



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J2797/07

In the matter between:

MODIKWE, ANDREW RANANE

Applicant

and

STAFF DYNAMIX PRIMESERVE

Respondent

Heard: 2 November 2102

Delivered: 13 December2012

JUDGMENT

BHOOLA J

Introduction

[1] The applicant seeks an order in the following terms :

1. The respondent is in contempt of the arbitration award made under the auspices of the CCMA under case number GAPT2766-07 dated the 4th May 2007 that has been made an order of court under case number J2797/07 on the 19th February 2009.

2. The respondent is ordered to reinstate the applicant in the position as merchandiser, or a similar position at the current market related salary that applies on the applicant's date of reinstatement.
3. The respondent is ordered to pay the applicant an amount equal to the salary he would have earned between the 1st of July 2007 and the date of reinstatement taking into account all the adjustments and increases the applicant would have been entitled to.

[2] At the hearing of this matter the applicant's counsel, appearing on a *pro-bono* basis, abandoned the relief sought in prayer 2. It is not disputed that the applicant is too ill to return to work.

Background facts

[3] The applicant was employed in 2004 by the respondent, a labour broker, and placed at various branches of Builders' Warehouse in Pretoria. On 11 September 2006 while he was working at the Builders' Warehouse Zambesi branch as a merchandiser earning a monthly salary of R2 115.00, he was suspended without pay. He made enquiries on 22 February 2007 as to when his suspension would be lifted. He was unaware of the reason for the suspension. With the assistance of his trade union, ICUSA, he referred a dispute to the CCMA and a default arbitration award was issued as follows :

- "1. The suspension of the applicant was unfair in terms of the Labour Relations Act. The Applicant was able to prove the existence of an unfair labour practice.
2. The respondent, Staff Dynamix, is ordered to reinstate the applicant, Mr A Modikwe, to his previous position of merchandiser on 1 June 2007. The applicant must report to Staff Dynamix at 8am on 1 June 2007.
3. The respondent is also ordered to pay the applicant, Mr A Modikwe, for the period of his suspension which amounts to 7 months back pay being R14 805.00 (7 x R2 115.00).
4. Said must be paid on or before 1 June 2007.
5. There is no order as to costs in the matter".

Analysis

- [4] The applicant alleges that before he could return to work the respondent approached the CCMA with an application for rescission. In 2008 the application was dismissed. In February 2009 he brought an application for the arbitration award to be made an order of court. During March 2009 ICUSA sent a copy of the order to the respondent, and meetings were scheduled for 8 April and thereafter 14 April but which did not take place. On 21 April 2009 the respondent offered to pay him an amount of R7000.00 and undertook to make attempts to find him a position similar to the one he was in prior to his suspension since his position was no longer available. On 6 May 2009 the respondent gave an undertaking to pay him R7000.00, with the balance payable within six months and to find him alternative employment as soon as possible. In June 2009 he was informed by ICUSA that the respondent had found him an alternative position at Builders' Warehouse Fairie Glen branch in Pretoria where he was to report on 1 July 2009. Upon his arrival he was informed that he would be employed as a general worker not a merchandiser, and would only be paid R10.95 per hour instead of the R11.75 per hour that he had earned as a Merchandiser. The respondent refused to confirm whether his appointment was permanent. He informed the respondent that he was to be reinstated as a merchandiser at the original rate. He was advised that if that was his attitude he should return to court. He informed his union and was advised that he should await further instructions. ICUSA informed him on 25 July 2009 that the respondent had a position available for him at Builders' Warehouse Zambesi branch, and when he got there he raised the same concerns he had expressed when he reported for work to Fairie Glen. He again contacted ICUSA. He admits that he had rejected the respondent's offers of employment but submits that the offer was to employ him in a lower position at a lesser rate. He insists that he is entitled to reinstatement as a merchandiser at the rate he was earning at the time. The union thereafter ceased to represent him as he could not afford to pay his dues. He has not been able to secure alternative employment despite his best efforts.

[5] It is clear from the applicant's own admissions that the respondent is not in contempt. It has sought to accommodate him and repeated its offer at the hearing of this matter. Insofar as his counsel sought to suggest that it might be appropriate to order that the respondent should pay him for the period from the date of the award till the date of its offer i.e. from 1 June 2007 to 6 May 2009, this relief is in my view not competent in that there is a dispute of fact as to whether he tendered his services in compliance with the award. As the respondent's counsel submitted the applicant does not make this averment in his pleadings and his version in the replying affidavit and the founding affidavit is inherently contradictory in that he states that he was unable to tender his services since the respondent had applied for rescission, and that he did tender services but was turned away. No further facts are provided as to the circumstances in which his tender to work was rejected and the respondent disputes that this is factually correct. The respondent's counsel submitted that the correct remedy is for him to report to work, which he has on his own version refused to do. The applicant's counsel argued that it is common cause that the first tender of his services was made on 1 July 2007, and that the respondent's failure to comply with the award raises an inference that they are in wilful default and have acted *mala fide*. In this regard counsel relied on *Consolidated Fish Distributors v Zive* 1968(2) SA 517 and argued that this court should make the same inference.

[6] In these circumstances I am unable to find that the respondent is in contempt as it has made numerous attempts to comply with the order. The applicant is entitled to pursue a contractual claim related to the back pay which he claims is due to him. It is not appropriate for this court to fashion a remedy in these circumstance. The parties were urged to settle the matter and it appeared that although some progress was made the applicant rejected the offer. This is unfortunately to his own detriment.

Order

[7] Therefore, I make the following order :

The application is dismissed with no order as to costs.

BHOOLA J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: E Liebenberg

Instructed by Macrobert Inc., Pretoria.

RESPONDENT: M A Lennox

Instructed by Cliffe Dekker Hofmeyr Inc,
Johannesburg.