



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case no: DA13/17

PLSMIDTH BUFFALO (PTY) LTD

Appellant

and

ELLIAS MAYIMAYI HLAkola

Respondent

Heard: 15 May 2018

Delivered: 29 November 2018

Summary: Enforcement of an arbitration award in terms of s158(1)(c) of the LRA – employer contending that Labour Court not properly applying its mind in making the award an order of court and also failing to take into account the delay by the employee in seeking the enforcement of the award – principle relating to the exercise of the discretion restated - evidence showing that employer author of its own misfortune in refusing to comply with a clear award and failing to act diligently to ascertain the review judgment dismissing its review application.

Held that: the employer's argument that the court failed to exercise its discretion judicially because it failed to consider that it was yet to receive written reasons is without merit in light of its failure to act diligently or at all to secure the reasons or even establish if there was an *ex tempore* judgment handed down. To avoid further delay the respondent made the application and the court *a quo* made the

award an order of court... It then follows that the court *a quo* exercised its discretion judicially. Appeal dismissed with costs.

Coram: Waglay JP, Phatshoane ADJP and Hlophe AJA

JUDGMENT

Waglay JP

- [1] The appellant appeals against the judgment of the Labour Court (Mabaso AJ) which made an award an order of court. In terms of the award, the appellant was to reinstate the respondent and pay him an amount of R32 470.00.
- [2] For the purpose of this appeal, the circumstance leading to the current dispute is common cause, and the facts are limited for the determination of this appeal. The respondent was dismissed for misconduct on 30 June 2011. Dissatisfied with the dismissal, he referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council. The award that ensued favoured the respondent as recorded above and the appellant was directed to comply with the award on or before 16 January 2012.
- [3] Notwithstanding the injunction to abide with the award on a certain date, the appellant, exercising its right under the Labour Relations Act 66 of 1995 (LRA), filed a review of the award on 29 February 2012. The review served before Mooki AJ. The review was dismissed. Whether reasons for the court order were handed down is a matter that is not before this Court but is incidental to the current dispute.

- [4] Since the review was dismissed, the respondent through his attorneys addressed a letter to the appellant on 17 September 2014 enquiring as to when the respondent could resume work. Almost a month later, the appellant replied and indicated that it was not aware of the court order and it had made a request to the registrar to be furnished with written reasons. No written reasons were forthcoming. The appellant formed the view that the respondent could not report for duty as it was awaiting written reasons before deciding whether it would appeal the judgment. The respondent's insistence to report for duty fell on deaf ears as the appellant did not change its stance aforesaid.
- [5] Appellant's attitude caused the respondent to, on 22 June 2015 bring an application in terms of section 158(1)(c) of the LRA to make the award an order of the Labour Court.
- [6] The matter served before Mabaso AJ. The court *a quo* was confronted at the onset with the problem, not that written reasons were yet to be furnished but as to whether there was an oral judgment handed down on 12 September 2011, the date of the Court order. The court *a quo* recorded that the registrar and the respondent's attorneys indicated that an *ex tempore* judgment was delivered. Notwithstanding the incertitude as to the nature and or foundation of the court order, the court *a quo*, having satisfied itself that there was no pending leave to appeal, asked itself whether it was in the interest of justice to make the award an order of the Labour Court.
- [7] To this effect, the court *a quo* relied on the purpose of the LRA encapsulated in section 3 which requires an expeditious resolution of labour disputes. The court *a quo* further found support in the Constitutional Court's judgment of *Toyota SA (Pty) v CCMA and Others*¹ which emphasised the need for a speedy resolution of labour disputes.

¹ 2006 (3) BCLR 374 (CC).

