



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

CASE NO J 1217/12

Not reportable

In the matter between:

MPOFU, THOKOZANI TOGS

APPLICANT

and

MAXIS GRILL MARKETING (PTY) LTD

RESPONDENT

Application heard: 25 March 2014

Judgment delivered: 28 March 2014

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application in terms of s 158 (1) (c) to have an arbitration award made an order of court. The award was issued on 28 April 2011, under the auspices of the National Bargaining Council for the Restaurant Catering and Allied Trades. In the award, the arbitrator found that the respondent had unfairly dismissed the

applicant. She ordered that the applicant be reinstated with retrospective effect and that he be paid back pay, quantified in the amount of R52 920.00.

Factual background

- [2] It is common cause that the respondent has failed to comply with the award. On 24 May 2012, the applicant filed the present application. In the answering affidavit filed on the respondent's behalf, a Mr Philip Maré of the General, Domestic and Professional Employers' Organisation, deposed to the following:

‘5.1.2 The Respondent, through me had several meetings with the Applicant wherein same respondent agreed to settle the matter between the parties upon receipt of monies to the respondent and on the basis that he would not return to the workplace. Applicant refers himself to his former employer and has not taken phone calls from the employer calling him. Mr Mpofu is thus a lying, despicable, disingenuous, opportunistic and poorly constructed character.

5.1.3 I tried contacted the applicant by way of telephone on the following dates and times on the 20th, 21st and 22nd of May 2011 inclusive of an sms sent to the respondent that the applicant accepts he's terms of full payment and that it is agreed he does not return to the workplace. When he says he was not contacted he is lying. He is a disingenuous, opportunistic and poorly constructed character. Him referring to it in dismay and that he was surprised it should be disregarded with the disdain and contempt it deserves. After agreeing to taking the money so owed to him from the award and the matter not proceeding to review and then turning around and denying having agreed to it is sick and twisted. When he denies that there has been compliance with the award should be disregarded and should be dismissed with the contempt it deserves (sic).

- [3] The applicant filed a replying affidavit in which he denied having agreed to any kind of settlement with the respondent. He states that the respondent attempted to force him to accept an offer of R30 000 and not return to work, which he refused.

- [4] On 23 August 2013, presumably on account of the dispute effect disclosed in the papers, this court ordered that the matter be referred for the hearing of oral evidence.
- [5] Mare testified that in his capacity as a representative of the respondent, he was instructed by the respondent, after the arbitration award had been issued, to discuss the various options available to it. The respondent wished to apply to have the award reviewed and set aside; alternatively, it wished to offer the applicant an amount less than that to which the applicant was entitled in terms of the award by way of a settlement.
- [6] Mare testified that he had a number of meetings with the applicant, the most significant of which was a meeting on 17 May 2011, held in the respondent's boardroom. He told the applicant in that if no settlement was possible, the respondent intended to take the award on review. He offered the applicant some R 30,000 to settle the matter, but without the option of reinstatement. Mare stated that the applicant rejected the offer and said that if he was not to be reinstated, he wished to receive the full amount of the back pay awarded. Mare testified that he did not have a mandate to agree to the proposal, and needed to consult the respondent. He went to speak to his client to explain terms of what the applicant sought. He received instructions to the effect that the applicant's offer was acceptable and return to the boardroom. When he arrived there, the applicant had left.
- [7] Mare states that he then tried calling the applicant to tell him that the respondent had accepted his proposal and that he followed up with a number of SMSs to advise the applicant that his offer had been accepted. In particular, on 22 May 2011, he sent an SMS to the respondent and the following terms:

'Please contact Philip Mare re Maxis revised offer. They are willing to pay you the amount and agree that you do not come back. I have left messages as well...

