IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA11/2013

In the matter between:

COCA COLA SABCO (PTY) LIMITED **Appellant**

And

HAROLD VAN WYK **Respondent**

Heard: **18 November 2014**

Delivered: **05 May 2015**

Summary: Reinstatement award – writ of execution calculated for the period between the date of the award and the implementation of the award – Labour Court holding that quantification for payment for that period may be done by way of affidavit before the registrar – Appeal - period between the date of the award and the implementation of the award not covered by the LRA - reinstatement award covering only the period between the date of dismissal and the date of the order and not entitling an employee to remuneration between the date of the award and the actual date of implementation – employee seeking payment for that period having a contractual claim against employer. Employer becoming a judgment debtor only after adjudication of the contractual claim. Appeal upheld – paragraph 2 of the Labour Court's judgment deleted.

Coram: Musi JA, Murphy *et* Kathree-Setiloane AJJA

JUDGMENT

MUSI JA

[1] This is an unopposed appeal against the judgment of the Labour Court (Van Niekerk J).

[2] The respondent was employed by the appellant since 1996. During September 2001, whilst still employed by the appellant, he was seriously, but not permanently, injured in a motor vehicle collision. On 2 January 2002, he returned to work. During June 2003, he was dismissed for incapacity due to ill health.

[3] He referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Conciliation failed and he referred the dispute for arbitration. On 5 August 2004, a commissioner, acting under the auspices of the CCMA, found that the respondent's dismissal was procedurally fair but substantively unfair.

[4] The commissioner issued the following award:

> '1. The dismissal of the Applicant was substantively unfair and procedurally fair.
>
> 2. The Respondent is ordered to re–instate the Applicant retrospectively without any loss of benefits to his former position and on terms that are no less favourable prior to the dismissal.
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> 3. The Respondent is further ordered to pay the Applicant arrears salary in the amount of R33 507-10 calculated at R703-00 per week X 4.333X11 months.
>
> 4. Payment of the above amount to be paid on or before the 1st of September 2004.
>
> 5. There is no order as to costs.'

[5] The appellant was not satisfied with the outcome and launched a review application against the commissioner's award. The review application was dismissed with costs on 16 November 2007. On 11 March 2008, an application for leave to appeal suffered the same fate.

[6] The appellant petitioned the Judge President. On 31 July 2008, the Labour Appeal Court refused the appellant's petition for leave to appeal.

[7] On 19 February 2009, the registrar of the Labour Court issued a writ of execution against the appellant's movable property. After protracted negotiations, the respondent was reinstated on 2 March 2009. The relevant parts of the writ read as follows:

> 'and to cause to be realised of such movable goods by public auction the sum of:
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> 1) R33 507-10 (Thirty three thousand five hundred and seven rand ten cents) awarded as Compensation to the Applicant in terms of the arbitration award dated 5 August 2004 confirmed under Labour Court Case No: JR2166/04 on 16 November 2007 attached to this writ marked Annexure **"A"**
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> 2) R164 489.34 (One hundred and sixty four thousand four hundred and eighty nine rand thirty four cents) (outstanding salary calculated at R703-00 per week x 4.333 x 54 months since 1st of September 2004) plus interest. See Equity Aviation Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others (CCT88/07) 2008 ZCAA 16.
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> 3) Interest on R33 507.10 at the rate of 15.5% per annum (monthly compounded) calculated from 5 August 2004 to date of final payment, obtained and recovered by judgment of the Labour Court dated 11th March 2008 in the case mentioned in the preceding paragraph, plus R387, 60 for the taxed costs and charges incurred in issuing this writ Attached to the writ is the court order dated 11th March 2008 under Labour Court Case No. JR2166/04 marked Annexure **"B".**'

[8] The appellant approached the Labour Court with an application to set aside the writ of execution.

[9] Paragraphs 1 and 3 of the writ were not contested in the court *a quo*. The appellant only took issue with paragraph 2 thereof.

[10] The court *a quo* carefully analysed the award of the commissioner and correctly concluded that:

> 'Despite the inelegant and possibly ambiguous terms of his award, it had the effect of reinstating the first respondent with retrospective effect, on conditions not less favourable than those that pertained prior to dismissal, save that in regard to his salary, and in the exercise of the commissioner's discretion, the applicant was obliged only to pay the third respondent the amount that he would have earned in the preceding 11 months, i.e. R33 507. 10. This is not an award of compensation, whatever labels the first respondent may have affixed to it in paragraph 1 of the writ.'

