THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: DA 17/2023

In the matter between:

TRANSNET FREIGHT RAIL	**Appellant**
and	
BENNETT MASHABA	**First Respondent**
COMMISSIONER HILDA GROBLER *N.O.*	**Second Respondent**
TRANSNET BARGAINING COUNCIL	**Third Respondent**

Heard: **12 November 2024**
Delivered: **18 November 2024**
Coram: **Savage ADJP, Van Niekerk JA *et* Govindjee AJA**

JUDGMENT

VAN NIEKERK, JA

Introduction

[1] This is an appeal, with the leave of the Labour Court, against the whole of the judgment delivered on 11 July 2023, when the Court ordered that the appellant pay the first respondent the amount of R1 992 608.08, being arrear salary claimed by the first respondent.

Factual background

[2] The first respondent was employed by the appellant as a senior manager: integrated resource scheduling. On 8 August 2019, the first respondent was suspended and charged with three counts of sexual harassment and two counts of intimidation and bullying. After a s 188A enquiry conducted by the second respondent (arbitrator) and a comprehensive ruling that extended over 60 pages, the first respondent was found guilty on all counts and dismissed.

[3] On 3 November 2020, the first respondent filed an application to review and set aside the arbitrator's ruling. In the course of preparing the record for filing, it became apparent that the record was incomplete. An attempt to reconstruct the record was unsuccessful. The first respondent then requested the Judge President to issue a direction in terms of clause 11.2.4 of the then applicable Practice Manual. The matter was allocated to a Judge of the Labour Court who on 30 November 2021, issued the following direction:

> 'The First Respondent [appellant] must indicate by 10 December 2021 whether it objects to the dispute being remitted back to the third respondent for a hearing *de novo*, and if so, why, failing which the matter will be so remitted.'

[4] It is common cause that the appellant did not file any objection in response to the direction and that there is no record of any order setting aside the award under review, nor is there any order of the Labour Court remitting the matter to the third respondent (bargaining council) for rehearing.

[5] On 13 December 2021, the first respondent's attorneys enquired whether any objections had been filed, and advised that the first respondent would report for work

the next day. On the same day, the appellant's attorney responded by advising that the first respondent had been suspended at the time of the hearing and that the suspension remained in place pending arrangements for a fresh hearing. Later on the same day, the first respondent's attorney sought payment of the first respondent's arrear salary from the date of dismissal to the date of the tender of his services, on the basis that the first respondent's dismissal *"has been vacated by order of court"*.

Labour Court

[6] In the absence of payment as demanded, the first respondent filed an application in which he sought a declaratory order in terms of which he was entitled to back pay *"from the date of dismissal"*. The application was heard on 8 March 2023 and judgment delivered on 11 July 2023. In essence, the Labour Court found that the dispute had been remitted to the bargaining council with the consequence that the first respondent's dismissal fell away and that he was thus entitled to payment for the period between the date of his dismissal and the date on which he tendered his services. The Court did not order that the first respondent continue to be paid until the *de novo* hearing had been completed.

[7] The Labour Court reasoned that the direction had served as an order setting aside the arbitration award, with the consequence that the award revived the first respondent's contract of employment, thus entitling him to the back-dated remuneration that he claimed. The Court relied primarily on *Sampson v SA Post Office SOC Ltd*[1] where it was held that the consequence of the reviewing and setting aside of an award issued in terms of s 188A is the restoration of the *status quo ante* and specifically, that the dismissed employee is placed back in employment, as if the dismissal had never occurred.

[8] The appellant contends, among other things, that the Labour Court erred in concluding that a direction issued by a Judge in Chambers in terms of clause 11.2.4 of the Practice Manual served as an order setting aside the award, that the setting

[1] (2017) 38 *ILJ* 2368 (LC); [2017] ZALCJHB 145.

aside of the arbitrator's ruling had the automatic consequence that the dismissed employee is automatically reinstated.

