



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 119/20

In the matter between:

MLUNGISI WELLINGTON BOOI

Applicant

and

AMATHOLE DISTRICT MUNICIPALITY

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Second Respondent

MXOLISI ALEX NOZIGQWABA N.O.

Third Respondent

Neutral citation: *Booi v Amathole District Municipality and Others* [2021] ZACC 36

Coram: Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgments: Khampepe ADCJ (unanimous)

Heard on: 18 May 2021

Decided on: 19 October 2021

Summary: Labour Relations Act 66 of 1995 — remedy of reinstatement — section 193(2)(b) demands that intolerability of continued employment relationship be considered before reinstatement is ordered — high threshold of intolerability required for departure from primary remedy of reinstatement

Application for leave to appeal — review of arbitration award —
peremption — no ground for interference with arbitration award
— appeal upheld

ORDER

On application for leave to appeal:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld.
4. The order of the Labour Court handed down on 3 November 2017 is set aside and replaced with the following:
 - “1. The application to review and set aside the arbitration award issued by the third respondent under case number ECD 041609 dated 17 October 2016 is dismissed.
 2. The Amathole District Municipality is ordered to reinstate Mr Mlungisi Wellington Booï on terms not less favourable than those that applied prior to his dismissal.
 3. The Amathole District Municipality is ordered to pay Mr Mlungisi Wellington Booï back-pay for his retrospective reinstatement for the period between 9 December 2015 and 3 November 2017, less any amounts already paid to him pursuant to his dismissal.”
5. The punitive costs award against Mr Mlungisi Wellington Booï made by the Labour Court in its judgment dated 24 April 2018 is set aside.
6. There is no order as to costs in relation to the proceedings in this Court.

JUDGMENT

KHAMPEPE ADCJ (Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaetsi AJ and Tshiqi J concurring):

Introduction

“Employees are ordinarily vulnerable because, unlike employers, they do not often have the resources necessary to vindicate their rights by prosecuting cases all the way up to this Court. Condoning the flouting of laws that govern the fate of people’s livelihood is a matter so serious that it always requires greater sensitivity and care.”¹

[1] It is precisely because employees are vulnerable, often lack resources, and that there are labour law rules that regulate the everyday lived experiences of so many, that a body of jurisprudence has developed that seeks to promote, protect and fulfil the right to fair labour practices, in order to embed this right in the fabric of this democracy. Why? Because what is at stake, after all, is a person’s livelihood, upon which much in life depends.

[2] This matter has arrived at the door of this Court because, according to the applicant, his right to fair labour practices is at stake. This, in respect of an ordinary employee dismissed from gainful employment, whose dismissal was subsequently found to be unfair, and who was subsequently exonerated of the charges that constituted the genesis of the dismissal, yet who has been precluded from the benefit of reinstatement. The relief being sought is reinstatement. And the crisp question that seizes the attention of this Court is whether a court or arbitrator is entitled, in terms of section 193(2)(b) of the Labour Relations Act² (LRA), to consider whether a continued employment relationship would be intolerable, when considering the remedy of reinstatement.

¹ *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (SARS) at para 52.

² 66 of 1995.

[3] Let me begin by outlining the genealogy of this matter, before I turn to address the crux of it, with what I hope will embody the requisite sensitivity and care.

Background and litigation history

[4] This matter concerns a dismissal dispute between the applicant, Mr Mlungisi Wellington Booï and the first respondent, his former employer, the Amathole District Municipality. Mr Booï was employed by the Municipality as a senior manager of municipal health services until he was charged with misconduct, and dismissed in December 2015, following a disciplinary hearing that found him guilty of all of the charges levelled against him.³

Bargaining Council

[5] Aggrieved, Mr Booï disputed the substantive and procedural fairness of the dismissal in the South African Local Government Bargaining Council, cited as the second respondent. The presiding officer of the arbitration proceedings, Mr Mxolisi Alex Nozigqwaba N.O., cited in this Court as the third respondent, exculpated Mr Booï of all charges and found that his dismissal was substantively unfair. The arbitrator dismissed Mr Booï's argument regarding procedural unfairness on the basis that the evidence did not support such a finding.

³ Mr Booï faced the following charges in the disciplinary hearing:

- “1. You conducted yourself in an insubordinate, provocative and wilful manner by alleging that a factual finding that a performance target (Key Performance Indicators) KPI 53 for G2 was not met was wrong and just an opinion of the Municipal Manager, and that borders on insolence.
2. You were grossly dishonest by misrepresenting the facts in the performance template and supplied incorrect information that a target was achieved whereas it was not.
3. You were gross[ly] negligent by failing to perform your job responsibility diligently to the best of your ability and ensure that the Municipal Health Information System is utilised by the staff under your supervision as a Senior Manager.
4. The conduct mentioned in charge 3 has put the image of the Amathole District Municipality into disrepute and under spotlight in the meeting attended by six municipalities on 06 May 2015 wherein it was reported that ADM was still not reporting the District Environmental Health Information System (DHEIS) despite numerous attempts made for ADM to do so.”

[6] Applying section 193(2) of the LRA, the arbitrator granted an arbitration award, in terms of which Mr Booi was to be reinstated retrospectively. On the point of reinstatement, the Municipality had argued that Mr Booi's continued employment would be an operational risk because the relationship of trust between him and his direct supervisor, Ms Mniki, had irretrievably broken down. The arbitrator concluded that this argument was premised on Mr Booi being found guilty of the misconduct for which he was disciplined by the Municipality. *In casu*, Mr Booi was found to be innocent, and although there may have been strained personal relations between Mr Booi and his supervisor, the arbitrator held that this was insufficient to "persuade [him] to deviate from the primary remedy of substantive unfairness of the dismissal". The arbitrator awarded retrospective reinstatement to the effect that the Municipality was ordered to pay Mr Booi back-pay in the amount of R741 340.64.

Labour Court

[7] After the award was handed down, and before Mr Booi could report for duty, the Municipality approached the Labour Court to review the award. The application was based on three primary grounds for review: firstly, the arbitrator misconstrued the essence of the charges for which Mr Booi was dismissed and accordingly misconceived the entire enquiry into substantive fairness; secondly, the arbitrator misapplied the law of evidence in respect of certain evidence, including a voice clip introduced by Mr Booi during the arbitration, and consequently misconstrued the evidence; and thirdly, the arbitrator committed a reviewable irregularity by ordering reinstatement despite the fact that the trust relationship between Mr Booi and the Municipality had, on the evidence, obviously broken down. Mr Booi disputed these grounds of review, maintaining that the arbitrator did not err in his interpretation and analysis of the charges and the evidence. He maintained that he was prepared to continue working with Ms Mniki, notwithstanding the fact that both of them had attested to their difficult relationship during the arbitration proceedings.

