



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 01/2021

In the matter between:

IVAN MYERS

Applicant

and

THE NATIONAL COMMISSIONER OF

SOUTH AFRICAN POLICE SERVICE

First Respondent

THE PROVINCIAL COMMISSIONER OF

WESTERN CAPE

Second Respondent

Heard: 8 December 2022 (virtually)

Delivered: 02 February 2023

Coram: Coppin JA, Savage et Tokota AJJA

JUDGMENT

COPPIN JA

- [1] This is an application by Mr Myers, the applicant, purportedly in terms of rule 42(1) of the Uniform Rules of the High Court (UR 42(1)), read with section 174

(b) of the Labour Relations Act¹ (LRA) to “vary” certain paragraphs in the body of and the order of the main judgment handed down by this Court in an appeal involving the same parties as above.

[2] On 30 June 2022, in an appeal brought by Mr Myers against an order of the Labour Court, this Court handed down a written judgment² in which the following was ordered:

‘100.1 The appeal is upheld with costs.

100.2 The order of the court *a quo* is set aside and is substituted with the following order:

‘1. The review application is dismissed and the order of the arbitrator is amended to read as follows: (a) It is declared that the SAPS committed an unfair labour practice relating to the promotion of Myers; (b) Myers is to be absorbed into the upgraded position of unit commander of K9 Cape Town Dog Unit at salary level 12 and the rank of colonel as contemplated in terms of regulation 30(9) of the SAPS Employment Regulations, retrospectively and with effect from 1 May 2017; (c) The respondents are directed to do all that is administratively required to give effect to such absorption; (d) The SAPS is ordered to pay Myers the difference between what he was paid on level 10 and what he should have been paid on level 12, retrospectively from 1 May 2017; (e) The calculation of the payment contemplated in paragraph (d) should include all notch advances and the benefits on salary level 12 since 1 May 2017; (f) the SAPS is ordered to adjust Myers’ pension fund accordingly; (g) there is no order as to costs.’

100.3 The Respondent’s and the SAPS had to comply with the award as amended by no later than 30 August 2022.’

¹ Act 66 of 1995, as amended.

² Reported as *Myers v National Commissioner of the SA Police Service and another* (2022) 43 ILJ 2469 (LAC).

[3] Mr Myers contends in his application that the said judgment and order ought to be amended or varied by this court, particularly, in the following respects:

- ‘1. That paragraphs [1] and [34] of the said judgment of this court [be] amended and varied to read: “Leave to appeal to this court was granted on petition after the court *a quo* refused leave to appeal.”
2. That paragraph [100.1] [being the order in the said judgement] be varied from “The appeal is upheld with costs”, to “The appeal is upheld with costs, including the costs of the application to the Labour Appeal Court for leave to appeal.”
3. [That] paragraph 100.2 (b), (d) and (e) of the order of this court be amended and varied to read: “100.2(b): Myers is to be absorbed into the upgraded position of unit commander of K9 Cape Town Dog Unit at salary level 12 and the rank of colonel as contemplated in terms of Regulation 30(9) of the SAPS Employment Regulations retrospectively and with effect from 1 August 2015.” “100.2(d): the SAPS is ordered to pay Myers the difference between what he was paid on level 10 and what he should have been paid on level 12, retrospectively from 1 August 2015.” “100.2 (e): the calculation of the payment contemplated in paragraph (d) should include all notch advances and other benefits on salary level 12 since 1 August 2015.”

[4] Mr Myers contends that there are “*two patent errors or omissions in the judgment which justify the variation of the judgment and the order granted pursuant thereto*”. In particular, Mr Myers avers, firstly, that in paragraph 1 of the main judgment, it is stated that “*leave to appeal to this court was granted by the court a quo*” and that this was erroneous since it was a common cause fact that leave to appeal had been granted to him on petition to this Court, which ordered that the costs of the application for leave to appeal “*shall be costs in the appeal*”, after the court *a quo* had dismissed his application for leave to appeal with costs.

[5] Secondly, Mr Myers contends, that in its order, particularly the amendment of the award, this Court erred concerning the date stated there and that it should have been “1 August 2015” and not “1 May 2017”. Mr Myers avers that the

latter date was erroneous and that the date of his absorption ought to have been stated as having been 1 August 2015.

- [6] The respondents, essentially, contest the basis and regularity of the application. While admitting that this Court has the inherent power to vary its own judgements or orders, they dispute that the basis for the exercise of such power is to be found in either UR 42(1) or section 174(b) of the LRA, that Mr Myers relies on. The respondents further argue that the application is, in any event, an abuse and that even though this Court might have erred in stating in the body of its judgment that the court *a quo* granted Mr Myers leave to appeal, this was never stated in its order in terms of which it upheld the appeal with costs.
- [7] Thirdly, the respondents contend that Mr Myers deliberately misconstrued this Court's order in respect of his date of absorption and wrongly contends that it erred in that regard, whereas it is clear from the judgment, including the reasons, that this Court deliberately decided that the date ought to have been 1 May 2017. The respondents further argue that Mr Myers' application is effectively an attempt at appealing this Court's order; that it constitutes an abuse of the processes of this court, warranting its dismissal with costs.
- [8] It is not in issue that, even though there are rules for the conduct of proceedings in this court,³ there is no specific provision in those rules for the variation of this Court's judgments or orders, similar or equivalent to UR 42 (1).
- [9] There is no provision in law that makes UR 42(1) applicable to the proceedings of this Court and the applicant's reliance on that rule and section 174(b) of the LRA are misplaced. The latter section deals with this Court's powers on appeal and provides that it has the power "*to confirm, amend or set aside the judgement or order that is the subject of the appeal and to give any judgment or make any order that the circumstances may require*". Thus, while the section is broad and may arguably include the power to vary or correct an

³ GN 1666 of 14 October 1996: Rules for the conduct of proceedings in the Labour Appeal Court.

obvious error in its judgment, the section is clearly not the direct equivalent of UR 42(1) and is not reliant on that rule for its effect or cogency.

