



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA 108/13

In the matter between:

GAUTENG DEPARTMENT OF EDUCATION

Appellant

And

BRENT SAUNDERS

Respondent

In re:

BRENT SAUNDERS

Applicant

And

GAUTENG DEPARTMENT OF EDUCATION

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

N CAWE, *N.O*

Third Respondent

Heard: 03 March 2015

Delivered: 09 September 2015

Summary: Enforcement of arbitration award in terms of s158(1)(c) of the LRA – arbitrator issuing award in favour of employee – employer seeking review of arbitration award – incomplete record filed and parties in disagreement in fixing date for the reconstruction – employee seeking making arbitration award an order of court – employer contending that enforcement of award impracticable due to pending review application – Labour Court exercising

discretion in making award an order of court – discretion should be exercised judicially taking into account all material facts- employer prejudiced by award made an order of court – Labour Court not taking into account employer’s effort in the reconstruction of the record – appeal upheld with costs.

CORAM: Waglay JP, Landman JA, and Mngqibisa-Thusi AJA

JUDGMENT

MNGQIBISA-THUSI AJA

- [1] This is an appeal against the judgment and order of Bruinders AJ in the Labour Court handed down on 21 October 2013. In terms of the order, the arbitration award made by Ms N Cawe, under the auspices of the Education Labour Relations Council (“ELRC”), was made an order of Court in terms of s158(1)(c) of the Labour Relations Act 66 of 1995 (“the Act”). On 19 February 2014, this Court granted the appellant leave to appeal on petition.
- [2] The appellant further seeks condonation for the late filing of the Notice of Appeal. With regard to condonation, there is no reason to refuse the application as it is unopposed and there is no reason to suppose that the respondent will be prejudiced if the application is granted.

Factual background

- [3] The respondent was employed as a Deputy Principal at Parktown Boys High. During February 2011, four learners from the school had, without authority, driven the school’s golf cart (“the cart”) and in the process damaged it. The school had acquired the second-hand cart through a donation of R 15 000.00 made by a parent, a certain Mr E Hayward. The respondent also contributed an amount of R 3 000.00 towards the acquisition and branding of the cart. As a result of the damage to the cart, the respondent laid a criminal charge against the learners at the Parkview Police Station. Several meetings were held between the respondent, the parents of the learners and the police officer investigating the matter. It appears during the meetings that the respondent

falsely represented to the parents and the police officer that the cart was his, whereas in fact it belonged to the school. Furthermore and in order to avoid the learners being prosecuted and/or possibly having a criminal record, the parents of the learners agreed to compensate the respondent. A quotation was sourced and the parents agreed to jointly pay an amount of R 38 000.00 as compensation. The respondent gave the parents his personal bank account into which the money should be deposited. The reason given by the respondent to the parents for the money being deposited into his personal bank account was that he owned the cart and that he had already expended his personal funds to replace the damaged cart.

- [4] By the time the learners' parents deposited the R 38 000.00 into the respondent's bank account, the respondent had already acquired a new golf cart for R 59 000.00 which he branded with the school's logo and entered into the school's asset register.
- [5] When Mr Hayward learned about the misrepresentation made by the respondent pertaining to the ownership of the cart, he wrote a letter to the respondent querying his claim of ownership of the cart. Thus the school, including the school's governing body ("the SGB"), became aware of the respondent's ownership claim of the cart and that he had directed that the money for the replacement of the cart be deposited into his account.
- [6] The SGB sold the cart at a loss for R 47 000.00. The SGB reimbursed the parents of the learners collectively with the amount of R 38 000.00 they had deposited into the respondent's bank account and gave the respondent R 9 000.00 from the proceeds of the sale of the cart. Because of this, the respondent lost R 12 000.00 of the money he expended in the acquisition of the new cart.
- [7] The school instituted disciplinary proceedings against the four learners and the respondent.
- [8] The charge against the respondent reads as follows:

'It is alleged that you committed an act of dishonesty in that you received an amount of R 38, 000.00 from the parents of Mzwakhe Mthethwa, Kabelo Mothibeli, Kopano Makgalemele and Sifiso Yende for the golf cart belonging to Parktown Boys High School damaged by the said learners in that you convinced the parents that the golf cart belonged to you and not the school.