[8] The Labour Court held that it was "entitled to interfere with an award made by a commissioner if and only if the commissioner misconceived the nature of the

enquiry . . . or committed a reviewable irregularity which had the consequence of an unreasonable result”.⁴ The Labour Court held that the arbitrator’s finding in respect of the charges was not so wholly unconnected to the evidence that it could be said that it was a decision that no reasonable decision-maker would have reached.⁵ In other words, the arbitrator’s finding that Mr Booi was not guilty of the four charges fell within the band of reasonable decisions.

[9] However, the Labour Court considered the third ground of review raised by the Municipality and held that the arbitrator’s decision not to deviate from the primary remedy of reinstatement is unsustainable, given the reasonableness threshold, on the available evidence. The Labour Court held that the applicable law was section 193(2) of the LRA, which obliges an arbitrator to require an employer to reinstate an employee whose dismissal is found to be unfair, unless the circumstances surrounding the dismissal would render a continued employment relationship intolerable.⁶ On the basis of the cumulative evidence, the Labour Court held that the manner in which Mr Booi conducted himself, although insufficient to sustain a finding of misconduct, was completely destructive to the prospect of a continued employment relationship. Therefore, in failing to take account of this evidence in reaching his order of reinstatement, the arbitrator reached a decision that fell outside the “band of decisions that are reasonable”.⁷ The Labour Court upheld the arbitrator’s finding that the dismissal was unfair, but set aside the award of retrospective reinstatement, replacing it with one of compensation in a sum equivalent to eight months’ remuneration.⁸ It is important to note that Mr Booi demanded and received payment in terms of that judgment.

⁴ *Amathole District Municipality v Mlungisi Wellington Booi*, unreported judgment of the Labour Court of South Africa, Port Elizabeth, Case No PR 235/16 (3 November 2017) (Labour Court judgment) at para 14.

⁵ *Id* at paras 16-7.

⁶ *Id* at para 19.

⁷ *Id* at para 21.

⁸ The amount of compensation awarded by the Labour Court was equivalent to the amount of back-pay awarded by the arbitrator pursuant to the award of retrospective reinstatement, being R741 340.64.

Labour Court: leave to appeal

[10] Although not within the prescribed time period, Mr Booi sought leave from the Labour Court, to appeal to the Labour Appeal Court. His application was accompanied by an application for condonation. Mr Booi attributed the belated filing of his application to difficulties he had experienced in obtaining legal representation and submitted that it was in the interests of justice to grant leave since his main application bore strong prospects of success.

[11] The Labour Court held that there was a significant degree of doubt regarding the probability of Mr Booi's explanation for his delay.⁹ However, that the greatest issue for his application was that he had demanded payment in terms of the decision that he was seeking leave to appeal.¹⁰ The Court, applying the doctrine of peremption,¹¹ held that, in demanding payment, Mr Booi had evinced a clear intention to abide by the judgment of the Labour Court, rather than contest it. And, in this act of acquiescence, he had barred himself from later pursuing an appeal. The Labour Court refused to grant condonation, and, holding the view that Mr Booi had acted in bad faith and abused court process, awarded punitive costs on an attorney client scale.¹²

Labour Appeal Court

[12] Almost a year later, after his application for condonation was refused by the Labour Court, Mr Booi petitioned the Labour Appeal Court directly to appeal the Labour Court judgment on the same grounds as those advanced in the original application. Namely, that the Labour Court had misdirected itself by reviewing the arbitration award on a ground that was not adequately raised by the Municipality, and that the Labour Court had effectively raised the ground of review *mero motu* (of its own

⁹ *Mlungisi Booi v Amathole District Municipality*, unreported judgment of the Labour Court of South Africa, Port Elizabeth, Case No PR 235/16 (24 April 2018) (Labour Court appeal judgment) at para 4.

¹⁰ *Id.*

¹¹ The principles relevant to peremption were set out in *Dabner v South African Railways and Harbours* 1920 AD 583 at 594. See also, *National Union of Metalworkers of SA v Fast Freeze* (1992) 13 ILJ 963 (LAC).

¹² Labour Court appeal judgment at para 8.

volition) without affording him an opportunity to address the Court on the issue of the intolerability of the continued working relationship.¹³ In addition, he refuted the Labour Court's conclusions regarding his conduct and argued that he had had no knowledge of the doctrine of peremption and the consequences of his demand for payment on his right to appeal. The Labour Appeal Court granted condonation, but dismissed the application for leave to appeal on the basis that it lacked prospects of success.

Mr Booi's submissions before this Court

[13] Mr Booi approached this Court to contest the Labour Court's decision to set aside the arbitration award and substitute the reinstatement order with an order for the payment of compensation. He seeks reinstatement.

[14] To begin with, Mr Booi admits that his application was filed some 213 calendar days late. However, he emphasises that this came about because he was unemployed and unrepresented, and endured difficulty in securing legal advice, particularly once the lockdown measures were implemented. Thus, this Court ought to condone his non-compliance with the Rules of this Court on the basis that the interests of justice require it in these circumstances.¹⁴ After all, he submits, his appeal raises important constitutional issues pertaining to employment security.

[15] On jurisdiction, Mr Booi submits that this Court's jurisdiction is engaged, firstly, because the matter concerns his constitutional right to fair labour practices enshrined in section 23 of the Constitution. This, he avers, is because this matter calls for the interpretation and application of sections 145 and 193(2)(b) of the LRA, and it is trite

¹³ The Municipality argued that the intolerability of a continued employment relationship was, in fact, pleaded as a ground of review before the Labour Court and thus, the Court had not raised the issue *mero motu*. In addition, the Municipality averred that there was ample evidence before the Labour Court which was indicative of the intolerability of a continued employment relationship, and Mr Booi was expressly given an opportunity to address the Labour Court on that issue during argument.

¹⁴ In making this submission, Mr Booi relies on this Court's jurisprudence in the following cases: *Notyawa v Makana Municipality* [2019] ZACC 43; (2020) 41 ILJ 1069 (CC); 2020 (2) BCLR 136 (CC); *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC); and *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC).

that the interpretation and application of the LRA gives rise to a constitutional issue. He also submits that this Court's extended jurisdiction is engaged.¹⁵ Mr Booi contends, further, that it is in the interests of justice to grant leave because there are reasonable prospects of success on appeal in the light of the fact that the *courts a quo* erred in their treatment of the matter.

