutory entitlement. As a result, if compensation is ordered, the presiding commissioner must have due regard to the amount of severance already paid to the Applicant by the Respondent.

The Applicant records that the amount of severance pay already paid is not in issue. The amount of compensation to be awarded to the Applicant in the event of a finding that the dismissal was procedural[ly] and/or substantively unfair is independent of the severance pay already paid.'[15]

[19] When the matter came before the commissioner, the applicant's counsel stated the following

'Mr Ngcukaitobi: *Thank you Mr Arbitrator. Whilst we are on the subject of preliminary points, I see that in the pre-arbitration minute there is an objection raised at paragraph 3 in relation to the nature of the relief that is sought in this matter. That is not an objection that we take in limine as such but it is something that will be argued as part of the merits of the dispute. So although it's styled as an in limine objection, the fact is this, we will argue the point at the end of the arbitration. I just need to get that out of t[h]e way*.'[16]

The applicant's representative elaborated on the issue of severance pay during his opening address where he stated

'*Now you will see of course at page 84 there is a letter written to the employee which sets out the termination date of 30 November 2010 and it*

[14] Arbitration award: Index to Pleadings, p 21.
[15] Record p 649-50.
[16] Record p 227.

sets out the proposals for payment of severance package. . . One thing will strike you there, Mr Arbitrator. Those payments considerably exceed what the employee would have been entitled to under the Basic Conditions of Employment Act. They are generous. That is because policy of Coca-Cola is to pay employees more than they would be statutorily entitled to. I say this because I see that if the employee doesn't get his job back, he says that he wants compensation, buy you and I know that one of the factors which the Labour Appeal Court says we must take into consideration is assessing the amount of compensation is the amount of severance. If you get more money from the company when you are retrenched, that is effectively set off against what you would have been entitled to in compensation. It's a factor and an important factor that must be taken into account.'[17]

[20] Mr Mgaga, who also appeared for Mr Ndlovu at the arbitration, confined his response on the issues raised by the applicant, to what was set out in the pre-arbitration agreement. In response to the contentions of the applicant in this Court, Mr Mgaga appears to base his argument that the issue of severance is "independent" to that of any compensation awarded by the commissioner in terms of s 193 of the Act, on the provisions of the applicant's Severance Pay Plan which records the following

'Situations Affecting Severance Benefit

If an employee who is entitled to a severance benefit under this Plan is re-employed by the Company or a Related Company, the employee will be required to refund a pro-rated portion of the separation payment equal to the remaining amount of the benefit that would have been payable as of the date of reemployment, if the employee had received severance benefits on a monthly basis.

For example:

If an employee has received 18 months of severance under this Plan and rehired 12 months after separating from the Company then the employee will be required to return 6 months of severance pay as of the date of re-employment.'[18]

[17] Record p 238.
[18] Index to CCMA Record – Vol 1, p 37.

[21] While the applicant argued that the first respondent had to take into account the amount of severance awarded to the third respondent in determining any compensation to be awarded if he found that the dismissal was unfair, third respondent submitted that in the event of reinstatement, the Commissioner had to defer to the applicant's Severance Pay Plan which regulates the situation where an employee is "re-employed". The difference, in my view, lies in that the Severance Pay Plan contemplates a situation of a retrenched employee being re-hired by the company after an up-turn in economy or in its business in general. The plan does not contemplate the situation of a retrenched employee being reinstated pursuant to an order of Court. Given the example cited above from the policy, as the third respondent was dismissed on 31 December 2010 and the arbitrator's award was handed down in August 2011, it would mean that if the agreement were strictly applied (to the exclusion of any Order pertaining to the return of the severance package), consequent upon the Order of reinstatement with back pay, all that the third respondent would have to refund was 10 (ten) month's severance pay.[19] That would entail that the award of reinstatement, together with back pay of R530 060.72, would remain intact, as well as severance of 7 (seven) month's salary (equivalent to approximately R530 060,72). The third respondent will then have been reinstated with back pay, as well as benefitting from a severance package for the period he was out of work. If the argument of the third respondent were to prevail, he would be reinstated with back pay to a date earlier than that of his dismissal. This would be contrary to the provisions of s 193(1)(a) of the Act. If one were to consider the combined amount as compensation under s 194 of the Act, it would also exceed 12 months remuneration.

