



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE **WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date of hearing: 26 March 2021

[Signature]
03.06.2021

CASE NO: 13681/2021

In the matter between:

KHOLOFELO MAKWANE

APPLICANT

And

BARAKA ENTERPRISE CONSULTING (PTY) LTD

FIRST RESPONDENT

(Registration No.: 2003/003366/07)

MANIE BARNARD

SECOND RESPONDENT

L JANSEN VAN RENSBURG

THIRD RESPONDENT

JUDGMENT

NYATHI AJ

A. INTRODUCTION

[1] This is an urgent application wherein the Applicant seeks the following relief against the Respondent:

- 1.1 That non-compliance with the Rules of this Court regarding forms of service and time periods be and is hereby condoned and the matter be heard as urgent in terms of Rule 6(12)(a),
- 1.2 That the First, Second and Third Respondents be found to be in contempt of a Commission for Conciliation, Mediation and

Arbitration [CCMA] award dated 25 February 2021 under Case No.:
GATW 855-21.

- 1.3 That the First Respondent be ordered to re-instate the Applicant with immediate effect in accordance with the CCMA award.
- 1.4 That First Respondent and/or Third Respondent be ordered to pay the Applicant R45 000.00 in respect of back pay as ordered in the award.
- 1.5 That Third Respondent's conduct in respect of contempt be reported to the Legal Practice Council.
- 1.6 That the Respondents be ordered to pay Applicant's costs jointly and severally on an attorney and own client scale.

B. SUMMARY OF MATERIAL FACTS

[2] The Applicant had been employed by the First Respondent in terms of a fixed-term contract. When the First Respondent did not renew the Applicant's contract, the Applicant lodged a dispute at the CCMA for arbitration.

[3] The Second Respondent is a service delivery manager employed by the First Respondent.

[4] The Third Respondent was the legal representative of the First Respondent following the outcome of the CCMA proceedings.

[5] The Commissioner in the CCMA proceedings issued an award in favour of the Applicant, directing that the Applicant was to be reinstated by the First Respondent in his position as from 8 March 2021, and further that he was to be paid an amount of R45,000.00 by the First Respondent as retrospective remuneration. The award was delivered by the Commissioner by email on 26 February 2021.

[6] On or about 5 March 2021, the Third Respondent, acting on instruction of and on behalf of the First Respondent as its legal representative, sent a letter to the Applicant in order to inform the Applicant of the First Respondent's intention to bring a formal review application pertaining to the CCMA award. The letter also stated that an amount of R45,000.00 would be placed on trust by the First Respondent to stay the operation of the award pending the outcome of the review application. The letter also advised the Applicant not to report for work on 8 March 2021.

[7] Notwithstanding the letter, the Applicant attended the premises of the First Respondent on 8 March 2021, where he was subsequently refused access.

[8] Further correspondence was exchanged, and the Applicant again attended the premises of the First Respondent on 11 March 2021, only to be refused access. The Applicant thereafter brought this application on 15 March 2021, as aforesaid.

[9] No evidence has been adduced by the Applicant that he has had the arbitration award certified in terms of section 143(3) of the Labour Relations Act 66 of 1995 (hereinafter "the LRA").

C. URGENCY

[10] The Applicant seeks initially, an order that this matter be heard as one of urgency. the provisions of Rule 6 (12) in the case of urgent applications, permits the court to: "dispense with the forms and service provided for in these Rules and to dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet."

[11] The principles relating to urgent applications are trite by now, having been laid out by Coetzee J in *Luna Meubel Vervaardigers (Edms) Bpk v Makin Furniture & Another (t/a Makin Furniture Manufacturers (Pty) Ltd*,¹ I do not deem it necessary to repeat them here.

[12] The Applicant did not expansively lay out the degree in which it sought to deviate from the standard timeframe, save for explaining the events leading to the loss of employment and how the matter ended up at the CCMA.

¹ 1977 (4) SA 135 (W)

[13] It was submitted on behalf of the Applicant that by its very nature a contempt application is urgent. Judicial reasoning supports this view as well. Plasket AJ (as he then was), held that ongoing contempt of a court order, by its very nature, is urgent.²

[14] One of the objects of contempt proceedings is by punishing the guilty party to compel performance of the order.³

[15] I thus acceded to this request and heard this matter on an urgent basis.