[16] The crux of Mr Booi's case is that he ought to have been reinstated given that he was exonerated of the charges laid against him; thus, the Labour Court erred in interfering with the arbitrator's award, in terms of which he would have enjoyed reinstatement. He emphasises that the existing legal precedent supports the principle that the primary remedy for employees who have demonstrated that they were not guilty of allegations of misconduct levelled against them, rendering their dismissal unfair, is that they fall to be reinstated. This is the primary relief promised by section 193 of the LRA.

[17] Mr Booi further submits that the Labour Court impermissibly raised the question of the intolerability of a continued employment relationship between himself and Ms Mniki, *mero motu*.¹⁶ Mr Booi contends that the Labour Court did so when it said that any one of the four allegations of misconduct, if proven, would render a continued employment relationship intolerable, and if more than one was proven, the cumulative effect of this would be completely destructive of the prospect of a continued employment relationship. This, he submits was inappropriate since the Municipality had not raised the question of the intolerability of a continued employment relationship, so the Labour Court therefore effectively advanced arguments that went beyond the pleaded case. On this, Mr Booi makes much of the fact that courts are bound by the

¹⁵ In terms of section 167(3)(b)(ii) of the Constitution.

¹⁶ Before the matter was set down for hearing, this Court issued directions which called for the parties to file written submissions on the question of whether the intolerability of a continued employment relationship was a review ground before the Labour Court, or whether that Court raised the point *mero motu* – which is understood to refer to a court raising and deciding an issue that had not been properly placed before it for determination by way of the pleadings.

issues that litigating parties plead before them.¹⁷ Whilst he acknowledges that there may be circumstances where issues can be raised *mero motu*, he avers that the requirements for doing so were not met in this case.

[18] On the merits of that question, in any event, Mr Booi takes issue with the Labour Court's assessment of the employment relationship. Although he admits, as he conceded in the disciplinary proceedings, that his relationship with his supervisor was strained, the finding that it had irretrievably broken down was inaccurate. He emphasises that he has never conceded that there existed, or was going to exist, an "intolerable" employment relationship. He further avers that the Labour Court erred in placing inordinate weight on the subjective contentions of Ms Mniki when considering the evidence as to the quality of their relationship.

[19] Furthermore, Mr Booi emphasises that the Municipality's case has always been that any of the four allegations of misconduct, if proven, would render a continued employment relationship intolerable. However, it was never the Municipality's case that if the allegations of misconduct were not proven, then the possibility of a continued employment relationship would still be intolerable. In other words: the intolerability of the employment relationship was always dependent upon the allegations of misconduct being proven. Accordingly, he takes issue with the fact that the Labour Court, in reaching a conclusion as to the intolerability of their relationship, relied on factors relating to the charges that it had exonerated him of. According to Mr Booi, once the Labour Court had accepted that the evidence did not prove the charges against him, it naturally followed that the same evidence could not be relied upon by the Labour Court

¹⁷ Citing *Head of Department, Department of Education Free State Province v Welkom High School; Head of Department, Department of Education Free State Province v Harmony High School (Equal Education and Centre for Child Law as Amici Curiae)* [2013] ZACC 25; 2014 (2) SA 228 (CC); 2013 (9) BCLR 989 (CC) at para 244 and *Sterkiewies (Pty) Ltd t/a Harrismith Feedlot v Msimango* [2012] ZASCA 77; 2012 (5) SA 392 (SCA). He also relies on *Southern Africa Enterprise Development Fund v Industrial Credit Corporation Africa Limited* 2008 (6) SA 468 (W) at para 22, where it was said that the role of the reviewing court is limited to deciding issues that are raised in the review proceedings, and a court may not, on its own, raise issues not raised by the party who seeks the review. Mr Booi relies on *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA) (*Mothupi*) where it was held at para 30 that "a court will not allow a new point to be raised for the first time on appeal unless it was covered by the pleadings" and that "[i]t would be unfair to the other party if the new point was not fully canvassed or investigated at the trial".

to deny reinstating him. Thus, once he was exonerated of the charges, he was entitled to reinstatement as the primary remedy provided by the LRA.¹⁸

[20] As far as peremption goes, Mr Booi submits that he has not perempted his right to bring this appeal, as the Municipality contends, but that it was simply unfortunate that in order to have been in a position to appeal the Labour Court judgment, he had no choice but to demand payment in terms of the judgment. But, in any event, even if this Court concludes that he has perempted his right by acquiescence, it is open to a court, in certain circumstances, to entertain an appeal notwithstanding a waiver of the right to appeal.¹⁹ This, he avers, is plainly a case where the interests of justice weigh in favour of this Court doing exactly that.

The Municipality's submissions before this Court

[21] The Municipality maintains that Mr Booi's appeal, the focus of which is the Labour Court's decision to substitute an order of reinstatement with one of compensation, is without merit. It submits that the Labour Court correctly found that Mr Booi had perempted his right to challenge the Labour Court's judgment, given that he had sought and received the financial benefit of that judgment, which is an obstacle that still confronts his application.

[22] The Municipality further submits that the Labour Court was correct in substituting the order of reinstatement with one of compensation because it did so on

¹⁸ Mr Booi relies on, for example, *Amalgamated Pharmaceuticals Ltd v Grobler N.O.* (2004) 25 ILJ 523 (LC) (*Amalgamated Pharmaceuticals*), in which the Labour Court held, at para 13, that:

“the mere fact that the applicant does not trust the individual respondents cannot, without more, be a basis for holding that the employment relationship has broken . . . [t]o punish the individual respondents with unemployment, even if this is accompanied with some compensation, without finding them guilty of any wrongdoing is grossly unfair.”

Similarly, he cites *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* [2010] ZACC 3; (2010) 31 ILJ 273 (CC); 2010 (5) BCLR 422 (CC) (*Billiton*) at para 29, where Froneman J held as follows:

“[i]f [the conduct] did not justify dismissal, I find it difficult to understand why, at the same time, it could nevertheless provide a ground to prevent reinstatement.”

¹⁹ *SARS* above n 1 at para 27; *Minister of Defence v South African National Defence Force Union* [2012] ZASCA 110 (*SANDFU*) at para 23; and *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA) (*Von Abo*) at para 19.

account of the intolerability of the employment relationship. On an overall conspectus of the evidence, Ms Mniki's description of Mr Booi's conduct and the troubled state of the relationship, even on his own account, could not be seriously disputed. Thus, the Labour Court was entirely correct in concluding that the arbitrator ought not to have granted the remedy of reinstatement in the light of this evidence, as there was clearly no prospect of a viable employment relationship being established pursuant to a reinstatement order.

[23] It avers that the Labour Court did not raise the appropriateness of reinstatement *mero motu*. This is because it had placed the reinstatement order before the Labour Court as a pleaded basis for interference with the arbitrator's award, regardless of Mr Booi's guilt or innocence in respect of the charges, and the matter was fully ventilated by both parties during oral argument. And, it goes on, even if the Labour Court had raised the question *mero motu*, doing so was permissible since the ventilation of the question of the appropriateness of reinstatement was patently necessary for the purpose of ensuring that justice was done.