In view of your actions you are thus charged with misconduct in terms of section 18 (1) (ee) of the Employment of Educators Act, 77 of 1998 as amended.'

- [9] Section 18(1)(ee) of the Employment of Educator's Act ("the Educator's Act") provides that:

'Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if s/he commits an act of dishonesty.'

- [10] At the disciplinary hearing and after the respondent pleaded guilty to the charge, the chairperson imposed a sanction of dismissal. The chairperson based the appropriateness of the sanction on s(1)(ee) read with s18(5)¹ of the appellant's Disciplinary Code which gives the chairperson a discretion of imposing dismissal, amongst other alternative types of sanction, in the event of dishonesty.
- [11] An internal appeal body dismissed the respondent's appeal against the chairperson's decision to dismiss him.
- [12] The school also reported the respondent to the South African Council of Educators ("SACE"), which in turn imposed a fine of R 12 000.00 on the respondent, and suspended his teacher's certificate for five years.
- [13] The respondent referred an unfair dismissal dispute to the ELRC. When conciliation failed, the matter was referred to arbitration. On 24 July 2012, the arbitrator issued an award in terms of which she found that the respondent's dismissal was substantively unfair on the ground that it was too harsh under the circumstances. The arbitrator ordered reinstatement of the respondent with effect from 1 August 2012 without loss of any benefits. Furthermore, the

¹ Section 18(5)(a) of the Code provides that "An educator may be dismissed if he or she is found guilty of dishonesty, as contemplated in subsection (1)(ee)".

arbitrator's award provided that the respondent should forfeit three months' salary as he had been found to be dishonest. The appellant was ordered to pay the respondent R 66 999.00 as back pay within six months of the order. In her award, the arbitrator concluded that the respondent was dishonest in claiming ownership of the cart, but found that the respondent's false representation, which did not benefit him personally, was in itself not sufficient to warrant a dismissal. The arbitrator also concluded that the appellant had not provided any evidence during the hearing that because of the respondent's dishonesty, the trust relationship between it and the respondent had broken down. In deciding to reinstate the respondent, the arbitrator took into account the respondent's long service with the appellant and a positive testimonial handed in by the respondent's colleagues from Parktown Boys.

Labour Court

[14] On 01 August 2012, the appellant sent a letter to the respondent's attorneys alerting them to the fact that it intended reviewing the arbitration award. However, after the respondent was unsuccessful in having the award certified and on 10 August 2012, the respondent launched an urgent application in the Labour Court for an order under the provisions of s158(1)(c)² of the Act, seeking to make the arbitrator's award an order of court. The purpose of making an arbitration award an order of court is so that the arbitration award may be enforced. On 15 August 2012, the appellant filed papers for a stay of the application in terms of section 158(1)(c), pending the finalisation of the review application and also filed its review application. The grounds for reviewing the arbitrator's award were the following: (i) that the arbitrator misconceived her duties as an arbitrator in that she dealt with the arbitration as a judicial review rather than a hearing *de novo*; (ii) that the arbitrator ignored material facts; and (iii) that the reinstatement of the respondent together with three months back pay is reviewable.

² Section 158(1)(c) of the Act reads as follows:

"(1) The Labour Court may –

(c) make any arbitration award or any settlement agreement an order of the Court."

