



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JA113/ 21

In the matter between:

GREATER TAUNG LOCAL MUNICIPALITY

Appellant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

IMATU obo BAKANG SEBITLOANE

Second Respondent

SR MODIPA N.O

Third Respondent

Heard: 01 November 2022

Delivered: 16 January 2023

Coram: Sutherland JA, Coppin JA et Kathree-Setiloane AJA

Summary: Lapsed review application for failure to file the record – Labour Court held that the employer had the option to bring a reinstatement application to resurrect review, if it deemed that option fit. This notwithstanding, Labour Court then made the arbitration an order of court. This constituted an improper exercise of its discretion as, contrary to the demands of law and fairness, the Labour Court failed to take into account the employer's entitlement, arising from the judgment itself, to bring a

reinstatement application and that by making the arbitration order an order of court, it would deny the employer the opportunity to bring a reinstatement application.

JUDGMENT

KATHREE-SETILOANE AJA

Introduction

- [1] The Greater Taung Local Municipality (appellant) appeals against the whole of the judgment and order of the Labour Court (Mosime AJ) in which it *inter alia* made an arbitration award an order of court.
- [2] The appeal has, however, lapsed and the appellant has applied for condonation for its late filing of the appeal record and, reinstatement of the appeal. Both applications are unopposed.
- [3] The appeal lapsed because the appellant filed the appeal record 50 days outside the prescribed period of 60 days from the date of the Labour Court's order granting it leave to appeal.¹ The appellant's explanation for the delay is that the service provider, Urgent Court Records, was unable to finalise the record on time as it was awaiting missing portions of the transcript of evidence from the first respondent, the South African Local Government Bargaining Council (Bargaining Council). The appellant has provided a reasonable explanation for the delay which covers the full period of the delay. As will become clear, the appellant has good prospects of the appeal succeeding. Accordingly, the late filing of the appeal record is to be condoned and the appeal reinstated on the roll.

¹ Rule 5(6) of the Rules for the conduct of proceedings in the Labour Court.

Background

- [4] The second respondent, Mr Sebitloane (employee), was employed by the appellant. He was charged with gross insubordination and unbecoming behaviour for taking unauthorised leave, despite facing a similar charge of misconduct in the same year. He was found guilty and was dismissed by the appellant on 18 April 2017.
- [5] He referred an unfair dismissal dispute to the Bargaining Council. The third respondent (arbitrator) issued an arbitration award in which he found the employee's dismissal to be substantively unfair and ordered the appellant to, *inter alia*, retrospectively reinstate the employee.
- [6] On 22 June 2018, the appellant instituted a review application against the arbitration award in the Labour Court. The appellant did not file the review record within the prescribed period of 60 days as provided for in paragraph 11.2.2 of the Practice Manual of the Labour Court² (Practice Manual). On 14 February 2019, the second respondent, IMATU, acting on behalf of the employee, brought a Rule 11 application in which it sought an order dismissing the review application. It also brought an application in terms of section 158(1)(c) of the Labour Relations Act³ (LRA) to make the arbitration award an order of court.
- [7] On 6 February 2019, the appellant filed its notice to oppose the Rule 11 application. It thereafter filed its answering affidavit some seven months out of time but failed to make a substantive application for condonation. IMATU objected to the late filing of the answering affidavit without a condonation application. The Labour Court refused to condone the late filing of the appellant's answering affidavit. As a result, IMATU's Rule 11 application remained unopposed.

² Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

³ Act 66 of 1995, as amended.

Judgment of the Labour Court

- [8] The Labour Court addressed the appellant's delay in filing the review record within the prescribed period as provided for in paragraph 11. 2.2 of the Practice Manual. It observed that by the time IMATU lodged its Rule 11 application for the dismissal of the appellant's review application, the appellant had made no attempt to reinstate the review application and seek condonation for the late filing of the review record. Having considered paragraph 11 of the Practice Manual, the Labour Court stated that the appellant should have sought IMATU's consent to extend the 60-day period for the submission of the review record, and in the event of its refusal to do so, it should have applied to the Judge President for consent.
- [9] The Labour Court went on to hold that the appellant's failure to do so resulted in the review application being deemed to have been withdrawn pursuant to paragraph 11.2.3 of the Practice Manual, and that the only option available to the appellant would be to bring an application for the reinstatement of the review application. It held in this regard that *"since the Practice Manual does not 'trump' the Rules of Court, [the appellant] still has the option open to it to make application, if it deems that option fit, for the reinstatement of the review application, accompanied by a substantive application for condonation for the delay in filing the review record on time"*.
- [10] Concerning the relief sought by IMATU for the arbitration award to be made an order of court, the Labour Court found that there were *"no legal constraints to making that order"*. As a result, it made the following order:
- '1. The application for review as brought by [the appellant] is deemed to have been withdrawn by virtue of the provisions of clause 11.2.3 of the Practice Manual of this Court.
 2. The arbitration award issued by the Third Respondent [arbitrator] as nominee official of the SALBGC (the First Respondent), under case number NWD 041714, is hereby made an order of this Court.
 3. There is no order as to costs.'