[24] In fact, the Municipality submits that where the arbitrator went wrong, as the Labour Court pointed out, was in the assumption that a finding of not guilty in respect of the substantive misconduct charges meant that the remedy of reinstatement necessarily had to follow. According to the Municipality, that assumption was a *non sequitur* (a conclusion that does not follow), given the arbitrator's duty to examine the objective evidence before him at the arbitration. In conclusion, the Municipality avers that there is no basis for this Court to interfere with the Labour Court's judgment.

Jurisdiction and leave to appeal

[25] This matter engages this Court's jurisdiction. That is so because the matter concerns the interpretation and application of section 193 of the LRA, particularly section 193(2)(b). It is trite that a matter that concerns the interpretation and application

of the LRA raises a constitutional issue that clothes this Court with jurisdiction.²⁰ Further, the core of the dispute is Mr Booi's entitlement to reinstatement pursuant to a substantively unfair dismissal. That implicates his right to security of employment, which is part of the right to fair labour practices in section 23(1) of the Constitution. As my ensuing discussion of each of the issues raised shows, there are also strong prospects of success, which tips the scales in favour of granting leave to appeal.

Condonation

[26] Now, let me dispose of an issue which, unless resolved, may prove fatal to Mr Booi's application: that is, the question of condonation. Mr Booi was delayed in filing his application for leave to appeal in this Court.

[27] Condonation is not merely for the taking. In the oft cited case *Brummer*, this Court confirmed that condonation should be granted if it is in the interests of justice, which can be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the effect on the administration of justice, prejudice and the reasonableness of the explanation for the delay.²¹

[28] Mr Booi has provided extensive reasons as to why this Court should grant condonation, by which I am persuaded. For the greater part of these proceedings, Mr Booi has been self-represented. And, upon the appointment of counsel pro bono at the instance of this Court, issues arose which can be attributed to the absence of instructing attorneys. Furthermore, it is to be recalled that Mr Booi is before this Court pursuing his constitutionally enshrined rights to fair labour practices. When regard is had to the reasons for and the nature of the delay, coupled with the decent prospects that this application bears, it is in the interests of justice to grant condonation.

²⁰ See *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* [2015] ZACC 8; 2015 JDR 0738 (CC); 2015 (6) BCLR 660 (CC) at para 14 and *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 50.

²¹ See *Brummer* above n 14 at para 3.

Peremption

[29] Another preliminary obstacle that must be overcome before I deal with the merits of this appeal is the issue of peremption. It cannot be gainsaid that the doctrine of peremption serves the important purpose of legal certainty, but it is trite that its application is not absolute.²² When a court faces the possible operation of the doctrine, the relevant enquiry is whether there are overriding policy considerations that militate against the enforcement of peremption of the party's right of appeal.²³

[30] It is common cause that Mr Booï instructed his erstwhile legal representatives to secure payment of the compensation in terms of the Labour Court's judgment, and that this conduct objectively created the impression that he had acquiesced in that judgment. However, Mr Booï was at pains to demonstrate that his actions were guided by the advice of attorneys who not only assisted him in securing payment of the compensation, but also acted as his attorneys of record in his application for leave to appeal in the Labour Court. That Court even acknowledged their role and stated that costs *de bonis propriis* could have been in order had this been sought.²⁴ This finding is antithetical to the Labour Court's conclusion that the doctrine of peremption clearly applies, because it signifies the likelihood that Mr Booï's actions were an unfortunate consequence of the conduct, or rather misconduct, of his attorneys.

²² *SANDFU* above n 19 at para 23, where the Supreme Court of Appeal cited its earlier decision in *Von Abo* above n 19 at para 19, and stated as follows:

“The general rule that a litigant who has deliberately abandoned a right to appeal will not be permitted to revive it is but one aspect of a broader policy that there must at some time be finality in litigation in the interests both of the parties and of the proper administration of justice. Bearing in mind the policy underlying the rule it must necessarily be open to a court to overlook the acquiescence where the broader interests of justice would otherwise not be served. As this Court said recently in *Government of the Republic of South Africa v Von Abo*, in response to a similar contention that the appeal had been perempted:

‘It would be intolerable if, in the current situation, this Court would be precluded from investigating the legal soundness of the first order, as a result of the incorrect advice followed by the appellants or an incorrect concession made by them.’”

²³ *SARS* above n 1 at para 25.

²⁴ Labour Court appeal judgment above n 9 at para 8.

[31] This matter raises issues relating to fair labour practices and job security, which this Court has held to be core values of the LRA and important constitutional issues.²⁵ Under these circumstances, the interests of justice will be favoured by this Court electing not to enforce peremption. The Municipality's contention that the constitutional issues raised in *SARS*, where this Court held that the policy considerations favoured not enforcing peremption,²⁶ were of greater consequence than any raised in this matter is unsustainable and insensitive. Widespread joblessness, poverty and exploitation of employees in South Africa are all hurdles that the constitutional project seeks to overcome. Safeguarding security of employment is central to this endeavour.

[32] In addition, there are aspects of Mr Booi's conduct that weigh in his favour. To a person versed in and familiar with the law, it may be perspicuous that a litigant cannot endeavour to benefit from the same court order that they seek to overturn on appeal. But Mr Booi is a layperson, and his misunderstanding is not altogether unfathomable. He was unemployed for nearly two years when the Labour Court handed down its judgment in the review proceedings. During those proceedings, he persisted with the argument that he was entitled to be reinstated after being unfairly dismissed. It is understandable that he would have been suffering financial hardship at the time, and that his efforts were focused on being reinstated in his former job rather than finding alternative work. Mr Booi's relentless pursuit of this appeal, which extended to his decision to personally draft an application for leave to appeal to this Court, further demonstrates that it was never his intention to waive his right to appeal.

[33] Mr Booi's invidious position is all the more evident against the backdrop of the harsh realities of the South African job market and that he had been acquitted of all charges by the arbitrator and the Labour Court. Under these circumstances, it is understandable that Mr Booi may have opportunistically thought, albeit incorrectly, that the financial impediment to his appeal could be overcome by the compensation owed

²⁵ See *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) (*Equity Aviation Services*) at paras 30-1.

²⁶ *SARS* above n 1 at para 29.

to him in terms of the Labour Court's order. His unfamiliarity with the law, his desperate circumstances and the poor legal advice provided to him led to this situation. I am accordingly satisfied that the policy considerations, coupled with the fact that Mr Booi's position was occasioned by a substantively unfair dismissal, weigh in favour of not enforcing peremption. This Court is therefore entitled to deal with this application.