- [15] By agreement between the parties, both applications were postponed *sine die* pending the filing by the appellant of an application to review and set aside the arbitration award. Costs were reserved. The parties further agreed that the appellant would file the record of the arbitration proceedings (“the record”) on or before 21 June 2013.³ On 21 June 2013, the respondent filed an incomplete record. It is common cause that in view of the incomplete record, the parties were in negotiations pertaining to the reconstruction of the record but could not agree on dates.⁴
- [16] On 11 July 2013, the respondent enrolled the s158(1)(c) application for hearing. All papers in that application, including heads of argument had been filed.
- [17] As appears from the record of the hearing, the Labour Court suggested to the parties that it should hear the appellant’s review application first and thereafter the respondent’s s158(1)(c) application. Counsel for the appellant objected to that process and argued that the respondent’s s158(1)(c) application could not proceed in view of the pending review application. Counsel submitted that once the arbitration award was made an order of court, the appellant would be excluded from having the arbitrator’s award reviewed and set aside.⁵ Counsel further submitted that in view of the incomplete record, the review application was not ripe for hearing. It is common cause that the disciplinary chairperson’s reasons for her decision to dismiss the respondent were missing from the record. Furthermore, the appellant’s counsel argued that it did not prepare for the review application and therefore was not ready to argue the review application. The appellant’s counsel further submitted that the application to stay the s158(1)(c) application was not before the court as it had not been set down for hearing on that particular day.
- [18] The Labour Court was of the view that there was nothing barring it from entertaining the respondent’s s158(1)(c) application even if there was a pending review application. The court was of the opinion that the missing part

³ Rule 5 (17) of the Rules of this court requires the appellant to deliver the record within 60 days of the order granting leave to appeal.”

⁴ See court *a quo*’s judgment, paragraph 3, line 19-20.

⁵ In this regard see *Dartprops (Pty) Ltd v CCMA and Others* [1999] 2 BLLR 137 (LC).

of the record was not relevant to the issues to be determined in the review application, particularly because the chairperson had testified at the arbitration hearing and her evidence was summarised in the award.

- [19] The Labour Court proceeded to hear submissions made by the respondent's counsel in the s158(i)(c) application. The appellant's counsel made no submissions in this regard in view of the appellant's stance that there was a pending review application and that the s158(1)(c) application should not be proceeded with.
- [20] On 06 September 2013, the court *a quo* granted an order making the arbitration award an order of court. After briefly summarising the arbitrator's reasons for coming to the conclusion that the respondent's dismissal was a harsh sanction and after assessing the appellant's prospects of success in the review application, the court *a quo* concluded that:

'[21] Here there was dishonesty. However, it was aimed at protecting not prejudicing the employer and the school. The dishonesty was not for personal gain. It was directed at parents of school pupils. It did not prejudice them either. Their sons had damaged school property. They had agreed to contribute to the replacement of the cart. They would have made the contribution if the employer (sic) were not dishonest.

[22] The only difference the dishonesty made is that the contribution was paid into the employee's bank account. That was after he had already paid for the replacement of the cart. They paid the money into his bank account because they had agreed to pay for or contribute towards its replacement, not because he misrepresented that the cart was his. When they paid him, the employee had already replaced the cart from his own funds. The parents owed him the money because he had already paid for a replacement cart that he had delivered to the school. The contribution by the parents was not enough to pay for the replacement of the cart. The employee paid the balance out of his own pocket. The employer sold the cart at a loss, repaid the parents in full, but did not repay the employee his full contribution. He lost R12 000.00. This conduct by the employer amounts to cutting off your nose to spite your face.

...

[24] All in all, the employee has lost in excess of R100 000, 00 for telling a lie that had no material consequence for his employer or the parents and that did not benefit him, only his employer. I can see no reason for interfering with the exercise of the arbitrator's discretion. She decided to impose a sanction less than dismissal because she found that dismissal was too harsh in the circumstances. Her finding takes into account the things for which she is criticized in the grounds of review. It is apparent from an analysis of the award that the grounds of review are without merit. There are no prospects of success on review. The s158 (1) (c) application should succeed."

[21] On 10 October 2013, the respondent brought an urgent application for the execution of the award, which the appellant opposed. On the day of the hearing of the matter, the parties, however, reached an interim settlement in terms of which the respondent was reinstated in an administrative position at the same pay level he would have been but for his absence since 1 March 2012.