- [11] The Labour Court is empowered by section 158(1)(c) of the LRA to make an arbitration award an order of court. This is a discretionary power which must be exercised judicially.⁴ An arbitration award that is made an order of court is not reviewable. Such an order is, nonetheless, appealable because it has a final effect.⁵ The order, therefore, stands until set aside on appeal.
- [12] As held by this Court in *PLSMIDTH Buffalo (Pty) Ltd v Hlakola*,⁶ an appeal court will only interfere with the exercise of a discretion by a lower court, in the limited circumstances that it was exercised improperly or unreasonably. Thus, for an appeal court to interfere with the exercise of a discretion, the appellant must “show that the court a quo acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity”⁷.
- [13] The appellant contends that the Labour Court committed a misdirection as it made the arbitration award an order of court, in terms of section 158(1)(c) of the LRA, in circumstances where the appellant indicated its intention to bring an application to reinstate the lapsed review application, and the Labour Court accepted as much by holding that it may bring an application to reinstate the review application if it deems that option fit. The appellant, however, argues that this holding is inconsistent with the Labour Court’s order which made the arbitration award an order of court, as they are incapable of operating simultaneously.
- [14] In response, IMATU argues that an appeal lies against an order of a lower court and not its reasons. Hence, the Labour Court’s acknowledgement that the appellant may bring an application to reinstate its review application has no impact on its order which made the arbitration award an order of court. IMATU, accordingly, contends that the Labour Court’s order is unassailable because the

⁴ *SADTU and others v Head of the Northern Province Department of Education* [2001] 7 BLLR 829 (LC).

⁵ *Gauteng Department of Education v Saunders: In re Saunders v Gauteng Department of Education and others* [2015] 12 BLLR 1187 (LAC).

⁶ [2019] 4 BLLR 363 (LAC) (*PLSMIDTH Buffalo*).

⁷ *Supra* at para 16.

appellant's review application had lapsed and the appellant did not apply for it to be reinstated.

[15] The Labour Court may only make an order in terms of section 158(1)(c) of the LRA if it is satisfied that: (a) the agreement or award is sufficiently clear to enable the defaulting party to know exactly what it should do to comply with it, and (b) the defaulting party has failed to comply with the terms of the agreement or award. Once satisfied that these conditions are present, the Labour Court must exercise its discretion in favour of granting or refusing the order. In so doing, it must take into account "*all relevant facts and circumstances*" that are "*necessary to satisfy the demands of law and fairness*".⁸

[16] IMATU sought the dismissal of the appellant's review application in its Rule 11 application as a result of the appellant's failure to bring an application to reinstate the lapsed review. The Labour Court did not dismiss the review application as sought by IMATU. Nor did it dismiss the Rule 11 application. Instead, it held that the appellant has the "*option, open to it, to make application, if it deems it fit, for reinstatement of the review application, accompanied by a substantive application for condonation*". However, contrary to the demands of fairness and the law, the Labour Court failed to take this factor into account when it exercised its discretion in favour of making the arbitration award an order of court. It furthermore failed to take into account the impact that this order would have on the appellant's entitlement, arising from the judgment itself, to bring an application for reinstatement of the review application. The Labour Court committed a misdirection in failing to take these factors into account in exercising its discretion in favour of making the arbitration award an order of court.

[17] Crucially, once an arbitration order is made an order of court it is not reviewable. Thus, by making the award an order of court, the Labour Court denied the appellant the opportunity to bring an application to reinstate the review application. The Labour Court furthermore made the arbitration award an order of court in the full awareness that the appellant intended to, forthwith, bring an

⁸ *South African Post Office Ltd v Communication Workers Union obo Permanent Part-Time Employees* [2013] 12 BLLR 1203 (LAC). Although this case dealt with an application to make a settlement agreement an order of court in terms of section 158(1)(c) of the LRA, the LAC held in *PLSMIDTH Buffalo* that the same principle applies to making an arbitration award an order of court.

application for the reinstatement of the appeal.⁹ Having acknowledged, in the judgment, that the appellant had this option open to it, the Labour Court proceeded to make the arbitration award an order of court. This constitutes an improper exercise of its discretion. The Labour Court should have, instead, made an order: (a) dismissing the Rule 11 application; (b) directing the appellant to file its reinstatement application; and (c) postponing the application to make the arbitration award an order of court.

[18] For all these reasons, the appeal must succeed.

Costs

[19] I consider it fair and just not to make a costs order in the appeal.

Order

[20] In the result, I make the following order:

1. The late filing of the appeal record is condoned and the appeal is reinstated.
2. The appeal is upheld with no order as to costs.
3. The order of the Labour Court is set aside and replaced with the following order:
 - “1. The Rule 11 application is dismissed.
 2. The applicant is ordered to file its application for reinstatement of the review application within 7 days of this order.
 3. The application to make the arbitration award an order of court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 is postponed *sine die*.

⁹ The appellant's counsel informed the Labour Court that the appellant intended to bring a reinstatement application.

4. There is no order as to costs.”



F KATHREE-SETILOANE AJA

Sutherland JA and Coppin JA concur.

APPEARANCES:

FOR THE APPELLANT:

Fatima Mahomed

Instructed by Kgomo Attorneys

FOR THE SECOND RESPONDENT:

S Grobler SC

Instructed by IMATU Northern Cape Office