*Did the Labour Court raise the intolerability of the continued employment relationship *mero motu*?*

[34] One of the main grounds of appeal in this matter relates to Mr Booi's averment that the Labour Court, in deciding to order compensation rather than reinstatement, raised the issue of the intolerability of the continued employment relationship *mero motu*. I must say that I am wholly unpersuaded by this argument: it is perspicuous that the question, and quality, of the relationship between Mr Booi and Ms Mniki was a feature of the record, and Mr Booi himself had, at various times, alleged that it had soured. It was even the subject of oral argument before the Labour Court. It is a total stretch, then, to suggest that the Labour Court raised it out of the blue. However, even if the Labour Court did raise the issue *mero motu*, it would have been justified in doing so, as I demonstrate below.

[35] It is trite that courts are bound by the issues that the litigating parties raise.²⁷ However, a court can raise an issue *mero motu* where (i) raising it is necessary to dispose of the matter, and (ii) it is in the interests of justice to do so, which depends on the circumstances at hand.²⁸

²⁷ See, for example, *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 67 and *Mothupi* above n 17 at para 30.

²⁸ *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 58, relying on *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at paras 40-1.

[36] To the extent that it can be said that the Labour Court raised the question of the intolerability of the working relationship *mero motu*, it was in the interests of justice for that Court to do so, that issue being so fundamental to the question of whether reinstatement, as a remedy, would be appropriate. In *Moodley*,²⁹ the Labour Appeal Court emphasised that an arbitrator's failure to take cognisance of section 193(2) and to consider whether reinstatement might be inappropriate constituted a reviewable irregularity. This fortifies my view that section 193(2) requires a court to consider the intolerability of the working relationship prior to making an order of reinstatement, a position also crisply captured in *Toyota*:

“Once the Labour Court or an arbitrator has found a dismissal unfair, it, she or he is obliged to consider which one of the remedies listed in section 193(1) is appropriate, having regard to the meaning of section 193(2). Considering both the provisions of section 193(1) and section 193(2) is important because one cannot adopt the attitude that dismissal is unfair, therefore, reinstatement must be ordered. The Labour Court or an arbitrator should carefully consider the options of remedies in section 193(1) as well as the effect of the provisions of section 193(2) before deciding on an appropriate remedy. A failure to have regard to the provisions of section 193(1) and (2) may lead to the court or arbitrator granting an award of reinstatement in a case in which that remedy is precluded by section 193(2).”³⁰

It cannot be said then, that just because the charges of misconduct could not be proven, the intolerability of a continued employment relationship could not still be examined.

[37] In fact, the Labour Court would have had to have raised the issue even in the absence of any specific evidence or pleadings to that effect, as held in *Mediterranean Textile Mills*—

²⁹ *Moodley v Department of National Treasury* [2017] ZALAC 5; (2017) 38 ILJ 1098 (LAC) at para 33.

³⁰ *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2015] ZACC 40; (2016) 37 ILJ 313 (CC); 2016 (3) BCLR 374 (CC) (*Toyota*) at para 135.

“even in a situation . . . where no specific evidence was canvassed or submissions made during the trial on the issue of the non-reinstatable conditions, the court or the arbitrator is not only entitled but, in my view, is obliged to take into account any factor which in the opinion of the court or the arbitrator is relevant to the determination of whether or not such conditions exist.”³¹

Intolerability is a matter for the court or arbitrator to determine when exercising the discretion to order reinstatement, and not merely a matter of the parties’ pleadings. This case simply cannot turn on the question of whether the Labour Court raised the issue *mero motu*. What the matter turns on is the proper approach to section 193(2)(b) of the LRA, and the nature of the enquiry when an arbitrator’s decision to order reinstatement is taken on review to the Labour Court. It is to this that I therefore turn.

Proper approach to section 193(2)(b)

[38] It is plain from this Court’s jurisprudence that where a dismissal has been found to be substantively unfair, “reinstatement is the primary remedy” and, therefore, “[a] court or arbitrator must order the employer to reinstate or re-employ the employee unless one or more of the circumstances specified in section 193(2)(a)-(d) exist, in which case compensation may be ordered depending on the nature of the dismissal”.³²

[39] The primacy of the remedy of reinstatement is no coincidence. It is the product of a deliberate policy choice adopted by the Legislature. This choice, and its centrality to our laws governing labour disputes, is articulated in the following extract taken from the explanatory memorandum attached to the Draft Labour Relations Bill:³³

³¹ *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union* [2011] ZALAC 23; (2012) 33 ILJ 160 (LAC) (*Mediterranean Textile Mills*) at para 30. This was confirmed in *Booyesen v Safety and Security Sectoral Bargaining Council* [2021] ZALAC 7; (2021) 42 ILJ 1192 (LAC) at paras 16-7.

³² *Equity Aviation Services* above n 25 at para 33, which was confirmed in *Billiton* above n 18 at para 26.

³³ See the Explanatory Memorandum of Draft Negotiating Document in the Form of a Labour Relations Bill, GN 95 GG 165259, 10 February 1995 (Draft Labour Relations Bill).

“A major change introduced by the draft Bill concerns adjudicative structures. In the absence of private agreements, a system of compulsory arbitration is introduced for the determination of disputes concerning dismissal for misconduct and incapacity. By providing for the determination of dismissal disputes by final and binding arbitration, the draft Bill adopts a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal. *The main objective of the revised system is to achieve reinstatement as the primary remedy. This objective is based on the desire not only to protect the rights of the individual worker, but to achieve the objects of industrial peace and reduce exorbitant costs.* It is premised on the assumption that unless a credible, legitimate alternative process is provided for determining unfair dismissal disputes, workers will resort to industrial action in response to dismissal. . . . *Without reinstatement as a primary remedy, the draft Bill's prohibition of strikes in support of dismissal disputes loses its legitimacy.*”³⁴ (Emphasis added.)

[40] It is accordingly no surprise that the language, context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one. The term “intolerable” implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in section 193(2), which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal.³⁵ And, my approach to section 193(2)(b) is fortified by the jurisprudence of the Labour Appeal Court and the Labour Court, both of which have taken the view that the conclusion of intolerability should not easily be reached, and that the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability.³⁶

[41] Thus, “intolerability” in the working relationship should not be confused with mere “incompatibility” between the parties. “Incompatibility” might trigger a different kind of enquiry with different remedies. For instance, an incapacity enquiry may be

³⁴ Id at 141-2.

³⁵ *Equity Aviation Services* above n 25 at para 36.

