



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No. JA66/12

In the matter between:

POTGIETERSRUST PLATINUM LIMITED

(MOKGALAKWENA SECTION)

Appellant

~~and~~ And

GODFREY DITSELA & 2 OTHERS

Respondents

Heard: 27 May 2014

Delivered: 2 July 2015

Summary: Mootness – The LC ordered reinstatement of employees (respondents) and employer (appellant) complied with the order – Appellant nevertheless still appealed against the LC’s judgment, thus causing respondents to incur unnecessary costs. Held: Appeal moot - no longer necessary for the LAC to issue judgment on merits of the appeal – Appellant ordered to pay the respondents’ costs.

Coram: Davis, Ndlovu JJA and Molemela AJA

JUDGMENT

NDLOVU JA

- [1] This is one matter that should never have come before this Court, for the reason of its mootness.
- [2] On 22 July 2010, the CCMA commissioner (the second respondent in the Court *a quo*) issued an arbitration award whereby he found that the dismissals of the respondents were substantively unfair and ordered that the appellant (the respondents' former employer) must compensate each respondent in the amount equivalent to 12 months' remuneration. The respondents, who were represented by their trade union, the National Union of Mineworkers, were not satisfied with the outcome of the arbitration proceedings (as they sought reinstatement) and, thus, referred the matter for review by the Labour Court, in terms of section 145 of the Labour Relations Act¹ (the LRA). The review application served before Whitcher AJ (as she then was) who, on 23 August 2012, handed down her judgment with the following order, in favour of the respondents:
- '1. The second respondent's finding that compensation of 12 months' remuneration is an appropriate form of relief is reviewed and set aside.
 2. The second respondent's finding on the appropriate relief for the applicant employees' unfair dismissal is substituted with an order that the third respondent must reinstate the applicant employees with retrospective effect including back-pay from the date of their dismissals.
 3. The applicant employees must be issued with final written warnings on their return to work.
 4. The applicant employees must be reinstated by 1 September 2012.
 5. The third respondent must pay the applicants' costs.'
- [3] The appellant's application for leave to appeal was declined by the Court *a quo* on 22 November 2012, but granted by this Court on 28 February 2013, on

¹ Act 66 of 1995.

petition.² The appellant submits that the Court *a quo* erred in reversing the commissioner's award and substituting it with the order of reinstatement in favour of the respondents. The appellant further submitted that the commissioner's decision was one which a reasonable decision-maker could have made in the circumstances. Among other things, the appellant contended that the extended delay between the dismissals and the arbitration proceedings was such that it rendered the reinstatement of the respondents reasonably impracticable.³

[4] The matter was argued before this Court on 27 May 2014. Mr *Myburgh SC* appeared for the appellant and Mr *Makinta* for the respondents.

[5] During Mr *Makinta's* address, it came to light that all the respondents had in fact already been reinstated by the appellant in the same positions that they held prior to their dismissals. This had happened about a year already before the hearing of the appeal. It also transpired that this development was actually alluded to in the respondents' heads of argument.⁴ When the Court invited Mr *Myburgh* for his comment, he said that he had no instructions on the issue. After the arguments were concluded, the judgment was reserved.

[6] Given the uncertainty expressed by Mr *Myburgh* on the issue of the respondents' reported reinstatement (due to lack of instructions on his part), I had delayed preparing the judgment, hoping that the issue would be clarified in due course, as I considered it would be pointless preparing a judgment in respect of a matter that is moot. However, no clarification on the issue was forthcoming.

[7] Eventually, upon recent inquiry to the appellant's attorneys regarding the matter, they responded in a letter dated 19 February 2015 as follows:

- '1. We confirm that the Fourth to Sixth Respondents were reinstated by the Applicant.

² In terms of section 166(2) of the LRA.

³ Paragraph 47 of the appellant's heads of argument.

⁴ Paragraph 24.11 of the respondents' heads of argument.

2. In such circumstances, it will not be necessary for the Labour Appeal Court to deliver [the] judgment in this matter.

3. We apologise for any inconvenience.

Yours faithfully

ENS Africa' [signed]

[8] A copy of this letter was forwarded to Mr *Makinta*'s office. In his response thereto, Mr *Makinta* did not subscribe to the approach adopted by the appellant's attorneys. He suggested that they should formally withdraw the appeal and tender the respondents' costs. The appellant's attorneys are apparently not amenable to that suggestion. Consequent to this impasse, the Court will now proceed and deal with the matter. On the basis of the order that I intend to propose, there is, in my view, no need to hear any further submissions from the parties.

[9] It is trite that, save in exceptional circumstances, a court will only entertain a dispute as long as such dispute remains live between the parties. It is so because a court does not need to make an order that will be incapable of execution by virtue of the matter having become academic. In *Geldenhuis & Neethling v Beuthin*,⁵ the Appellate Division (*per* Innes CJ) stated the following:

'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'⁶

[10] Recently, the Legislature promulgated the Superior Courts Act,⁷ section 16(2)(a) of which provides as follows⁸:

⁵ 1918 AD 426. See also: *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) at para 13-18; *Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another* 2005 (1) SA 47 (SCA) at paras 39-41; *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) at para 7; *Minister of Trade and Industry v Klein NO* [2009] 4 All SA 328 (SCA) at para 13; *Legal Aid South Africa v Magidiwana and Others* 2015 (2) SA 568 (SCA) at paras 18-20; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 21.

⁶ At 463H.

⁷ Act 10 of 2013, which came into effect on 23 August 2013.

‘(2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.’

[11] Of course, in the present instance, it is not clear as to when the respondents were reinstated in relation to the date when this Court granted the appellant leave to appeal. However, in my view, it was unwise and unfair of the appellant to proceed with the appeal and thus drag the respondents to Court in circumstances where the order of their reinstatement had already been implemented by the appellant a year ago. Indeed, it is beyond my comprehension what the appellant had in mind and sought to achieve by proceeding with this appeal. There is no indication or suggestion that the reinstatement order was implemented by the appellant conditionally, on a “without prejudice” basis. In the circumstances, the relief sought by the appellant would, if granted, clearly have no practical effect or result.⁹

[12] Significantly, despite the fact of reinstatement of the respondents having been mentioned in the respondents’ heads of argument, the appellant still proceeded and briefed counsel, who was not properly instructed about the issue, to come to Court and argue the appeal. In that way, the appellant unduly caused the respondents to incur further legal costs, as they had no option but to defend their reinstatement, as sanctioned by the Court *a quo*.

[13] Accordingly, it seems to me that, the respondents are entitled to costs of the appeal. For the reason of mootness, there is no longer any need for the Court to issue a judgment on the merits of the appeal.

[14] In the result, the appellant is ordered to pay the costs of the appeal.

⁸ These provisions are the replica of section 21A(1) and (3) of the repealed Supreme Court Act 59 of 1959, the predecessor of the Superior Courts Act, 2013.

⁹ Section 16(2)(a) of the Superior Courts Act, above.

Ndlovu JA

Davis JA and Molemela AJA concur in the judgment of Ndlovu JA

APPEARANCES:

FOR THE APPELLANT:

Mr AT Myburgh SC

Instructed by ENS Africa

FOR THE RESPONDENTS:

Mr ES Makinta of Makinta Attorneys