- [8] Having satisfied itself of the need to bring finality to the litigation, the court *a quo* had regard to the award which the respondent sought to be made an order of court and the various correspondence of the parties.
- [9] The court held that the letters from the appellant to the respondent evinced a wish to appeal not a decision to appeal. Relying on the decision of *Gauteng Department of Education v Sanders in re Sanders v Gauteng Department of Education and Others*² which stated that the purpose of making an award an order of court was for the award to be enforced, the court took the view that in light of the speedy resolution of labour disputes, it would defeat the purpose of the LRA to further delay the respondent the enjoyment of his right to the benefit of the award. To this end, the court made the award an order of court. The court, however, refused to grant costs on the basis that the respondent should have certified the award instead of taking the route of section 158(1)(c) of the LRA.
- [10] It is that judgment, making the award an order of court, that the appellant wants overturned. The grounds upon which the appeal is sought are two. The appellant contends in the first place that the court *a quo* failed to take into account the fact that it had not received reasons for the order dismissing its review application. On this score, it submitted that the court *a quo* failed to consider the correspondence exchanged between it and the respondent evincing that it had not received reasons for the order dismissing its review application. To this effect, it contends that the court *a quo* erred in receiving submissions from the bar that an *ex tempore* judgment was handed down this, notwithstanding the fact that such oral judgment was foreshadowed neither from the correspondence between it and the respondent nor from the correspondence with the registrar. I may add that when appellant speaks of “correspondence”, it is referring to two letters addressed to the Registrar one dated 08 October 2014 and the other four months later on 2 February 2015. Additionally, it wrote twice to the respondent on each occasion in reply to the correspondence from the respondent. Its response

² [2015] 12 BLLR 1187 LRA.

was simply that it was waiting for reasons for judgment whereafter it would take instruction on whether to appeal

- [11] The appellant contends that the judgment *a quo* infringes on its constitutional right to have access to justice as envisaged by section 34 of the Constitution of the Republic of South Africa, 1996 (Constitution). This is so because, in its view, it was entitled to be furnished with written reasons for the purpose of lodging its appeal. The appellant further submits that although the court *a quo* had a discretion to make an award an order of court, it ought to have exercised that discretion against making such order so that appellant is given the right to lodge its appeal.
- [12] The second ground upon which the appellant relies is the inordinate delay in bringing the section 158 application. The appellant argues, in light of a number of judgments including that of *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others*³ that an employee in whose favour an award was granted cannot sit back and bring her/his section 158 application when it pleases her/him. The appellant submits that the court *a quo*'s reasons for making the award an order of court based on the speedy resolution of labour disputes are irreconcilable with the Constitutional Court's judgment in *Myathaza* because the court *a quo* failed to have regard to the fact that a period of nine months had passed between the date of the dismissal of the review application and the date that the respondent filed its section 158(1)(c) application.
- [13] The respondent, on the other hand, contends that the court *a quo*'s judgment is unassailable because the court *a quo* exercised its discretion judicially in finding that it was in the interest of justice to make the award an order of court taking into account the need to resolve labour disputes speedily. The respondent submits that he is entitled to the relief contained in the award and such relief cannot be delayed while the appellant takes his time to consider whether it should appeal. Further the request for reasons for a judgment cannot prevent the court *a quo*

³ [2017] 3 BLLR 213 (CC) (*Myathaza*).

from exercising its discretion to make an award an order of court particularly since the appellant has displayed a total lack of diligence to enquire and follow up on this issue.

- [14] Although the appellant made submissions that the court *a quo* failed to take account of the delay in bringing the section 158(1)(c) application and that it was awaiting reasons for the order dismissing its review application, the issue for consideration in this appeal is whether the court *a quo* failed to exercise its discretion judicially.
- [15] At the outset, it is prudent to dismiss the appellant's contention that the court *a quo* received submission from the bar that an oral judgment was issued. As correctly submitted by the respondent, that submission played little or no role in the court *a quo*'s judgment. After enquiring whether there was an oral judgment, the court *a quo* asked the relevant question whether it was in the interest of justice to make the award an order of court. The court *a quo* found it worrisome that up to the date of the hearing the appellant had provided no evidence that it did anything other than the two letters referred to above to ascertain whether an *ex tempore* judgment was handed down or when they could expect reasons from the court.
- [16] In the circumstances, I am of the view that the Labour Court was entitled to make the award an order of court. In making an award an order of court, the Labour Court exercised a discretion. It is trite that an appeal court will interfere with a discretion of a court *a quo* only if it was exercised improperly or unreasonably. For an appeal court to interfere with a discretionary power of a court below, an appellant must show that the court *a quo* acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or exercised its discretion improperly or unfairly.⁴ In considering whether a court *a quo* had improperly exercised its discretion, the appeal court is not entitled to interfere on the basis that in its opinion it would