³⁶ See, in particular, *National Transport Movement v Passenger Rail Agency of SA Ltd* [2017] ZALAC 71; (2018) 39 ILJ 560 (LAC) and *Jabari v Telkom SA (Pty) Ltd* (2006) 27 ILJ 1854 (LC).

held to establish whether the incompatibility goes as far as rendering the employee incapable of fulfilling their duties. This is entirely distinct from “intolerable” relations.

[42] I hasten to add that the evidentiary burden to establish intolerability is heightened where the dismissed employee has been exonerated of all charges. In this context, what ought to ring true are the words of the Labour Court in *Amalgamated Pharmaceuticals*, that in a constitutional democracy in which the right to fair labour practices is entrenched, “[t]o punish . . . [individuals] . . . with unemployment, even if this is accompanied with some compensation, without finding them guilty of any wrongdoing is grossly unfair”.³⁷ Similarly, we ought to be guided by what this Court said in *Billiton*: “[i]f [the conduct] did not justify dismissal . . . it [is] difficult to understand why, at the same time, it could nevertheless provide a ground to prevent reinstatement”.³⁸ It should take more to meet the high threshold of intolerability than for the employer to simply reproduce, verbatim, the same evidence which has been rejected as insufficient to justify dismissal.

[43] Having said all of the above, where an arbitrator acting in terms of section 193(2) has considered all the evidence, found that it does not establish intolerability, and decided to order the primary remedy of reinstatement, then the high bar implied by section 193(2)(b) dictates that the arbitrator’s decision should not readily be interfered with by a review court. Furthermore, a review court is confined to the strict grounds of review under the LRA, and narrow standard set by *Sidumo*:³⁹ namely, is the decision reached by the arbitrator one that a reasonable decision-maker could not reach? All this to say that the question which arises in this case is whether the Labour Court was entitled to interfere with the award of the arbitrator on the basis of the reasonableness standard which that Court purportedly applied. I address that question in what follows.

³⁷ *Amalgamated Pharmaceuticals* above n 18 at para 13.

³⁸ *Billiton* above n 18 at para 29.

³⁹ *Sidumo* above n 20.

Was the Labour Court entitled to interfere with the arbitrator's decision?

[44] I must state upfront that the answer to this question is “no”. Despite the Labour Court having paid lip service to the question of whether the order of reinstatement fell outside of a band of decisions to which a reasonable arbitrator could arrive, it appears that the Court considered itself at large to conduct the enquiry that was before the arbitrator afresh – as if it were sitting as a court on appeal. This was a fatal error – one which this Court warned against in *Sidumo*, when it said that reviews should not be conflated with appeals. A court reviewing an arbitration award of reinstatement on the basis of the intolerability provision in section 193(2)(b) does not itself conduct the intolerability enquiry afresh. Instead, it assesses whether the enquiry conducted by the arbitrator led them to a decision which could not have been reached by a reasonable decision-maker conducting that enquiry.

[45] One only has to look at the evidence relied on by the Labour Court to conclude that the Court, with respect, fudged the enquiry. Much weight was attributed by the Labour Court to Ms Mniki's views of Mr Boo's alleged incompetence; her feelings of humiliation, embarrassment and disrespect at his instance; and her assessment that she was unable to work with him again. The Labour Court took the view that the arbitrator had failed to have regard to Ms Mniki's evidence, and that this failure was attributable to the arbitrator's erroneous view that, because the evidence had not established misconduct, it was irrelevant to the question of the intolerability of reinstatement.

[46] My assessment of paragraph 18 of the arbitrator's award⁴⁰ leads me to a different conclusion. It is evident from this paragraph that the arbitrator did consider Ms Mniki's

⁴⁰ Para 18 of the arbitration award reads as follows:

“On the issue of appropriate relief, I have carefully considered both parties' submissions in light of what the law provides. The applicant seeks reinstatement as a relief. The respondent is arguing that continued employment would operationally be too risky as there is likelihood of repetition of the tensions between the applicant and his direct supervisor. There is also a submission to the effect that the relationship has been irretrievably broken down. The respondent's submissions in this regard speak to a situation whereby the applicant is guilty of the offence charged of and is to be viewed as an operational risk. In the case at hand the applicant is not guilty of all the charges. He has not been found to be guilty of any offence. Yes there might have been strained personal relations between the applicant and his supervisor

evidence that the relationship had irretrievably broken down, but found that this evidence was presented in a manner that hinged on Mr Booi's guilt, which was not established. Far from ignoring Ms Mniki's cries, the arbitrator was alive to her evidence of "strained personal relations", but nevertheless concluded that this evidence had not persuaded him "to deviate from the primary remedy of a substantive dismissal, which is to order reinstatement". It follows that there was no basis for the Labour Court's interference with the arbitrator's exercise of his discretion to reinstate on the ground that the arbitrator had failed to consider Ms Mniki's evidence. That evidence was considered. Having disposed of Ms Mniki's evidence in his findings on the charge of misconduct, the arbitrator was entitled to attach scant weight to it when considering the appropriate remedy. That decision fell within the band of reasonable decisions which the arbitrator could have reached in his assessment of the evidence. The Labour Court itself acknowledged that it was not entitled to interfere with the reinstatement award merely because it disagreed with the arbitrator attaching, or failing to attach, weight to particular evidence. Yet, that is precisely what it did.

[47] The reasonableness of the arbitrator's decision is unassailable, which is all the more evident when one considers what I have said above about the proper interpretation of section 193(2)(b). If, indeed, the section imposes a high threshold that requires compelling evidence before a conclusion of intolerability can be reached, then it was reasonable for the arbitrator to reach the conclusion he did with regard to Ms Mniki's evidence. It is inevitable that an employer seeking to rid itself of an employee, which has gone so far as to pursue this outcome through a substantively unfair dismissal, will lead evidence that reflects the allegedly poor prospects of a continued relationship. With this in mind, courts ought to be guided by the general principle, which was affirmed by the Labour Appeal Court in *Concorde Plastics*, that the enquiry into whether there has been a breakdown of the employment relationship is an objective one, and does not turn on the subjective and possibly irrational views of the employer.⁴¹ It

but that cannot persuade me to deviate from the primary remedy of substantive unfairness of the dismissal. In light of the aforesaid I find in favour of reinstatement."

⁴¹ *Concorde Plastics (Pty) Ltd v NUMSA* 1997 (11) BCLR 1624 (LAC) (*Concorde Plastics*) at 1648A-C.

was therefore reasonable for the arbitrator to conclude that Ms Mniki's views about the prospects of a continued relationship were not sufficient to reach the high bar of intolerability, and did not warrant departure from the primary remedy of reinstatement.