[22] For some inexplicable reason, in view of the fact that the judgment and order of the court *a quo* making the arbitration award an order of court has not been set aside, the appellant's review application was set down for hearing in the Labour Court. Judgment has been reserved pending the outcome of this appeal.

[23] The appellant appeals against the judgment and order of the Labour Court on the following grounds that:

23.1 the appellant was deprived of its rights to be heard on the review application;

23.2 the Labour Court's finding that the respondent did not benefit or stand to benefit from his admitted dishonesty is incorrect on the facts; and

23.3 the court's finding that the respondent did not benefit or stand to benefit from his admitted dishonesty does not take into consideration the fact that the respondent committed misconduct contemplated in s18(1)(ee) of the Educators Act which should have consequences in law.

[24] The respondent opposes the appeal on the grounds that:

24.1 the appellant failed to exercise its right to have the application in terms of s158(1)(c) of the Act stayed pending the finalisation of the review application.

24.2 the Labour Court having found that the appellant was delaying the finalisation of the review application, correctly found that the review application had no prospect of success.

[25] The main issue to be determined is whether the Labour Court erred in exercising its discretion in favour of making the arbitration award an order of court in light of a pending application to review the arbitration award.

[26] In *National Education Health & Allied Workers Union on behalf of Vermeulen v Director-General: Department of Labour*,⁶ the court said the following:

‘[24]... The power to make an award an order of court under s158(1)(c) of the LRA (or concomitantly to stay enforcement of an award under s145(3)) is a discretionary power to be exercised judicially, and in general should be applied in favour of lending enforceability to an award in the interests of bringing finality to labour disputes. The prospects of success are therefore only one consideration. Equally important are the balance of convenience and the requirements of fairness.’⁷

[27] It is the appellant’s contention that the court *a quo* denied it the right to be heard by proceeding to deal with the review application in the absence of any input on behalf of the appellant as appellant’s counsel was not ready to argue the merits of the review application. It is the appellant’s contention that the review application was not ripe for hearing as the record was incomplete. It is further the appellant’s contention that the court *a quo* erred in not postponing the s158(1)(c) application with an order that the appellant pays the wasted costs occasioned by the postponement. It is the appellant’s contention that a postponement of the s158(1)(c) application was justified in view of the fact that the parties still had to agree on a date for the reconstruction of the record.

⁶ (2005) 26 ILJ 911 (LC).

⁷ At para 24. See also *Ntshangane v Speciality Metals CC* [1998] 3 BLLR 305 (LC) at paras 13 and 14.

Moreover, it is appellant's contention that at the time the application was enrolled, it had already issued a notice to compel the ELRC to produce the record and therefore there was no tardiness on its part.

- [28] On the issue of the court's discretion under the provisions of s158(1)(c) of the Act, it is the appellant's contention that this is to be exercised judicially, taking into consideration whether the interests of justice would be served if the enforcement of the award was stayed pending the finalisation of the application for review. The appellant argues that it is not in the interests of justice to make the award an order of court as its effect is to preclude the appellant from challenging the reinstatement of the respondent in light of his serious dishonest conduct. It is the appellant's view that should the s158(1)(c) application have been postponed and the parties given an opportunity to finalise the reconstruction of the record, this application and the review application, together with the application for a stay could be set down to be heard at the same time. The respondent would not be prejudiced in that should the review court confirm that his dismissal was substantively unfair, the respondent would be reinstated. Furthermore, the respondent would not lose any benefits that accrued to him since his dismissal.
- [29] On the issue of prospects of success in the review application, it is the appellant's contention that the court *a quo* erred in not limiting itself to determining the prospects of success of the appellant's review application, but actually made a determination on the review application in the absence of the record and argument on behalf of the appellant. It is the appellant's contention that had the record been available at the hearing, the court *a quo* would have discovered that it was not reasonable for the arbitrator to have reached the conclusion she did based on the available material.
- [30] It is further the appellant's contention that taking into account the respondent's dishonest conduct which fell within the purview of s18(1)(ee) of the Educator's Act, a reasonable arbitrator would have found that the employment relationship between the appellant and the respondent had become intolerable. Counsel submitted that the sanction of dismissal was not inappropriate and unfair under the circumstances.