[22] It was further submitted on behalf of the third respondent, that the decision of the arbitrator not to interfere with the issue of severance should not be regarded as an irregularity nor should any inference be drawn that he had failed to apply his mind to the facts before him. It was contended that the commissioner correctly decided to have the issue of the third respondent's severance payment resolved in terms of the applicant's Severance Pay Plan.

[19]The third respondent's severance package comprised a total of 17 months salary.

This argument finds expression in the written submissions by the third respondent on the issue of the repayment of the severance package at the arbitration proceedings

> *'It is submitted that in so far as retrospective reinstatement is concerned the Commission does not have jurisdiction to pronounce on the severance pay that has already been paid to CCSA to Ndlovu. CCSA's policy on Severance Pay Plan does regulate what should happen if an employee was retrenched returns to to CCSA. It is also to be noted that CCSA did not even consult Ndlovu on severance pay as prescribed by Section 189(3)(f).*

As I have alluded to earlier, if the matter were to be resolved on the basis of the provisions of the Severance Pay Plan alone, the applicant would have been entitled to retain seven (7) month's salary from the severance package, calculated from the date of dismissal to the date of his reinstatement. It is perhaps equally important to note that in terms of the Severance Pay Plan, the right to recover severance payments already paid to an employee only arises in the instance of re-employment. It is therefore no answer to the complaint of the applicant when the third respondent says in his answering affidavit that '*I am expecting that when I am eventually reinstated the Applicant's policy on severance pay plan will be applied to me'.* (My emphasis.) It is also no answer in my view to the contention that the commissioner's failure to deal with this issue is not a reviewable act or omission. I do not accept the argument that the issue of the return of the severance monies paid to the third respondent was not before the commissioner. As set out earlier, the issue of the severance was raised pertinently at the commencement of the arbitration proceedings.

[23] Mr Mgaga submitted that the pre-arbitration minute must be interpreted narrowly in that the issue of the severance payment made to the third respondent would only arise if the commissioner found that compensation (as distinct from reinstatement) should be ordered. As I understood the third respondent's line of argument, as no compensation was awarded by the commissioner, the amount of the severance awarded become a non-issue, and therefore no reviewable irregularity was committed by the commissioner. What then is the essence of the order made by the commissioner? The

commissioner granted an award of reinstatement with back pay to the date of the dismissal. It is trite that under such circumstances, the dismissed employee is reinstated to his previous position, and placed in the position as if no dismissal had taken place. If this was the import of the order made by the commissioner, then it must follow that the positions of the respective parties are restored to that which existed prior to the dismissal. Under such circumstances, the third respondent would have suffered no loss which was not addressed by an order of reinstatement with full back pay. In light of the relief granted by the commissioner, the third respondent is no longer entitled to the severance package, which was intended to soften the blow from his retrenchment. I also am not persuaded that there is anything on record before me which points to the third respondent having 'effectively tendered to refund the severance pay' as contended for by the applicant in his heads of argument. The applicant denied that there has been any tender of the return of the severance. It was contended by Mr Boda that once the third respondent had elected to accept the severance package offered by the applicant in respect of his retrenchment, he then lost his right to pursue an action for reinstatement and must be regarded as having waived his right to pursue a claim for unfair dismissal. Although the facts of the matter were distinguishable from the present case, Ngcobo JA in Decision Surveys International (Pty) Ltd v Dlamini & others[20] held that the fact that an employee had accepted the conditions of the termination of his employment was no bar to him seeking relief of compensation arising from the unfairness of a retrenchment.

[24] In dealing with the issue of the severance payment which the commissioner elected not to deal with, I was urged by the applicant to follow the path adopted in Unilver S.A. (Pty) Ltd v Salence[21] where the Court took into account the fact that the employee who had challenged the fairness of his retrenchment, although successful, had to repay the amount of the severance award. In this regard the Court held that

[20] [1999] 5 BLLR 413 (LAC).
[21] [1996] 5 BLLR 547 (LAC).