Analysis

[9] I deal first with the Labour Court's conclusion that a directive issued in terms of clause 11.2.4 of the Practice Manual served as an order setting aside the arbitrator's ruling. Clause 11.2.4 reads as follows:

> 'If the record of the proceedings under review has been lost, or if the recording of the proceeding is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The Judge President will allocate the file to a judge for a direction, which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed.'

[10] The wording of clause 11.2.4 contemplates of the issuing of a 'direction' rather than an order. There is nothing in the LRA or the Rules that equates a direction with an order of Court. This is not to say that a Judge allocated the task of issuing a direction is precluded from making an order of Court in appropriate circumstances, but that is not what occurred in the present instance. The Judge did not issue an order. The lapse of the 10-day period afforded the appellant to object to the matter being remitted to the bargaining council did not, without more, have the effect of either setting aside the award under review or remitting it for rehearing.

[11] The respondent submits that the direction, signed as it was by the registrar on behalf of a Judge, was tantamount to an order of the Court and had the effect of reviewing and setting aside the arbitrator's award. Put another way, the first respondent contends that the direction was dispositive of the review application. There is no merit in this submission. Remission is a consequential order, dependent on a setting aside of the award sought to be reviewed. In *Police and Prisons Civil Rights Union obo Cindi v General Public Service Sector Bargaining Council and*

others[2] the Labour Court held that in the case of a 'limping record', (i.e. an incomplete record not capable of reconstruction), it was not open to the Court simply to remit the dispute for a *de novo* hearing, in the absence of an order by the Court that the award be reviewed and set aside. To the extent that clause 11.2.4 of the Practice Manual contemplates the referral of a lost or inaudible record to a Judge for direction, the Court held that a direction was not a court order and that the award remained intact unless and until reviewed and set aside by an order of Court. This reasoning is compelling. Not every decision or ruling of a court during the progress of a suit amounts to a judgment or order.[3] The Practice Manual makes clear that its intention is to promote access to justice, efficiency and consistency in proceedings before the Labour Court. It also makes clear that the Practice Manual is not a substitute for the Rules[4] and that a directive issued by a Judge is not binding on other Judges.[5] By definition therefore, a practice direction is subordinate to any relevant statute, the common law and the Rules. A direction has as its purpose the promotion of administrative efficiency; it is not a mechanism to be utilised to draw substantive conclusions of fact or law, nor is it a substitute for an order of the Court. A direction cannot be applied to restrict or undermine the provisions of any applicable legislation, the Rules or the common law.[6] A court's inherent power in terms of s 173 of the Constitution to protect and regulate its process (among other things, through practice directives) does not include a power to effect changes to legislation or the Constitution.

[12] Further, s 188A (8) provides that a ruling by an arbitrator issued under the section has the same status as an arbitration award, and the provisions of s 143 to 146 of the LRA apply, with the changes required, to any ruling. That being so, a

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[2] [2021] 10 BLLR 1059 (LC); [2021] 10 BLLR 1059 (LC).
[3] *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A); [1986] ZASCA 43, citing *Dickinson and Another v Fischer's Executors* 1914 AD 424 at 427.
[4] See clause 1.2 of the Practice Manual and also *Samuels v Old Mutual Bank* (2017) 38 *ILJ* 1790 (LAC) where this Court noted that '*The practice manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the Rules, the Labour Relations Act as well as various decisions of the courts on the matters addressed in the practice manual and the Rules'* (at para 15).
[5] See clause 2.1 of the Practice Manual.
[6] *National Director of Public Prosecutions (Ex Parte Application)* [2018] ZASCA 86; 2018 (2) SACR 176 (SCA) at para 31.

ruling issued in a s 188A inquiry constitutes administrative action.[7] An administrative decision has legal effect until it is set aside. S 145 of the LRA, which is directly applicable to a s 188A ruling, empowers the Labour Court to review and set aside an award, on grounds founded in the constitutional right to lawful and fair administrative action. What s 145 contemplates is that an award is set aside only by an order of Court. As I have indicated, remittal is a consequential remedy within the discretion of the review court that follows the setting aside of an award – there can be no remittal without the award being reviewed and set aside. Support for this view is apparent in the text of the Practice Manual itself. Clause 11.2.4 makes provision for a direction to be requested *"on the further conduct of the review application"*. By definition, a direction issued in these circumstances is process-related and can have no substantive consequence for the underlying review application. For the reasons reflected above, such a consequence can only be effected by an order of the Court.