D. JURISDICTION – APPLICANT’S VERSION

[16] The Applicant based his application firstly, on the provisions of section 143 (1) of the LRA which provides that:

“An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued ...”

[17] Secondly the Applicant relies on section 157 (2) (a) of the LRA to base his contention that this court has jurisdiction to hear this matter. The section reads as follows:

² Victoria Park Ratepayers Association v Greyvenouw CC & Others [ZAECHC] Case No.: 511/2003 SAFLII Unreported par 26.

³ Nestadt J in Protea Holdings Ltd v Wriwt & Another 1978 (3) SA 865 (W)

"The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa ... and arising from ... employment and from labour relations ..."

[18] In paragraph 5 of his founding affidavit, the Applicant alleges that he is a father of two minor children for whose maintenance he was responsible, and that because of the Respondents' non-compliance with the CCMA award he was no longer able to provide for them.

[19] The Applicant further state that his minor children have rights as enshrined in Section 28 (1) of the Constitution and that he holds corresponding obligations to them.

[20] The Respondents' conduct is in further violation his right to human dignity by deliberately refusing to implement an order confirming his human right to work and provide for himself and those he is responsible for.

[21] It was submitted on behalf of the Applicant that the above submissions qualify this matter to be brought to this court as it has concurrent jurisdiction with the Labour Court as contemplated in section 157 (2) (a) of the LRA.

E. JURISDICTION - RESPONDENT'S VERSION

[22] The Respondents raise the following issues in response to the Applicant's version:

22.1 The Respondents question whether this court has jurisdiction to entertain the matter. The Respondents allege that only the Labour Court has exclusive jurisdiction to hear this matter in terms of section 157 of the LRA. The Respondents further submit that in terms of section 143 (4) of the LRA any non-compliance with the award by the CCMA ought to be enforced by way of contempt proceedings instituted in the Labour Court.

22.2 The Respondents also contend that the matter is not ripe for hearing, because the arbitration award cannot be enforced. The Applicant, according to the Respondents, labours under the mistaken impression that the CCMA award dated the 25th of February 2021 constitutes a court order as envisaged in Section 143(1) of the Labour Relations Act. The Respondents submit that the CCMA order only has the effect of a court order once certified in accordance with the provisions of section 143 (1) of the LRA. The Applicant has not adduced any evidence that the arbitration award

in question has been certified In accordance with the provisions of section 143(3) of the LRA.

22.3 As to the merits of the matter, it must first be established whether all three Respondents can correctly be found to be in contempt.

22.4 If the Respondents can be found to be in contempt as alleged by the Applicant, it must be determined whether the Applicant qualifies for the interdictory relief prayed for.

22.5 Finally, the issue of costs must be determined, especially because the Applicants seek a *de bonis propriis* order against the legal representatives of the Respondent.

F. ANALYSIS OF THE LEGAL PROVISIONS

[23] In analysing the legal provisions, I will confine myself to the question of whether this court has jurisdiction to entertain this matter, unavoidably the facts of the merits may come up for consideration.

[24] The above position is because at the core of this matter is the enforceability of the CCMA order. The CCMA order in turn incorporates the main 3 prayers sought by the

Applicant, namely: That the Respondents be held to be in contempt, Reinstatement, and the payment of the R45 000 back pay.

[25] The Applicant contends that this matter has jurisdiction to deal with the enforceability of a CCMA order arising out of the provisions of section 157 (2) which I quoted in full in paragraph 17 above. The interpretation of this section has created uncertainty for some years.

[26] In *PSA obo Members v Minister of Health and Others* [2019] 1 BLLR 71 (LC)⁴ Van Niekerk J at paragraph [11] considered the two Constitutional Court judgments of *Chirwa v Transnet Ltd* [2008] 2 BLLR 97 (CC), and *Gcaba v Minister for Safety and Security & Others* 2010 (1) SA 238 (CC) and one more by the Supreme Court of Appeal. Referring to the matter of *Motor Industry Staff Association v Macun NO & others* (2016) 37 ILJ (SCA) at para 20 the SCA, He quoted with approval the SCA's summary of the approach to be followed:

"Section 157 (2) of the LRA was enacted to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. **The Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in workplace issues and be best**

⁴ Also reported as [2019] ZALCJHB 345 and (2019) 40 ILJ 193 LC delivered on 12 October 2018.

able to deal with complaints relating to labour practices and collective bargaining.

Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the LRA. Forum shopping is to be discouraged. When the Constitution prescribes legislation in promotion of specific constitutional values and objectives then, in general terms, that legislation is the point of entry rather than the constitutional provision itself." (my emphasis)

[27] In *Merafong City Municipality v SAMWU* [2016] 8 BLLR 758 (LAC) the Labour Appeal Court held that:

"[29] Section 157(1) is more of a confirmatory and reference section. It is not in itself a primary source of jurisdiction. Instead, it confirms that the Labour Court has jurisdiction in matters where the Labour Court has exclusive jurisdiction in terms of the LRA. It also confirms that the Labour Court's jurisdiction where other legislation provides that a matter has to be determined by the Labour Court. Its main purpose, as derived from its wording within the context of the entire section 157, appears to be to delineate to those instances in which the Labour Court would have exclusive jurisdiction."

[30] Section 157 (1) directs the reader of that section to the sources of the Labour Court's exclusive jurisdiction, albeit in very vague and general terms. It does not refer to specific sections in the LRA but suggests that they are to be found elsewhere in that Act. As a result, the interpreter is saddled with the difficult task of having to, for example, distinguish purely jurisdictional provisions from general empowerment provisions. The difficulty is

exacerbated by sections which purport to contain mere empowerment provisions, whereas they, on proper construction, also actually contain provisions which are sources of the Labour Court's jurisdiction.

[31] Section 158 is such a section. Its introductory wording specifically states that it deals with the powers of the Labour Court. Because the introductory words of the previous section, that is section 157, states that it deals with the jurisdiction of the Labour Court, the immediate expectation is that section 158 is not a source of jurisdiction, but merely contains provisions defining the powers of the Labour Court in respect of matters, which, in terms of some other provision of that Act, falls under the jurisdiction of the Labour Court. However, a close reading of the entire section 158 dispels that initial notion. It does deal with powers (post jurisdiction), but also with powers, which cannot but be construed and understood as sources of jurisdiction."⁵

[28] The Labour Court in *PSA obo Members (supra)* continued and warned in para 14 of the judgment that **"...the court should be circumspect and slow to assume jurisdiction in the absence of any provision that expressly confers jurisdiction..."** (own emphasis).

[29] As I have noted above, at the nub of this application is the enforceability of a CCMA award. In terms of section 143 (as amended), An arbitration award issued by a

⁵ Quoted by Van Niekerk J in *PSA obo Members v Minister of Health & others supra*.

commissioner is final and binding and it may be enforced **as if it were an order of the Labour Court**, unless it is an advisory arbitration award.

[30] The Respondents have informed the Applicant that they intend taking the grant of the award on review. CCMA awards are subject to review by the Labour Court. This means that a party aggrieved by a decision made by a commissioner in an award may apply to the Labour Court in terms of section 145 of the LRA, to have it set aside based on an alleged defect with that award.

G. CONCLUSION

[31] Having regard to the scenario above, I can find no place for a High Court to exercise any jurisdiction. It would lead to a situation so absurd that the legislature, in enacting section 157 (2), could not have contemplated.

[32] The reinstatement part of the CCMA award to remedy the alleged unfair labour practice is enforceable through contempt proceedings in the Labour Court. The LRA provides that the monetary compensation aspect falls to be dealt with in terms of section 143 (5) which provides that:

"Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purposes of enforcing or executing that award as if it were an order of the Magistrate's Court."

[33] Having regard to the foregoing, I do not find the way open to deal with the merits of this application for want of jurisdiction. The matter bears all the hallmarks of a forum shopping expedition by the Applicant.

H. ORDER

I make the following order:

The application is struck from the roll. Applicant to pay the Respondent's costs.



03.06.2021

J.S. NYATHI
Acting Judge of the High Court
Gauteng Division, Pretoria

Date judgment delivered: 03 June 2021.

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