[48] Having found that the Labour Court's primary ground for interference with the arbitrator's decision does not hold, the other grounds pale into insignificance. As for the Labour Court's reliance on the evidence of Mr Booi's alleged incompetence and failure to meet performance standards, it is difficult to see how the arbitrator could be said to have acted unreasonably by not considering this evidence. Mr Booi was charged with, and dismissed for, misconduct, and not for incompetence or incompatibility amounting to incapacity. If there were legitimate concerns about his incompetence, that alleged incompetence should not have prevented reinstatement. At best, evidence of incompetence or incapacity could have merely established a ground for the Municipality to launch an investigation into employee performance standards, following Mr Booi's reinstatement.

[49] I can reach no other conclusion than this: none of the grounds advanced by the Labour Court establish that that Court was entitled to interfere with the arbitrator's exercise of his discretion to order reinstatement on the basis that he acted unreasonably. Therefore, the appeal should succeed and the Labour Court's decision should be set aside.

[50] Before I proceed to the appropriate remedy, I wish to devote a moment to a salient point that ought to be taken away from this judgment. Labour litigation, as envisaged by the LRA, is distinct from any other civil litigation. This is made abundantly clear in the Preamble to the LRA, and through the specialised system and

institutions created by that Act.⁴² It has also been affirmed by this Court recently.⁴³ It follows that labour disputes must not be perceived as ordinary civil disputes by the courts that adjudicate them. Our law is clear: labour dispute resolution must be expedient, simple, accessible and cost-effective. It is with this in mind that the LRA carves out unique litigious pathways for disputes that arise pertaining to employment relationships. What the Legislature had in mind when carving out these pathways is evident from the explanatory memorandum to the Draft Labour Relations Bill, to which I once again refer:

“In order for this alternative process to be credible and legitimate and to achieve the purposes of the legislation, it must be cheap, accessible, quick and informal. These are the characteristics of arbitration, whose benefits over court adjudication have been shown in a number of international studies. *The absence of an appeal from the arbitrator’s award speeds up the process and frees it from the legalism that accompanies appeal proceedings.* It is tempting to provide for appeals because dismissal is a very serious matter, particularly given the lack of prospects of alternative employment in the present economic climate. *However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business.*”⁴⁴ (Emphasis added.)

[51] It is pertinent that the Legislature deliberately provided for the mechanism of a review, as opposed to an appeal, for arbitration awards made in respect of labour disputes. As demonstrated above, the intention behind this choice was to prevent labour

⁴² The Preamble to the LRA espouses the following purposes of that Act:

“[T]o provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;

to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act.”

⁴³ For an exposition of the jurisprudence dealing with the *sui generis* (unique) and specific nature of labour litigation, see this Court’s recent decision in *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Limited* [2021] ZACC 26 (UPSCO) at paras 24-32.

⁴⁴ Draft Labour Relations Bill above n 33 at 142.

dispute resolution procedures from becoming costly and time-consuming and, thereby, inadvertently favouring the party that wields greater resources and power. It was a pragmatic decision that serves the ends of justice and protects the rights enshrined in section 23 of the Constitution. Courts undermine these imperatives by readily treating reviews as appeals. Arbitration awards are intended to be final and binding. They are not to be treated as a mere box-ticking exercise, or the first step in a drawn-out process that can be exploited by the party who is able to “out-litigate” the other. It is no secret that the Labour Courts are backlogged and that this impedes their ability to adjudicate labour disputes in the swift manner contemplated by the LRA. This problem is, without a doubt, exacerbated when a court fails to distinguish between a genuine review and an appeal disguised as a review.

[52] This matter is a cautionary tale of these systemic problems. Of course, there will be instances where arbitration awards are marred by reviewable irregularities in respect of which the Labour Court is enjoined to intervene to set them aside. In doing so it is fulfilling its constitutional and statutory mandate. However, as Mr Booi’s case illustrates, no interests are served when the Labour Court exceeds the bounds of its power and acts as a court of appeal. A great deal of time and resources could have been saved in this matter if the Labour Court had been alive to these imperatives. In matters concerning a person’s livelihood, the importance of avoiding wastages of this kind cannot be overemphasised.

Remedy

[53] I now turn to the issue of remedy. Having succeeded in this Court, Mr Booi must be granted the remedy for which he has been fighting all along: reinstatement. This is not necessarily a straightforward request because of the effluxion of time since his dismissal. The arbitration award that was erroneously overturned by the Labour Court ordered retrospective reinstatement that entitled Mr Booi to approximately eight months of back-pay for the period between his dismissal and the date of the award.⁴⁵ That was

⁴⁵ This amounted to R741 340.64 as stated in para 20 of the arbitration award.

roughly five years ago, in October 2016. In November 2017, the Labour Court replaced the arbitration award with an order of compensation for exactly the same amount.⁴⁶

[54] This Court has clarified the remedies that a court is entitled to order in respect of unfair dismissals in terms of the LRA,⁴⁷ and has held that compensation in terms of section 193(1)(c) and back-pay for reinstatement are fundamentally distinct remedies.⁴⁸ And, significantly—

“[t]he capping [on compensation] in section 194 has no bearing on retrospective reinstatement. It is only when reinstatement or re-employment is not ordered that compensation in terms of section 194 may be ordered to a maximum equivalent to 12 or 24 months’ remuneration depending on the nature of the dismissal. It follows that it is competent to make a reinstatement order that requires an employer to pay back-pay for more than 12 months.”⁴⁹

[55] It follows that this Court is at liberty to order that Mr Booi is entitled to retrospective reinstatement, and in so doing, is constrained only by section 193(1)(a) of the LRA, which states that the reinstatement may be “from any date not earlier than the date of dismissal”. It is also noteworthy that, in exercising its discretion regarding the date of reinstatement—

“a court or an arbitrator may address, among other things, the period between the dismissal and the trial as well as the fact that the dismissed employee was without

⁴⁶ See para 2 of the order of the Labour Court judgment above n 4.

⁴⁷ These remedies are stipulated in section 193 of the LRA, which provides as follows:

- “(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 re-instate 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.”

⁴⁸ See *Equity Aviation Services* above n 25 at para 41.

⁴⁹ *Id* at para 45.

income during the period of dismissal, ensuring however, that an employer is not unjustly financially burdened if retrospective reinstatement is ordered or awarded.”⁵⁰

As always, any order that this Court makes must be just and equitable in the circumstances, as demanded by section 172 of the Constitution.

