THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J312/17

In the matter between:

ROSA THABA First Applicant

DIKGWADING FANTA RANTA Second Applicant

MOLOKO MARGARET SETJIE Third Applicant

and

PIETERSBURG OPLEIDING TEE KLUB (SAPS) Respondent

Heard: 13 February 2024

Delivered: 14 February 2024

Summary: Failure to comply with award, applicant seeking to make arbitration award, ordering reinstatement, an order of court. There has been no reinstatement, in accordance with the ordinary meaning of the word. Application is granted with costs.

JUDGMENT

DANIELS J

Introduction

[1] The applicants were dismissed by the respondent. They approached the CCMA and secured an arbitration award (the "award") in their favour. The commissioner found that their dismissal was procedurally and substantively unfair

and ordered that they be *reinstated on the same terms and conditions* which governed them before their dismissal.

[2] The applicants alleged that the respondent has not complied with the award, which is denied by the respondent. Further details appear below.

Material facts

[3] The respondent disclosed that it is a semi-official institution created and managed in terms of Standing Order (Financial) 71 – 77 of the South African Police Service ("SAPS") and its constitution. These documents were not provided to the court, but that matters not. It is trite that a club may, through its constitution, provide for its separate legal personality. In this matter, the parties were *ad idem* that the club had juristic personality.

[4] The applicants applied for their posts in 2012 and were appointed by the respondent as cooks. From that time, until their dismissal, the applicants were employed on a part time basis, as cooks, based at the Lebowakgomo Police Station. The respondent would call them in to cater for events relating to training courses or choir practice. Over the years, they consistently worked on average 5 days per month and were paid at R100, 00 per day.

[5] They were dismissed on or about 3 May 2016, when new individuals were employed in their previous position. They referred an unfair dismissal dispute to the CCMA and secured an arbitration award in their favour, on or about 22 May 2016, under case reference LP3318-16. The commissioner determined that their dismissal was unfair and ordered respondent to reinstate them *on the same terms and conditions which governed them before their dismissal*. In addition, the commissioner ordered that: "*The respondent shall call them to work once an activity requiring their services occurs at the workplace".*

[6] In the applicants' supplementary answering affidavit, they state that returned to work after the award, but they did so on different conditions of employment

because now they were rostered to work and had to compete with others for the work. They were not called to work once an activity was arranged which required their services.

[7] In respondent's supplementary answering affidavit, it states that during 2016 SAPS decided that all semi-official institutions should engage employees as full time employees of the SAPS. These employees would service SAPS as well as the semi-official institutions. SAPS advertised the positions, previously held by the applicants, as "Food Service Aids" and encouraged the applicants to apply. The applicants refused to apply, according to SAPS because they may have believed that the posts were advertised by the club. Accordingly, others were appointed to these positions on 1 February 2017. In the respondent's own words this rendered the applicants "redundant".

[8] Importantly, in its supplementary answering affidavit, the respondent carefully avoids stating that the applicants were dismissed.

[9] The respondent denies that it had failed to comply with the award and contends that it is common cause that it reinstated the applicants, and any dispute thereafter is a new cause of action. It was not common cause, as explained above. Furthermore, it could not be a new cause of action when there was no dismissal. Instead, the respondent failed to comply with the award at the time when the applicants returned to work.

[10] The respondent carefully avoids saying whether it had remunerated the applicants since February 2017. The probabilities overwhelmingly indicate that they were not remunerated, although this is not expressly dealt with on the papers.

[11] Accordingly, on a full conspectus of all the materials before me, the pleadings, and the probabilities, I simply cannot accept the respondent's propositions in para 9 above.

[12] Respondent points to the supplementary affidavit of the applicants, placing emphasis only on the following underlined portions:

"*Following the arbitration award the respondent called us back to work however not on the same terms and conditions as before.*

Initially we were working each time there was an activity and upon our return to work the respondent changed the terms and made us rotate with the other group that was hired during the time when we stopped from work.

The respondent called us back to work in July 2016 until 20 January 2017 and we were never called back to work. See attendance register marked as annexure B.

When we approached the above honourable court in May 2017 it was three months since we were called to work." (respondent's emphasis)

[13] To place emphasis on certain aspects of the applicants' supplementary affidavit and ignore other aspects is to ask the court to ignore the full context, which the court cannot countenance.

[14] The applicants launched an application in terms of section 158(1)(c) on 14 February 2017. It is unclear precisely who or what caused the delays since then. The application had been enrolled during 2017 and 2018. In 2018, on 14 February 2018, Lallie J postponed the matter and granted the applicants leave to amend their founding papers. Both parties supplemented their papers since then.

Legal Issues

[15] First, it is necessary for the court to determine whether the respondent complied with the award. It is therefore necessary to determine what the award means. Next, we consider the court's discretion in relation to section 158(1)(c) of the LRA.

Compliance with the award

[16] In *Firestone SA (Pty) Ltd v Genticuro AG*[1] the Appellate Division set out principles governing a court's judgment or order:

'*The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See Garlick v Smartt and Another, 1928 AD 82 at p. 87; West Rand Estates Ltd. v New Zealand Insurance Co. Ltd., 1926 AD 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it*."