- [31] On behalf of the respondent, it was submitted that there is no bar in making an arbitration award an order of court in circumstances where, although there is a pending review application, there was no application to stay execution of the award and the appellant had delayed in prosecuting the review application. Furthermore, it is the respondent's view that the appellant was given an opportunity to address the court on its application for a stay of proceedings, but declined the invitation. It is the respondent's contention that the court *a quo* came to a correct decision in concluding that there were no prospects of success in that the appellant had not set out any plausible grounds in its review application that would have made the review application succeed. It was submitted on behalf of the appellant that clause 18(5) of the Disciplinary code was not peremptory and therefore the arbitrator correctly exercised her discretion to reinstate the respondent as his dishonesty was not that serious and he acted in the best interest of the school, when the school itself failed to discipline the learners. It is further the respondent's further contention that the tardiness with which the appellant was prosecuting the review application was prejudicial to the respondent.
- [32] It is trite that once an arbitration award has been made an order of court, it is no longer reviewable. The order is of final effect and is therefore appealable. Where the appeal is against the discretion exercised by the lower court, the court of appeal can interfere with the decision of the lower court if the decision of the lower court could not reasonably have been made by a court properly directing itself to all the relevant facts.
- [33] It is common cause that when the s158(1)(c) application was heard, the parties were negotiating about dates for the reconstruction of the record. The respondent would not have suffered any prejudice if the application was postponed to a particular date in order for the parties to conclude the exercise of reconstructing the record and for the application for a stay or the review to be heard at the same time.
- [34] Inasmuch as the respondent's attorneys may have written several letters to the appellant's attorneys inquiring about the filing of the record, the respondent did nothing to assist in the reconstruction of the record well

knowing the fact that the appellant was struggling to obtain the full record. It is not for the respondent to wait for a sufficiently long period, then take advantage of the time lapse, and apply for the award to be made an order of court. There is an obligation on all the parties to a review application to assist with the reconstruction of the record.⁸

[35] The issue of the appropriateness of the sanction imposed was not only of importance to the appellant but also of public interest. The respondent would suffer little prejudice as he had been employed by the appellant albeit in an administrative capacity at the same level and remuneration. Accepting that the period between the making of the award and the hearing of the s158(1)(c) application was lengthy, the review application was timeously filed and the appellant did try to secure a proper record, hence negotiations on dates for the reconstruction. It does not appear that the court *a quo* also considered whether it would be fair to make the award an order of court or to have weighted the balance of convenience in the award being made an order of court. I am of the view that in fairness, the court *a quo* misdirected itself in entertaining the s158(1)(c) application and not granting the parties a limited time to finalise the record and have both applications: the review and the s158(1)(c), heard at the same time at some set future date.

[36] In the circumstance and in the interest of justice, I am inclined to uphold the appeal. With regard to costs, the fact that the respondent persisted with the hearing of the s158(1)(c) hearing notwithstanding the appellant's call to it to reconstruct the record and thereafter to oppose this appeal is in my view grounds in fairness to order it to pay the costs of this appeal.

[37] Accordingly, the following order is made:

- (i) the appeal is upheld with costs.
- (ii) the matter is referred back to the Labour Court for the parties to finalise the record within 60 days of the date of this order or to approach the Labour

⁸ *Sishuba v National Commissioner of the South African Police* [2007] 10 BLLR 988 (LC).

I agree

I agree

APPEARANCES:

FOR THE APPELLANT: Advs FA Boda and H Rajah

Instructed by State Attorneys

FOR THE RESPONDENT: Adv D J Vetten

Instructed by BDK Attorneys