> 'Whilst it might be sufficient merely to delete paragraph 2 of the order of the Court *a quo* it seems to me that it would be advisable, in the interests of certainty, to supplement the order of the Court *a quo* to make it clear that reinstatement is to be effective from 31 December 1993, the effective date of the termination of the respondent's employment, and that the appellant is obliged to remunerate the respondent for the whole of the period since the termination of his employment, subject to the respondent refunding his retrenchment package.'[22]

[25] Mr Mgaga submitted that the return of severance pay was not an item contemplated under the Act and therefore it was open to the commissioner to be persuaded by the parties regarding the relief sought. With reference to *Unilever,* he submitted that if this Court were reluctant to allow the issue of the repayment of the severance to be regulated alone by the provisions of the Severance Pay Plan, rather than the decision of the commissioner being reviewed and set aside, I should opt to issue an order clarifying the award of the first respondent. Mr Boda on the other hand contended that the commissioner's decision to remain silent on the issue of the return of the severance package was an irregularity which had to be reviewed, as opposed to a mere clarification being issued by this Court. I agree with the submissions of the applicant in this regard. A reading of the award of the commissioner makes it clear that he had no intention of pronouncing on the issue of the return of the severance payment by the third respondent, and was content to have this resolved by the parties, despite this issue being raised pertinently before him at the outset of the arbitration proceedings. In my view, in light of his decision to reinstate the third respondent with back pay, the commissioner was obliged to deal with the repayment of the severance as this payment occurred only as a result of the retrenchment of the third respondent. Once the basis for that dismissal had been addressed by a remedy of reinstatement with full back pay, it was incumbent on the first respondent to deal with the severance aspect. The decision of the commissioner not to make any order with regard to the severance package, in my view, was not a decision which another reasonable decision maker could reach in the circumstances. Moreover, the only justification apparent

[22]Above at 564D-E.

from the award, for the commissioner electing not to deal with the issue of the severance payment, is that 'this [was] not the case before' him. This is not a situation where a commissioner has failed to identify good reasons for his decision. In regard to his failure to pronounce on the severance pay, I am of the view that the applicant has succeeded in establishing that both the reasons (such as they are) and the result of the award are unreasonable. There can be no justification for a result where the third respondent is reinstated with full back pay and retains a severance package which far exceeds the amount of his back pay. It is a decision that a reasonable decision maker would not reach.

[26] Mr Boda submitted that the applicant should be awarded costs of the review application, whilst Mr Mgaga submitted that as the applicant has effectively abandoned its challenge to the merits of the commissioner's award and focused almost exclusively on the remedy, it should be liable for the costs of the application. Mr Mgaga contended that if the third respondent had known earlier of the applicant's intention to abandon much of the challenges foreshadowed in its Notice of Motion and founding affidavit, this matter could have been resolved between the parties. I may have been persuaded by the third respondent to award costs his favour, except that I found no evidence of an intention to refund the severance package to the applicant. On that aspect alone, the applicant was justified in persisting with the review. In light of the order that I make below, and the fact that the third respondent will be reinstated in employment, it seems to me to be just and equitable that each party bear their own costs.

[27] I accordingly make the following order:

1. The review application to set aside the decision of the first respondent dated 11 August 2011 under CCMA case number KNDB1107/11, is upheld to the extent as set out below :

1.1 The order of the first respondent is amended as follows:

1.1.1 The third respondent is to be reinstated to the position he held before his secondment to Lionshare, or any other position which is equivalent in status and grade to the one he held before his dismissal on 31 December 2010;

1.1.2 The Applicant is ordered to pay arrear salary to the third respondent for the period from 31 December 2010 to the date of his reinstatement;

1.1.3 The reinstatement of the third respondent as set out in para 1.1.1 above is against repayment to the applicant by the third respondent of the severance package paid to the latter in the amount of R1 300 920.00 (one million three hundred thousand nine hundred and twenty rand);

1.1.4 The reinstatement and the payment of the arrear salary shall be effected within 14 days of the date of this order;

1.1.5 The repayment of the severance package by the third respondent to the Applicant is to be effected within 14 days of the date of this order;

2. Each party to pay its own costs.

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Chetty AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv FA Boda.

Instructed by Cliffe Dekker Hofmeyr.

For the Third Respondent: Mr B Mgaga.

Garlicke & Bousfield Attorneys Inc.