[10] The respondents' counsel seemed to have suggested in argument that Rule 12 (2) of this Court's rules may have provided a basis for the relief that the applicant sought. The correctness of that contention is doubtful. Rule 12 (2) is a general rule that specifically provides that "[t]he Judge President, or any Judge authorised by the Judge President, may give any directions that are considered just and expedient in matters of practice and procedure". Thus, while that rule may have served to enable this Court to justly and expediently deal with the application, it is most certainly not the equivalent of UR 42(1) or section 174 of the LRA.

[11] The general principle is that after a court, which would include this Court, has handed down its judgment or order, it becomes "*functus officio*" and has no authority, or power to supplement or alter its judgment or order⁴. However, and notwithstanding the absence of a specific provision in the LRA or the rules of this Court which is the direct equivalent of UR 42(1), this Court has the inherent power, in terms of the common law which is preserved in terms of the Constitution⁵, and as set out in section 167(3) of the LRA, when approached within a reasonable time after such handing down, *mero motu* or on application by an affected party to, *inter alia*, amend or alter (i.e. correct) a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention⁶. This power is exceptional and is strictly confined and does not extend to altering the intended sense or substance of the judgment or order⁷.

The alleged errors

[12] In respect of the first – it is so that in the introductory part of the judgment it is stated, erroneously, that Mr Myers, the applicant, had been granted leave to

⁴ See, *inter alia*, *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176,178,186 - 187 and 192.

⁵ Constitution of the Republic of South Africa, 1996.

⁶ See *Acting Provincial Commissioner, Correctional Services & Others v Matheyse* (2) (2002) 23 ILJ 2205 (LAC) (*Matheyse*).

⁷ See, *inter alia*, H J Erasmus: *Superior Court Practice* D1 562D – 576A; *De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038A, 1039H-1043A.

appeal by the court of first instance, whereas the correct position is that he had been granted leave to appeal by this Court on the basis of a petition he brought. However, the first insurmountable difficulty for Mr Myers, the applicant, is that the error is not contained in this Court's final order and does not have an effect on the costs order this Court made when granting the petition.

- [13] Mr Myers' allegation in this application, that the erroneous statement would negatively impact his entitlement to the costs of the application for leave to appeal at the taxation, is also flawed. The issue of the costs of the leave was not addressed at all in this Court's order in the impugned judgment. At the time leave to appeal was granted on petition, it was also ordered by this Court that those "*costs shall be costs in the appeal*". That order was never revisited or amended by this Court when it dealt with the appeal.
- [14] This court did not and did not have to decide whether Mr Myer's had been granted leave by the court or on petition or concerning the costs related thereto. That had already been decided. Accordingly, the required causative connection between the error and the order made on appeal is lacking⁸.
- [15] This Court went on to uphold the Mr Myers' appeal "with costs", which, by virtue of the order made on petition, would include the party and party costs incurred by Mr Myers in his application for leave to appeal in the court of first instance and of petitioning this court for leave. In any event, it is a matter of record that the parties were never under a wrong impression, or in dispute about the correct position regarding the costs, and even if there were to be such a dispute, which is very unlikely, it could have been resolved quickly and simply without the need for this kind of application, which was clearly misconceived.
- [16] The second alleged "error" is no "error" at all. This court did not "err" concerning the date, but deliberately decided on the date "1 May 2017", having specifically found in paragraph [96] of the body of its judgment that a

⁸ See *Seedat v Arai* and another 1984 (2) SA 198 (T) at 201D and *Tshivhase Royal Council and another v Tshivhase* and another 1992 (4) SA 852 (A) at 863B.

reasonable date for Mr Myers' absorption into the upgraded post would have been a date two years from the date when he first started acting in the upgraded post (i.e. after being reinstated). That date is "1 May 2017", and is not "1 August 2015", as he would have it.

[17] If Mr Myers disagreed with this court's deliberate determination of the date of his absorption his remedy was certainly not to try and make out that this Court had made an error of the kind that could be corrected as contemplated in the provisions he purported to rely on. In substance, Mr Myers in his application is effectively seeking to appeal this court's decision on the date of his absorption. That is clearly impermissible and constitutes an abuse.

[18] It follows that the application must fail. The respondents have asked for costs on the basis that this application was clearly misconceived and a deliberate abuse of the processes of this Court. The submission has merit. Taking all the circumstances into account, including the law and fairness, there is no reason why Mr Myers, the applicant, should not bear the costs of this application that was doomed for failure from its inception.

Order

[19] In the result:

1. The last sentence of, respectively, paragraph [1] and paragraph [34] of the judgment in the appeal is corrected to read: "Leave to appeal to this Court was granted on petition.";
2. The application is dismissed with costs.

P. Coppin

Savage and Tokota AJJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPLICANT:

R Stelzner SC and J Nortje

Instructed by Halday Attorneys

FOR THE RESPONDENTS:

E de Villiers –Jansen SC

Instructed by The State Attorney (Cape Town)

LABOUR APPEAL COURT