⁴ *Coates Brothers Limited v Shanker and Others* [2003] 12 BBLR 1189 (LAC) at para 5.

have come to a different conclusion because this would be substituting its discretion for that of the court *a quo*.⁵

[17] From above, it is clear that an appeal court would only interfere with a discretionary power only if it was exercised improperly or a wrong principle. A case contemporary to the matter at hand (though relating to making a settlement agreement an order of the Labour Court) is that of *South African Post Office Ltd v CWU obo Permanent Part-Time Employees*.⁶ In that case, the Labour Court was called upon to make the settlement agreement signed by both parties an order of the Labour Court in terms of section 158(1)(c) of the LRA. In considering whether the Labour Court exercised its discretion judicially, this Court said:

‘...before the Labour Court will grant an order sought in terms of Section 158(1)(c) of the LRA it must be satisfied that, at the very least:

- i. ...
- ii. the agreement or award is sufficiently clear to have enabled the defaulting party to know exactly what it is required to do in order to comply with the agreement or award; and,
- iii. There has not been compliance by the defaulting party with the terms of the agreement or the award.⁷

Further that:

Once the Labour Court is satisfied with all of the above then it must, nevertheless, exercise its discretion whether to grant or refuse the order. In exercising the discretion, the Court must take relevant facts and circumstances into account, such as are necessary to satisfy the demands of the law and fairness. Necessarily, each case must be decided on its own facts and circumstances. There is, otherwise, no closed list of factors to be taken into account. **A relevant factor is the time it took the party seeking the relief to**

⁵ *Knox D'Arcy Ltd and Others v Jameson and Others* 1996 (4) SA 348 (A) at para 24.

⁶ (2014) 35 ILJ 455 (LAC); [2013] 12 BLLR 1203 (LAC) 9 (*South African Post Office*).

⁷ At para 21.

launch the application to make the settlement or award an order of court. The Labour Court may, for example, be more reluctant to make an award for reinstatement of employees an order of court where the employees unreasonably delayed in seeking the enforcement of the award, yet a delay in years in seeking to make an award for payment a sum of money may not be grounds for refusing to make the award an order of Court. Finally and most crucially it must be remembered that the purpose of making an agreement or award an order of the Labour Court is to compel its enforcement, or enable its execution and not for some other purpose.⁸ [own emphasis]

- [18] What the above means is that the appeal court must consider whether the court *a quo*'s exercise of its discretion was proper taking into account whether the award was sufficiently clear and there was non-compliance with the award.

- [19] In this case, the evidence is that the appellant had not complied with the award and the award clearly indicates that the respondent be reinstated and be paid a sum of money. More importantly that the respondent repeatedly sought for the appellant to implement the award, which was refused. This leaves us with the question of the delay in seeking to make the award an order of court.

- [20] The appellant contends that the court *a quo* failed to take into account the fact that there was a considerable lapse of time namely nine months for the respondent to file his section 158(1)(c) application. It common cause that the arbitration award is dated 16 December 2011. The order dismissing the appellant review application was sent on 17 September 2014 to the respondent. From October 2014 to February 2015, both parties exchanged correspondence. The essence of the respondent's letters was to enquire when to resume duties while the appellant's letters were to the effect that it was still waiting for written reasons from the registrar. Of significance is the appellant's letter of 10 October 2014 wherein the appellant stated that "*as soon as we receive these [reasons] we will*

⁸ At para 22.

