

8 NOVEMBER 2021

EMPLOYMENT LAW ALERT

IN THIS ISSUE >

Reinstate the Employee! Especially if there isn't a high level of intolerability

Is a court or arbitrator entitled or obliged, in terms of section 193(2)(b) of the Labour Relations Act 66 of 1995, as amended (LRA), to consider whether a continued employment relationship would be intolerable when considering the remedy of reinstatement in respect of an unfair dismissal? This is the issue that the Constitutional Court (CC) was required to decide in its recent judgment in *Booi v Amathole District Municipality and Others* [2021] ZACC 36.

FOR MORE INSIGHT INTO OUR
EXPERTISE AND SERVICES

CLICK HERE 



INCORPORATING
KIETI LAW LLP, KENYA

Reinstate the Employee! Especially if there isn't a high level of intolerability

The Labour Court (LC) upheld the arbitrator's finding that the dismissal was unfair, however, it set aside the award of retrospective reinstatement.

Is a court or arbitrator entitled or obliged, in terms of section 193(2)(b) of the Labour Relations Act 66 of 1995, as amended (LRA), to consider whether a continued employment relationship would be intolerable when considering the remedy of reinstatement in respect of an unfair dismissal? This is the issue that the Constitutional Court (CC) was required to decide in its recent judgment in *Booi v Amathole District Municipality and Others* [2021] ZACC 36.

This matter concerned Mr Mlungisi Wellington Booi (the Employee) and his erstwhile employer, the Amathole District Municipality (the Employer). During December 2015, following a disciplinary hearing, the Employee was dismissed for misconduct. He disagreed with this outcome and referred an unfair dismissal dispute to the South African Local Government Bargaining Council, where the arbitrator found him not guilty of the misconduct and held that his dismissal was unfair.

The arbitrator relied on section 193(2) of the LRA and awarded retrospective reinstatement. The Employer argued that the Employee's continued employment would be an operational risk because the relationship of trust between the Employee and his direct supervisor had irretrievably broken down. Despite this argument, the arbitrator held that the Employee was found to be innocent of the charges levelled against him and the strained relationship between the Employee and his supervisor was insufficient to persuade him from deviating from the primary remedy of reinstatement prescribed by section 193(2).

Before the Employee could return to work, the Employer launched a review application on three grounds. It is the third one which is crucial to this article, namely that the arbitrator committed a reviewable irregularity by ordering reinstatement despite the fact that the trust relationship between the Employee and the Employer had, on the evidence, broken down.

The Labour Court (LC) upheld the arbitrator's finding that the dismissal was unfair, however, it set aside the award of retrospective reinstatement. The LC found that the arbitrator's decision to reinstate the Employee was unreasonable as his conduct, although insufficient to sustain a finding of misconduct, was completely destructive of a continued employment relationship. The order of reinstatement was replaced by an award of compensation.

Before the Constitutional Court (CC)

Leave to appeal to the Labour Appeal Court was denied. The Employee then approached the CC to contest the LC's order, asking the CC to set it aside and substitute it with a reinstatement order. The Employee's argument was that he ought to have been reinstated given that he had been exonerated of the charges laid against him and the LC had therefore erred in interfering with the arbitrator's award, in terms of which he would have enjoyed reinstatement. The Employer argued that the LC was correct in setting aside the award of reinstatement as there was no prospect of a continued employment relationship between the two parties.

Reinstate the Employee! Especially if there isn't a high level of intolerability...*continued*

The CC concluded that there was insufficient evidence to suggest that the employment relationship was intolerable and as such ordered reinstatement.

The CC, relying on the case of *Toyota SA Motors (Pty) Ltd v CCMA* [2016] 37 ILJ 313 (CC), held that a court should consider the intolerability of the working relationship prior to making an order of reinstatement and the LC therefore did not err when considering that aspect. 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) to (d) of the LRA exists, in which case compensation may be ordered depending on the nature of the dismissal.

The bar for intolerability is a high one and the term "intolerable" requires more than the suggestion that the relationship is difficult, fraught, or even sour. Importantly, the CC held that a conclusion of intolerability should not easily be reached, and an employer must provide weighty reasons, accompanied by tangible evidence, to sufficiently prove that the employment relationship is in fact intolerable.

The evidentiary burden to establish intolerability is heightened where the dismissed employee has been exonerated of all charges. Furthermore, when it is clear that an arbitrator has taken into account all the evidence presented to them and, after considering the evidence, the arbitrator

decides to reinstate the dismissed employee, a review court should not easily bypass the high bar of intolerability set by section 193(2).

The CC held that the arbitrator had sufficiently considered the evidence of the direct supervisor and had made a reasonable decision in light of this. The LC was of the view that the arbitrator had not taken into account the evidence from the Employee's direct supervisor, but the arbitration award made it clear that this was not the case. The CC concluded that there was insufficient evidence to suggest that the employment relationship was intolerable and as such ordered reinstatement. In relation to the backpay to be paid to the Employee, the CC held that there were extreme delays on the part of the Employee in bringing this matter to a finality and such it was only fair that the retrospectivity of the reinstatement be limited to the period between the Employee's dismissal and the date of the LC's order.

The bar of intolerability has been set, and it is indeed a high one. Employers have to ensure that at arbitration proceedings they provide sufficient reasons accompanied by tangible evidence in order to convince the arbitrator that the relationship between the employer and employee is indeed intolerable. If they fail to do so, they risk an award of reinstatement.

***Fiona Leppan, Kgodisho Phashe
and Muzammil Ahmed***

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel
Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Bongani Masuku
Director
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com



Hedda Schensema
Director
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com



Anli Bezuidenhout
Director
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Phetheni Nkuna
Director
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Imraan Mahomed
Director
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Jean Ewang
Consultant
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com



Abigail Butcher
Associate
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com



Christine Mugenyu
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com



Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com



Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Peter Mutema
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E peter.mutema@cdhlegal.com



Riola Kok
Professional Support Lawyer
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com



Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com



Mayson Petla
Associate
T +27 (0)11 562 1114
E mayson.petla@cdhlegal.com



Tamsanqa Mila
Senior Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



Kgodisho Phashe
Associate
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com



Dylan Bouchier
Associate
T +27 (0)11 562 1045
E dylan.bouchier@cdhlegal.com



Jordyne Löser
Associate
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Taryn York
Associate
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2021 10575/NOV



INCORPORATING
KIETI LAW LLP, KENYA



EMPLOYMENT LAW | cliffedekkerhofmeyr.com