[11] The court *a quo* however went further and held that "an employer's liability for remuneration post reinstatement falls within the scope of the award of reinstatement and being a judgment *ad pecunian solvendam* it can be enforced by way of a writ of execution." The court *a quo* then offered a practical solution to the problem and said the following:

> 'Where a judgment for payment of monies that are not quantified in the judgment itself but are capable of being quantified without difficulty, it is incumbent on a judgment creditor to prove the nature and extent of the judgment debtor's liability, for example, by way of affidavit.'

[12] The court *a quo* concluded that paragraph 2 of the writ of execution was not properly proved. According to the court *a quo*, the quantification of paragraph 2 should have been done before the registrar by way of affidavit. The court *a quo* issued the following order:

> '1. The writ of execution issued on 19 February 2009 is varied by the deletion of paragraph 2 thereof.
>
> 2. The first respondent is given leave to apply for the issuing of a fresh writ, on affidavit, in which the first respondent quantifies the applicant's liability to the first respondent for wages payable consequent on the order of reinstatement.
>
> 3. There is no order as to costs.'

[13] This appeal is directed against paragraph 2 of the court *a quo*'s order. Mr Grobbler, on behalf of the appellant, argued that the court *a quo* erred in finding that an award for reinstatement "required the payment for the full period up to and including the date of compliance". He submitted that awards for reinstatement cannot extend to a date beyond the date of the award. He further submitted that awards for reinstatement cannot serve as a basis for a common law contractual entitlement to automatic payment of remuneration that would have been payable had the employee not been unfairly dismissed.

[14] The issues which we are called upon to decide are, firstly, whether an award of reinstatement automatically entitles an employee in whose favour such award was made to amounts post the date of the award until the implementation date or whether the claim in respect of the amounts subsequent to the date of the award should be claimed separately and secondly whether such amounts can be claimed by way of issuing a writ of execution accompanied by an affidavit setting out the amount of the claim.

[15] In *Equity Aviation Services (Pty) Ltd v CCMA and Others,*[1] the effect of a reinstatement order was explained as follows:

> '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. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word "reinstate" means that the reinstatement will not run a date from after the

[1] 2009 (1) SA 390 (CC).

> arbitration award. Ordinarily then, if a Commissioner of the CCMA order the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly.'[2]

[16] The effect of a reinstatement order, therefore, is to revive the contract of employment which was terminated by a dismissal. On the date on which the reinstatement order is made, the commissioner may order that the reinstatement be effective from the date of the order or retrospectively from any date not earlier than the date of dismissal. Importantly, for purposes of this matter, the commissioner may not order that the reinstatement will start from a date after the issuing of the arbitration award. This begs the question, what remedy, if any, does the employee have to claim the money due to him/her for the period between the date of the award and the actual implementation thereof.

[17] The money paid to an unfairly dismissed employee consequent to a retrospective reinstatement order is not compensation. Compensation and back-pay may only be granted in the alternative and are mutually exclusive.[3] The back-pay ordered by the commissioner can therefore only refer to the period between the date of dismissal and the date of the order and does not entitle an employee, without more, to remuneration between the date of the award and the actual date of implementation. The Labour Relations Act does not cater for such relief.

[18] Ordinarily an employer that complies with an order of retrospective reinstatement and back pay would not only pay the back pay but also the remuneration that the employee was entitled to between the date of the order and the implementation date, if the employee tendered his services during that period.

[2] At para 36.
[3] *Equity Aviation* at para 42.

[19] Since the LRA does not cater for relief between the date of the award and the date of implementation, how then should a reinstated employee recover that money if he tendered his services, during that period?

[20] According to the court *a quo,* such money may be recovered by simply quantifying it and filing an affidavit with the registrar. In *National Union of Metal Workers of South Africa and Others v Hendor Mining Suppliers, a Division of Marchalk Beleggings Pty Ltd,*[4] the learned acting judge was also of the view that the reinstatement order is the cause of action on which the judgment debt is claimed. She further said the following:

> '[20] It is apparent, in citing the dicta in the *Equity Aviation* matter, that the Constitutional Court in the *Billiton* matter reinforce the notion that the reinstatement order arises from the confines of the Labour Relations Act and is reinforced in terms of an order of court. To the extent that the employer or company appeals that decision, it does so with the risk that the order of reinstatement continues pending a reversal, if any, of that order by a higher court…
>
> [23] In other words, the possibility of paying additional back pay, pursuant to an appeal process to one or more of the higher courts, is a risk inherent in the process. The company's argument in this court - that the prospective part of the Labour Court order commencing from the period after 16 April 2007 and terminating on 28 September 2009 is subject to a properly pleaded contractual claim…is not only odd but perverse.'

[21] It seems to me that the court *a quo* and the learned acting judge in *Hendor Mining Suppliers* conflated the reinstatement order and the contractual duty to pay an employee for work done.

