



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA18/2015

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED

WORKERS' UNION obo M MASITENG

Appellant

and

SCOPEFUL 21 t/a MALUTI BUS SERVICES

Respondent

Heard: 05 September 2017

Delivered: 18 October 2017

Summary: Costs – opposition to appeal against finding that award prescribed justified until the Constitutional Court's decision in *Myathaza*: respondent withdrawing opposition in light of that decision: respondent only liable for costs of the appeal from date of that decision to date of appeal.

Coram: Coppin JA, Sutherland JA and Savage AJA

JUDGMENT

COPPIN JA

- [1] This is an appeal against the judgment of the Labour Court (Tlhotlhemaje AJ (as he then was)) dismissing an application brought by the appellant in terms of section 158(1)(c) of the Labour Relations Act¹ (*“the LRA”*) to make an arbitration award an order of court. Leave to appeal to this Court was granted by the court *a quo*.
- [2] In terms of the award, which was made on 29 July 2008, the dismissal of the employee, Mr M Masiteng, was found to be substantively unfair; the respondent was to reinstate him, with full benefits, as Human Resources Officer on or before 11 August 2008; and the respondent was to pay the employee back -pay from the date of his dismissal to 1 July 2008.
- [3] The appellant opposed an application brought by the respondent to review and set aside the award. Even though the respondent withdrew that application on 2 December 2011, it still refused to comply with the award, resulting in the appellant launching the application, which is the main subject of this appeal, on 7 June 2012.
- [4] The main defence raised by the respondent in its opposition to the appellant's application was that the award had prescribed in terms of the Prescription Act,² since more than three years had elapsed since the date of the issue of the award. The court *a quo* upheld the point, finding, in essence, that the Prescription Act was applicable; that the running of prescription had not been interrupted by the respondent's review; and that the award had prescribed on or about 30 July 2011. No costs order was made.
- [5] At the time of the court *a quo*'s decision, there were conflicting decisions in the Labour Court on the issue of the prescription of awards made in terms of the LRA. Those decisions are referred to in the court *a quo*'s main judgment and in its judgment in the application for leave to appeal. The court *a quo* granted leave to appeal to this Court, but the respondent opposed the appeal, *inter alia*, in light of the (then pending) decision by this Court on the issue of prescription.

¹ Labour Relations Act 66 of 1995.

² Prescription Act 68 of 1969.

- [6] In brief, this Court in *Myathaza v Johannesburg Metropolitan Bus Services SOC Ltd t/a Metrobus*,³ (*Myathaza*) held, *inter alia*, that the Prescription Act was applicable to an award such as the one under consideration in this matter; that the award was a “*debt*” as contemplated in that Act with a prescriptive period of three years; and that a review application, i.e. not covered by the Labour Relations Amendment Act,⁴ did not interrupt the running of the prescription.
- [7] This Court’s decision in *Myathaza* was taken on appeal to the Constitutional Court. In a decision handed down in December 2016, the Constitutional Court, in effect, overruled this Court’s decision in the matter⁵. Of the eight justices that constituted the Court, four justices⁶ held that the Prescription Act did not apply, and that even if it did apply to the award there, the award was not a “*debt*” as contemplated in the Prescription Act. Four other justices⁷ held, in essence, that the Prescription Act was applicable; that the award was a “*debt*”; but that prescription was effectively interrupted by the review application, and remained interrupted until all legal proceedings between the parties had been finalised.
- [8] Notwithstanding, the respondent continued to oppose the appeal until 1 September 2017, when it, in a letter to the appellant’s attorneys, withdrew its opposition and indicated that it will only be arguing the costs aspects before this Court. The respondent further indicated in that letter that it was willing to tender the appellant’s costs from 15 December 2016 to the date of the letter, namely, 1 September 2017.
- [9] At the hearing, counsel for the appellant submitted that in respect of the merits of the appeal, and despite the uncertainty of the ratio in *Myathaza*, the appellant should succeed on either of the two main conclusions arrived at by the Constitutional Court in that matter; and that such approach was

³ *Myathaza v Johannesburg Metropolitan Bus Services SOC Ltd t/a Metrobus* 2016 (3) SA 74 (LAC).

⁴ Labour Relations Amendment Act 6 of 2014.

⁵ See *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others* [2016] ZACC 49; (2017) 38 ILJ 527; [2017] 3 BLLR 213; 2017 (4) BCLR 473 (CC).

⁶ See the Judgment of Jafta JA (Nkabinde ADCJ, Khampepe J and Zondo J concurring), especially at paras 56- 60.

⁷ See the judgment of Froneman J (Madlanga J, Mbha AJ and Mhlantla J concurring) especially at paras 66-98.

consistent, firstly, with the manner in which the Constitutional Court itself dealt with a subsequent matter,⁸ and secondly, this Court's approach in *Van Tonder v Compass Group (Proprietary) Limited and Others*.⁹

[10] Regarding the costs, the appellant's counsel submitted that the appellant was entitled to the costs of both the application and the appeal. The respondent's counsel, however, argued that taking into account the law and fairness, its opposition to the application and the appeal itself were justified until the Constitutional Court's decision in *Myathaza*, and particularly because there were other decisions in the Labour Court supporting the respondent until then.

[11] There is merit in the respondent's counsel's submission in respect of costs. The tender is reasonable given the legal position that pertained. For the same reasons, there should be no costs in respect of the application itself.

[12] In the result:

12.1 The appeal is upheld with costs as tendered by the respondent in its letter dated 1 September 2017;

12.2 The order of the court *a quo* is set aside and substituted with the following order:

'The arbitration award, issued by Adv Motloung on 29 July 2008 under the auspices of the South African Road Passenger Bargaining Council, is made an order of the Labour Court in terms of sec 158(1)(c) of the Labour Relations Act 66 of 1995.'

P Coppin – Judge of Appeal

⁸ *Mogaila v Coco Cola Fortune (Pty) Ltd* [2017] 5 BLLR 435 (CC).

⁹ *Van Tonder v Compass Group (Proprietary) Limited and Others* (JA58/16) an unreported judgment of the LAC delivered on 1 June 2017.

Sutherland JA and Savage AJA concur.

APPEARANCES

FOR THE APPELLANT:

J G van der Riet SC

Instructed by Cheadle Thompson and Haysom

FOR THE RESPONDENT:

R G Beaton SC

Instructed by De Villiers Du Plessis Attorneys