[13] To the extent that the Labour Court relied on *Sampson* to support the conclusion that a direction remitting a matter for rehearing had the consequence of restoring the *status quo,* that case concerned a review application that served before the Labour Court by way of an application for default judgment, on the merits of the application. The Court granted an order that the award be reviewed, set aside and remitted to the dispute resolution agency concerned for rehearing before a different arbitrator. The remittal of the matter for a *de novo* hearing was thus the subject of an order of the Court, made after due consideration of all of the facts, arguments and the law. *Sampson* can thus be distinguished on the basis that the finding that the contract of employment had been revived was predicated on the existence of an order of Court reviewing and setting aside the award in question.

[14] The Rules of the Labour Court that came into operation on July 2024 repeal the Practice Manual. The new Rule 37 regulates review applications and specifically provides, as did clause 11.2.4 of the Practice Manual, that if in a review application, the record is lost or of such poor quality so as to compromise the integrity of the record, the applicant may approach the Judge president for a direction on the further

[7] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC).

conduct of the review application. Rule 37 (27) (c) provides that on allocation to a Judge for direction, the Judge must meet with the parties to discuss, among other things, the remittal of the matter to the person or body whose award is sought to be reviewed. A meeting held in terms of this Rule contemplates that the parties will make representations on the further conduct of the review application, which may include consent to an order that the award be reviewed and set aside on the basis that no record can be placed before the review court in circumstances where it is not possible for the Court to determine the application in the absence of a record. It should be recalled that s 145 (4) of the LRA empowers the Court, when it sets aside an award, either to determine the dispute on terms that are appropriate or to make any order than it considers appropriate regarding the procedures to be followed to determine the dispute. In matters that concern the review of rulings issued in terms of s 188A, where collateral matters regarding the employment status of a dismissed employee may arise, sufficient flexibility is afforded to the presiding Judge to tailor an order of the Court to address the consequences that may flow from the arbitrator's ruling being set aside.

[15] In sum: the direction on which the first respondent relied in support of his claim for remuneration does no more than advise the parties that the appellant was to indicate within a defined period whether it objected to the matter being remitted for a *de novo* hearing. The direction does not in itself have the legal effect of an order of the Court in terms of which the arbitrator's ruling is reviewed and set aside. No such order was granted. It follows that in these circumstances, the second respondent's ruling remains extant. There is thus no basis for any revival of the first respondent's contract of employment, or any claim for retrospective payment of remuneration. The Labour Court accordingly erred in coming to the finding that the first respondent's contract had been revived consequent of the direction issued in Chambers and that the first respondent was entitled to the remuneration he claimed. The appeal accordingly stands to be upheld.

Costs

[16] Neither party pursued the issue of costs but for the costs of the appellant's application for the late filing of the notice of appeal and the reinstatement of the

appeal consequent on it having lapsed. Mr Mhlanga, who appeared for the first respondent, commendably took the view that although initially opposed, the matter was of sufficient importance for the first respondent not to pursue his opposition to either application. In these circumstances, the appellant ought to bear the costs of the applications to reinstate the appeal and condone the late filing of the notice of appeal.

[17] I make the following order:

Order

1. The appeal is upheld.
2. The Labour Court's order is substituted by the following:

"The application is dismissed".

van Niekerk JA

Savage ADJP *et* Govindjee AJA concur.

APPEARANCES:

FOR THE APPELLANT: Mr P Maserumule, Maserumule Attorneys

FOR THE FIRST RESPONDENT: Mr S Mhlanga, Mhlanga Inc.