[17] To restate the principle, an order must be read as part of the entire judgment.[2]

[18] With the above principles in mind, it is necessary to determine what "reinstatement" means in the context of the award. In *Equity* Aviation *(Pty) Ltd v CCMA and others*[3] the court held:

"[36] *The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal*."

[1] 1977 (4) SA 298 (A)

[2] *Administrator, Cape & another v Ntshwaqela & others* 1990 (1) SA 705 (A)

[3] 2009 (1) SA 390 (CC) at para 33

[19] In this matter, fortunately, the award itself deals with the terms and conditions of employment by ordering that "*the* Respondent *shall call them to work once an activity requiring their* services *occur at the workplace*". To safeguard the applicants' remuneration, the commissioner directs the respondent to use the services of applicants for all the activities for which they were previously used – in other words all events related to training and choir practice. The commissioner need not have bothered given that, in these circumstances, this should have followed naturally. The common law position is that, once reinstated, upon tender of their services, the applicants are entitled to their normal remuneration even if their services are not used by their employer. In *National Union of Textile Workers and others v Jaguar Shoes (Pty) Ltd*[4] Booysen J states:

"*Words or phrases having a clear meaning at common law should thus, where they appear in statutes, be accorded that meaning unless the contrary intention appears from the statute. (Kleynhans v Yorkshire Insurance Co Ltd 1957 (3) SA 544 (A) at 551.) In terms of s 43(4)(b)(i), an employer is ordered to reinstate the person in question in his 'employ'. The Act does not prescribe what steps the employer should take to do so, save to state in ss (7) that an employer who pays the remuneration which would have been due to the employee in respect of his normal hours of work shall be deemed to have complied with the order*." (Own emphasis)

[20] The respondent confirmed that, with effect from 1 February 2017, it allocated no work to the applicants. By implication, and they were also not remunerated.

[21] The respondent cannot be said to comply with the award when it failed to remunerate the applicants after 1 February 2017. Nor can it be said that they complied with the award when their services were not utilized for years.

[22] Whether the respondent uses the applicant's services is within its discretion, but it must remunerate them at a rate of R500, 00 per month – in accordance with the award and the ordinary meaning of reinstatement.

[4] 1987(1) SA 39 (N) at 44

[23] If the respondent wishes to dismiss the applicants for operational reasons, it may do so by following the processes carefully laid out in the LRA. On the common cause facts, the respondent has not yet done so.

Section 158(1)(c) of the LRA

[24] In *Deutsch v Pinto & another*[5] Landman AJ (as he then was) held:

"*The power to make an award an order of court is a discretionary power. This power must be exercised judicially. Generally this court will be in favour of lending enforceability to an award. Inherent in the power to make an award an order of court is the power not to make an award an order of court either for a limited or unlimited period. A court will however generally be disinclined to let an award hang in the air. Why would a court not grant an application to make an award an order of court? There are probably various reasons. One reason would be where a party complains that the commissioner failed to apply the rules of natural justice or acted contrary to the rules or regulations of the CCMA designed to ensure that the audi alteram partem rule is honoured*."

[25] In *AB Civils (Pty) Ltd t/a Planthire v Barnard*[6] the LAC was faced with a settlement agreement which the parties had concluded, which one party sought to make an order of court because of non-compliance by the other party. The LAC noted that there was a generalized denial that the settlement had been complied with, a denial which lacked conviction. The LAC applied the "interests of justice" test and stated as follows:

"*Where, however, there is a dispute about compliance with an award, the court's discretion is given full play. It would then, depending on all the factors in each individual case, decide whether it is or is not in the interests of justice to convert the binding but unenforceable award into an order of court which may be enforced through the court's execution machinery*."

[5] (1997) 18 ILJ 1008 (LC) at 1016

[6] (2000) 21 ILJ 319 (LAC) at para 8

[26] It is clear I must also apply the interests of justice test. In this matter as well, the respondent's protestations (that it has complied with the award) lacks conviction. The applicants, on the other hand, have doggedly pursued the respondent to comply with the award. It is in the interests of justice to facilitate compliance by making the award an order of court.

Costs

[27] In *MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another*[7] the court stated as follows:

"*The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that cost orders are not made unless those requirements are met. 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*." (Own emphasis)

[28] I have considered the abovementioned rationale for not awarding costs. However, in this matter, the applicants, despite having limited access to resources, pursued their dispute by whatever means available to them. Given the delays, and the absence of merit in the respondent's opposition, a departure from rule, above, is necessary in law and fairness.

Conclusion

[7] [2008] 6 BLLR 540 (LAC) at para 19

[29] The applicants are entitled to the relief sought. Accordingly, I make the following order:

29.1 The award issued by the CCMA under case number LP3318-16 is made an order of court,

29.2 The respondent is directed to comply with the award by reinstating the applicant's employment contracts,

29.3 The respondent is ordered to pay the costs of the application.

R Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Mathabathe (Legal Aid)

For the Respondent: Mr Mabete, State Attorney