*take instructions from our client but would ask you to pend this matter until we revert further.*⁹

- [21] The above correspondence from the appellant evinces its request to the respondent to stay the execution of the award pending it getting instruction to proceed or not to proceed with the appeal. This was in response to the respondent's letter of 17 September requesting the appellant to advise when the respondent would resume duty after being turned away at the work place when he reported for duty.
- [22] The appellant's submission in the circumstances that the inordinate delay of nine months from the date of the order dismissing the review application and the section 158(1)(c) application is deplorable. In light of the *South African Post Office* case above one must be tempted to conclude that there was a delay in filing the said application. However, taking the facts and circumstances of this case into account, the evidence points to the fact that the appellant was the author of the delay. It failed to follow up on the result of its review. It is the respondent that made it aware of the court order. It is opportunistic for the appellant to ask the court to penalise the respondent for the delay in filing the section 158(1)(c) application when all it did was to sit doing nothing to try and establish what the true position was with regard to the judgment in respect of its review application other than writing two letters to the registrar asking for reasons for the judgment. Added to this is the fact that on the occasions that the respondent wrote to it to seek enforcement it was the appellant who requested that the matter be held over and the respondent gracefully held on for a while
- [23] The respondent had repeatedly put the appellant to terms stating that if the appellant continues resists in complying with the award, he would have no option than approaching the Labour Court for relief.¹⁰ This demonstrates that the respondent did not just sit around and do nothing. On the contrary, the respondent was proactive in attempting to bring finality to the matter but was met

⁹ Record vol 1 page 24.

¹⁰ Record vol 1 page 35.

with resistance from the appellant who maintained that without written reasons, it was not prepared to reinstate the respondent and yet did almost nothing to try and expedite the getting of the reasons assuming there was no *ex tempore* judgment. It, therefore, follows that the delay in filing the section 158(1)(c) application was not occasioned by the respondent but was occasioned by the appellant conduct. It borders on the unethical for the appellant to argue that the delay in the prosecution falls on the door of the respondent in circumstances where but for the appellant's request, the respondent would have filed the section 158(1)(c) application much earlier.

- [24] It is exactly to avoid further delay that the respondent made the application and the court *a quo* made the award an order of court. The interest of justice dictates that the respondent's interest trumps that of the appellant because the purpose of the section 158(1)(c) application is to enforce the award. It then follows that the court *a quo* exercised its discretion judicially.
- [25] Consequently, the appellant's argument that the court failed to exercise its discretion judicially because it failed to consider that it was yet to receive written reasons is without merit in light of its failure to act diligently or at all to secure the reasons or even establish if there was an *ex tempore* judgment handed down.
- [26] In the circumstances, the appeal must fail, and I see no reason why costs should not follow the result.
- [27] In the result, the appeal is dismissed with costs.



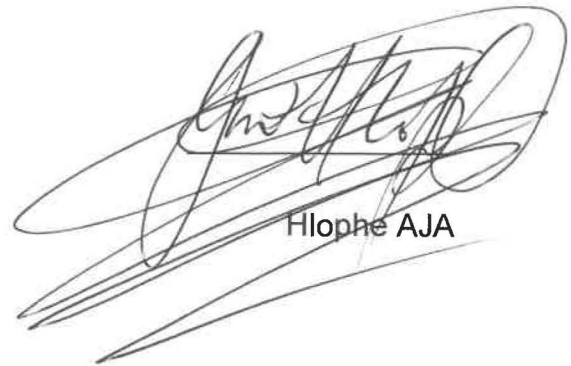
Waglay JP

I agree

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a series of loops and a long horizontal stroke.

Phatshoane ADJP

I agree

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Hlophe AJA

APPEARANCES:

FOR THE APPELLANT:

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Instructed by Edward Nathan Sonnenbergs

FOR THE RESPONDENT:

Mr Mhlanga from Mhlanga Inc