[22] The reinstatement order - as stated above - only serves to revive the contract of employment. The rights and obligations of the parties would therefore, as in the beginning, again be governed by the contract of employment.

[23] In *Johannesburg Municipality v O' Sullivan,*[5] it was said that:

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[4] [2014] JOL 32068 (LC).
[5] 1923 AD 201.

> *'In other words, so long as the employee is bound to devote his whole time and attention to the council's service and is consequently not free, when there is no work for him to do, to dispose of his labour elsewhere, so long is the council bound to pay him his weekly wage.'*[6]

[24] Therefore if the employee, after the reinstatement order and during the time that the employer exercises its review and appeal remedies to exhaustion, tenders his/her labour he/she does so in terms of the employment contract. She/he is therefore entitled to payment in terms of the contract of employment. The claim is therefore a contractual one, wherein the employee would have to set out sufficient facts to justify the right or entitlement to judicial redress. The employee would *inter alia* have to prove that the contract of employment is extant; that she/he tendered his/her labour in terms thereof and that the employer refuses or is unwilling to pay him/her in terms of that contract. The employer on the other hand would have all the contractual defences at her/his disposal.

[25] The court *a quo* was, in my view, incorrect in its conclusion that "awards of reinstatement, by their very nature, require the payment for the full period up to and including the date of compliance."[7] All that an award for reinstatement does is to revive the contract of employment.

[26] The wrong reasoning in relation to the nature of a reinstatement order probably led the court *a quo* to the conclusion that the quantification of the outstanding money between the date of the order and the implementation date of the order may be done by way of affidavit before the registrar. Such procedure, although practical, may have far-reaching and unfair consequences. The most obvious being firstly that the employer's right to defend himself/herself, by invoking contractual defences would be negated. Secondly it would give a reinstatement order a characteristic that it was never intended to have i.e. reviving the contract and setting out the entitlement of the employee to damages after the date of the order. A reinstatement

[6] At 206.
[7] Para 11 of the judgment of the court *a quo*.

award/order cannot extend to a date beyond the date of the order nor can it serve to form the basis of a common law contractual entitlement.

[27] In *De Crespigny v De Crespigny,*[8] Holmes J (as he then was) said the following about execution:

> 'The civil administration of justice provides machinery *inter alia* for the enforcement of rights. It provides, amongst other thing, for litigation, judgment, and execution. As execution is a process for enforcing judgments, it seems to me axiomatic that it is only available when the claim or *lis* has been judicially resolved. And it seems to me clear that a *lis* has not been judicially resolved if the amount payable under the judgment can only be ascertained after a further problem of law has been decided. It is not within the province of the plaintiff to decide such problems. In such a case, failing agreement between the parties, a plaintiff's remedy, at any rate in the Supreme Court, would, I think, be to apply for a definition of his rights under the judgment. Whether this should be done by way of an application for a *declaratur*, or in the course of applying for leave to execute, I need not decide.'[9]

[28] When there is a delay in the implementation of the reinstatement award and the employer refuses to pay an employee money that may be due between the period of the award and the implementation thereof, the *lis* between them has not been judicially resolved. It is only after a contractual claim in the civil courts or under section 77 of the Basic Conditions of Employment Act has been instituted and pronounced upon that it can be said that the employer is a judgment debtor against whom a writ may be issued.[10] The order of reinstatement is not a judgment dealing with the consequent damages for the breach of the contract.

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[8] 1959 (1) SA 149 (N).
[9] At 150 F-G.
[10] Section 77 of the BCEA reads as follows:
"**77 Jurisdiction of Labour Court**
(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.
(2) …
(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract…"

[29] The risk that an employer takes relating to the accumulated financial burden, caused by delays in the review and appeal process, has nothing to do with the cause of action. The risk to the employer remains and the rewards to the employee would also be intact if the claim is prosecuted properly and timeously.

[30] In summary, a reinstatement award does not cover the period between the award and its implementation. Should an employer refuse to pay an employee for the said period then the employee has a contractual claim - which is a totally different cause of action - against the employer.

[31] In so far as the views expressed in *Hendor Mining Suppliers* are inconsistent with the views expressed in this judgment; *Hendor Mining Suppliers* is wrong.

[32] I, therefore, make the following order:

a) The appeal is upheld.

b) Paragraph 2 of the court *a quo'*s judgment is deleted.

c) There is no order as to costs.

Musi JA

Murphy and Kathree-Setiloane AJJA agreed with Musi JA

APPEARANCES:

FOR THE APPELLANT: Adv Grobbler

Instructed by: Kramer Weihmann Joubert INC

FOR THE RESPONDENT: No appearances