



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J1201-13

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

First Applicant

MPHAHLELE N A

Second Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

LUCWABA NP N.O

Second Respondent

EMFULENI LOCAL MUNICIPALITY

Third Respondent

Heard: 15 October 2013

Delivered: 07 February 2014

Summary: Variation of an order of the Court. The Court has powers in terms of section 165 of the LRA to vary an order or judgment erroneously made. The principles governing variation in terms of section 165 of the Labour Relations Act of 1995 discussed.

JUDGMENT

MOLAHLEHI J

[1] This is an application for the variation of the order made by Bhoola J under case number JR 2598/09 on 5 December 2012. That order reads as follows:

‘1. The arbitration award handed down by the second respondent under the auspices of the first respondent issued on 15 August 2009 under case number GPD 030721 is reviewed and set aside;

2. The dismissal of the second applicant by the third respondent was unfair

3. No order as to costs.’

[2] The order was made subsequent to the successful review application by the applicant the consequence of which was that the decision of the Commissioner was substituted with an order, as appeared above, that the dismissal of the individual applicant was substantively unfair.

[3] As indicated above, the Court reviewed and set aside the arbitration award. It found that the dismissal of the individual applicant was unfair. The Court did not however provide any relief to the individual applicant.

[4] In the present instance, the case of the applicant is that the order made by the Court is ambiguous and should accordingly be varied to clear the ambiguity. The ambiguity it would appear can according to the applicant be corrected by varying the order and adding the following to it:

‘The third respondent is directed to reinstate the second applicant from the date of his dismissal (5 September 2006) without any loss of benefits.’

- [5] The application was set down for hearing on 15 October 2013 and on that day it was directed that the applicant should place the review application papers before the Court. The Court further directed that the matter be placed before the judge in chambers for the determination of the application. The applicants have placed the review papers before the Court and accordingly the application is considered below.
- [6] The powers of the Court to vary an order or a judgment is provided for under section 165 of the Labour Relations Act of 1995 which provides as follows:

‘The Labour Court, acting on its own accord or on the application of any affected party may vary or rescind a decision, judgment or order –

- a) Erroneously sought or erroneously granted in the absence of any party affected by that judgment or order
- b) In which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission, or
- c) Granted as a result of a mistake common to the parties to the proceedings.’

- [7] The purpose of section 165 of the LRA is similar to that of rule 42 of the Uniform Rules of the High Court.¹ The concept of a judgment or order erroneously granted had received attention in *Bakoven Ltd v G J Howes (Pty) Ltd*,² where the Court interpreted the concept in the following terms:

‘An order or judgment is ‘erroneously granted’ when the Court commits an ‘error’ in the sense of ‘a mistake in a matter of law appearing on the proceedings of a Court of record’ (The Shorter

¹ Rule 42(1)(a) of the High Court provides that: ‘(1) The court may, in addition to any powers it may have, *mero motu* or upon the application of any party affected, rescind or vary: an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby...’

² 1992 (2) SA 466 (E) at 471 E-G.

Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a *bona fide* defence (*Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd (supra)* at 578F-G; *De Wet (2)* at 777F-G; *Tshabalala and Another v Pierre* 1979 (4) SA 27 (T) at 30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission.

- [8] The applicant in an application for a variation of an order or a judgment bears the *onus* of showing that the judgment of the order was erroneously granted. The applicant discharges his or her *onus* by showing that at the time the judgment or the order was granted there existed a fact which the Court was unaware of and which had the Court been aware of may have adopted a different approach in making the order.³ In other words, it cannot be contended that an order or judgment was erroneously made where the Court has granted a relief which was sought by the applicant in the notice of motion. This means that the party which by his or her own mistake or negligence fails to pray for a particular order cannot later, once the order or judgment has been made, seek to have such order or judgment varied in order to address his or her mistake or negligence.⁴
- [9] According to Erasmus, Superior Court Practice an order or a judgment is erroneous "...if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order, or if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgement and which would have included the judge, if he had been aware of it, not to grant the judgment..."

³ See *Nyingwa v Moolman N O* 1993 (2) SA 508 (TKGD).

⁴ See *First National Bank of South Africa Ltd v Jurgens and Others* 1993 (1) SA 245 (W).

- [10] In *First National Bank of South Africa Ltd v Jurgens and Others*,⁵ in refusing to grant a variation order, the Court held that:

‘The ordinary meaning of ‘erroneous’ is ‘mistaken’ or ‘incorrect. The relief accorded to the plaintiff was precisely the relief that its counsel requested. The complaint now is that there is an omission of an accessory feature from the judgment. I am unable to perceive how an omission can be categorised as something erroneously sought or erroneously granted.

- [11] Furthermore the Court held that:

‘I consider that the Rule (Rule 42) has no operation where the applicant has sought an order different to which it was entitled under its cause of action as pleaded. Failure to mention a form of relief which would otherwise be included in the relief is not in my opinion such an error.’⁶

- [12] The order which is the subject of the present proceedings arose from the application proceedings which the applicant had instituted to review the arbitration award which had been given in favour of the third respondent. That being the case it meant that the applicant had to show in the notice of motion what order it was seeking and why.

- [13] The two orders which the applicant sought in the notice of motion in the review proceedings are; to have the arbitration award dismissing his claim reviewed and set aside and to have his dismissal declared unfair. In the alternative the applicant prayed to have the matter remitted back to bargaining council for consideration afresh.

- [14] There is no mention in the notice of motion that the Court should, if it was to grant the declaratory order sought, grant the relief envisaged under section 193 of the LRA.⁷ The founding and the supplementary

⁵ 1993 (1) SA 245 (W) at 247C-D.

⁶ At D-E.

⁷ Section 193 of the LRA provides: (1) If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court or the arbitrator may -

- (a) order the employer to reinstate the *employee* from any date not earlier than the date of *dismissal*;

affidavits are also silent on the issue of the remedy. The founding affidavit in the present matter is also silent as to where the issue of the remedy in terms of section 193 of the LRA was raised during the arbitration proceedings.

- [15] In light of the above, I am of the view that the proposition that the order of Bhoola J is ambiguous or was erroneously made is unsustainable. The learned judge made an order in line with the notice of motion which is silent as to the issue of the remedy once the Court declared the dismissal unfair as prayed for by the applicant. The order is specifically what the applicant had prayed for in the notice of motion. It should be noted that there is also no mention of the remedy in both the founding and the supplementary affidavits of the applicants in the review application.

Order

- [16] In the premises, the applicant's application is dismissed with no order as to costs.

E Molahlehi

Judge of the Labour Court South Africa

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- (b) order the employer to re-employ the *employee*, either in the work in which the *employee* was employed before the *dismissal* or in other reasonably suitable work on any terms and from any date not earlier than the date of *dismissal*; or

- (c) order the employer to pay compensation to the *employee*.

APPEARANCES:

FOR THE APPLICANT: Cheadle Thompson and Haysom Inc.

FOR THE RESPONDENTS: No appearance

LABOUR COURT