[56] Several years have passed since the arbitration award was issued and it is unfortunate that Mr Booi has not been gainfully employed by the Municipality throughout this period. However, in oral submissions his counsel rightly conceded that the delays in these proceedings have been occasioned by Mr Booi’s own conduct, and that it would be unfair to expect the public purse to finance back-pay for this period. Counsel was wise to make this concession. In addition to filing his application for leave to appeal to the Labour Court and the Labour Appeal Court well out of time, Mr Booi’s application for leave to appeal to this Court was characterised by extreme delays attributable to his own conduct. Even the initial hearing date had to be postponed because this Court had to appoint counsel to act on his behalf. This caused further delays in the proceedings. While this Court has deemed it just to grant condonation, an order that would entitle Mr Booi to back-pay for this period would “unjustly financially burden” the Municipality, and indeed the public purse that finances it. Thus, it is only fair that the retrospectivity of the reinstatement be limited to the period between Mr Booi’s dismissal and the date of the Labour Court’s order, being 9 December 2015 and 3 November 2017 respectively. It is equitable that Mr Booi be compensated for this period, during which he had to endure unemployment on account of his unfair dismissal and the Municipality’s review application.

[57] Mr Booi has already received R741 340.64 pursuant to the order of the Labour Court. This amount must be subtracted from the back-pay to which he is entitled for the overall period. Taking all of this into account, I am satisfied that this remedy is just and equitable as well as pragmatic in these circumstances.

⁵⁰ Id at para 43.

Costs

[58] In their submissions, counsel for Mr Booi argued that, should his application succeed in this Court, he should be entitled to costs. This, notwithstanding that he was represented pro bono by Messrs Kroon SC and Grobler. Counsel referred to this Court's decision in *Moko*⁵¹ and argued that access to justice will be served best by courts adopting an approach to costs whereby legal representatives who act pro bono may be entitled to recover their costs.

[59] This Court is indebted to Messrs Kroon SC and Grobler who, in this matter, dedicated their valuable time and resources to Mr Booi's case, and did so without compensation. Indeed, in our country of great inequality where barriers to justice are, at times, insurmountable, it cannot be disputed that society's best interests will be served by legal practitioners being encouraged to do likewise.

[60] However, this is a labour matter and this Court's jurisprudence is settled: the ordinary rule that costs follow the result does not apply in labour matters.⁵² Rather, what emerges from the provisions of the LRA⁵³ and the jurisprudence is that courts,

⁵¹ *Moko v Acting Principal, Malusi Secondary School* [2020] ZACC 30; 2021 (3) SA 323 (CC); 2021 (4) BCLR 420 (CC) at paras 43-4, where this Court cited *Jose v Minister of Home Affairs* 2019 (4) SA 597 (GP) at para 57, and held as follows:

“In my view, the following from *Jose v Minister of Home Affairs* is apt:

‘Legal practitioners who appear pro bono in matters in which litigants would otherwise not be able to pursue their fundamental rights, and in particular where the claims do not sound in money, ought not in ordinary circumstances to be prevented from claiming costs. On the contrary, the granting of a costs order in these circumstances is likely to increase access to justice.’

The pro bono nature of the legal assistance does not affect the costs award in favour of the applicant.”

⁵² *National Union of Mineworkers on behalf of Masha v Samancor Ltd (Eastern Chrome Mines)* [2021] ZACC 16; 2021 (42) ILJ 1881 (CC); 2021 (9) BLLR 883 (CC); *Long v South African Breweries (Pty) Ltd* [2019] ZACC 7; 2019 (40) ILJ 965 (CC); 2019 (5) BCLR 609 (CC); *South African Commercial, Catering and Allied Workers Union v Woolworths (Pty) Limited* [2018] ZACC 44; 2019 (3) SA 362 (CC); 2019 (3) BCLR 412 (CC); and *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; 2018 (39) ILJ 523 (CC); 2018 (6) BCLR 686 (CC). This jurisprudence was recently canvassed and affirmed in *UPSCO* above n 43.

⁵³ The issue of costs is provided for in section 162 of the LRA, which reads as follows:

“(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

when awarding costs in labour disputes, must consider what fairness demands and err on the side of not discouraging parties from approaching the courts for the peaceful resolution of labour disputes.⁵⁴ Further, if costs are to be awarded in labour matters, there must be reasons that justify a court’s decision to depart from the position that a losing party should not be mulcted in costs in labour disputes.

[61] In this matter, I see no reasons that can justify this departure. Although there is a compelling need to encourage legal practitioners to give back to society by breaking down the barriers to access to justice, this does not outweigh the need to preserve the integrity and accessibility of the Labour Courts. To do so would not remove the barrier. It would merely shift it before the doors of the Labour Courts. I accordingly make no order as to costs in this Court. It also goes without saying that the punitive costs awarded against Mr Booi by the Labour Court in its appeal judgment must fall away in the light of this Court’s decision.

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- (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—
- (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
 - (b) the conduct of the parties—
 - (i) in proceeding with or defending the matter before the Court; and
 - (ii) during the proceedings before the Court.
- (3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.”

⁵⁴ This principle was clearly espoused in *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O.* [2007] ZALAC 41; 2008 (29) ILJ 1707 (LAC) at para 19, where the Court held:

“In making decisions on cost orders this Court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers’ organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes. In that way these courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the courts for adjudication.”

Conclusion

[62] There are good reasons that reinstatement is lauded as the primary and commonplace remedy that accompanies findings of substantively unfair dismissals. It would be wholly unpalatable to our Constitution's commitment to the right to fair labour practices if employers were permitted to unfairly dismiss their employees, exonerated of allegations of misconduct, via the backdoor of disingenuous and last-minute allegations pertaining to an intolerability of a continued employment relationship. It is incumbent on employers to follow proper procedures and respect the labour rights of their employees, just as it is incumbent on the courts to interfere when they fail to do so. Let this judgment serve as a reminder of what may materialise when employers and courts alike lose sight of these imperatives.

Order

[63] In the result, the following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld.
4. The order of the Labour Court handed down on 3 November 2017 is set aside and replaced with the following:
 - “1. The application to review and set aside the arbitration award issued by the third respondent under case number ECD 041609 dated 17 October 2016 is dismissed.
 2. The Amathole District Municipality is ordered to reinstate Mr Mlungisi Wellington Booï on terms not less favourable than those that applied prior to his dismissal.
 3. The Amathole District Municipality is ordered to pay Mr Mlungisi Wellington Booï back-pay for his retrospective reinstatement for the period between 9 December 2015 and 3 November 2017, less any amounts already paid to him pursuant to his dismissal.”

5. The punitive costs award against Mr Mlungisi Wellington Booii made by the Labour Court in its judgment dated 24 April 2018 is set aside.
6. There is no order as to costs in relation to the proceedings in this Court.

For the Applicant:

P Kroon SC and S Grobler

For the First Respondent:

F le Roux instructed by Lionel Trichardt
and Associates