- [8] Mare stated further that in his mind, the applicant had agreed to settle the matter and he accordingly went ahead with arrangements to apply for a tax directive and to pay the applicant a sum of R52 920, being the back pay in terms of the award.
- [9] On about 30 May 2011, an official from the bargaining council contacted Mare to tell him that the applicant was at the council's offices and wished to make the arbitration award an order of court. Mare testified that he was upset and that in his mind there was an agreement that the applicant would be paid his back pay, he would abandon his right to reinstatement and that of the respondent would not seek to review the award. On 2 June 2011 Mare sent an email to the council in which he recorded that the respondent had complied with the award by making contact with the applicant and making payment of the monies in terms of the award. The email concluded by noting that the applicant had agreed verbally not to return to the workplace. It is not disputed that on 1 June 2011, the respondent deposited the amount of the back pay, less tax, into the applicant's bank account.
- [10] What followed is inexplicable. On 6 June 2011, the respondent issued a notice to attend a disciplinary hearing calling on the applicant to attend a hearing to explain his unauthorised absence from the workplace and what is described as "conduct negatively affecting the employment relationship". The applicant did not attend at this hearing and was dismissed in absentia. I understood Mare to suggest that this dismissal was to effect some form of insurance and that the respondent would rely on it if the applicant were reinstated. If that is so, the less said about the so-called dismissal the better; on the respondent's own version the applicant had been found to be unfairly dismissed and reinstated, but had agreed to abandon any right to reinstatement.
- [11] The applicant's version is that after receipt of the arbitration award and a number of unsuccessful attempts to present himself for work at the respondent's workplace, he was told ultimately to return on 13 May 2011. He was told by Mare that the respondent wished to settle the case for R30 000 he refused that offer. The applicant specifically denies any agreement to the effect that he would accept the back pay owing to him and abandon his right to be reinstated. In the

course of his evidence, the applicant stated that Mare left the room after he, the applicant, had rejected the offer of R30 000 made by Mare. At that point, Mare left the room for about five minutes. When he returned, the meeting continued. The applicant denied that he walked out of the meeting – he stated that he left when the meeting was over.

- [12] After the applicant had been cross-examined, it transpired that the applicant had recorded the meeting on 17 May 2011 on his cellphone. The court issued directives as to the transcription of the recording and on 4 March 2014, the applicant produced a transcribed record. When proceedings resumed on 25 March 2014, Mr Schabort, who appeared for the respondent, did not object to the admission of the transcript into evidence. However, he submitted that there were a number of inaccuracies in the transcript and more fundamentally, that the transcript did not reflect the entire meeting. In particular, he submitted that some 14 minutes were unaccounted for. Mare was recalled and testified that the transcription stopped at a point where the meeting had not yet been concluded. He testified that the agreement he contends was reached with the first respondent was reached at a point in the meeting not reflected in the transcription.

Analysis

- [13] Section 158 (1) (c) empowers this court to make arbitration awards issued by commissioners and bargaining council arbitrators orders of court, thus bringing to bear the court's power of enforcement. The power to make an award an order of court is a discretionary power, to be exercised judicially. As I have indicated, in the present instance, the respondent does not dispute the existence of the award, nor does it dispute that it has failed to comply with its terms. The respondent has raised the defence of the existence of a settlement agreement in terms of which the applicant agreed to abandon his right to reinstatement in terms of the award, and to accept only that part of the award which entitled him to back pay.

- [14] The respondent accepts that it bears the onus to prove the existence of the agreement for which it contends. Mare's evidence, in essence, is that after the respondent's offer of R 30 000 was rejected, the applicant stated that for him not to come back to work, he would accept payment of the full amount of back pay. He left the room to get instructions, he received instructions to settle on that basis and when he returned to the room, the applicant had left. In other words, Mare contends that after the rejection of the respondent's offer, the applicant made a counter proposal that he accepted, conditional only on ratification by the respondent.
- [15] Mare concedes that the agreement for which he contends was never reduced to writing. The best available evidence of the meeting on 17 May is the recording made by the applicant. Even if allowance were to be made for inaccuracies in the transcription and even if, as the respondent contends, the meeting continued for a further 14 minutes, the tenor of the conversation supports the applicant's version. The discussion comprises an attempt by Mare to persuade the applicant to accept a financial settlement, a proposal backed up by the threat of a review and the inevitable delay that would be occasioned by a review application. It was he who said *"No, but you know, if you say, look, give me my R 52 000 and I will leave and we sign an agreement, and that agreement there, we will pay you on tax value, and failure to give us tax directive, they will pay whatever is left."* The respondent's attitude was plain and put to the applicant more than once – the respondent was not going to comply with the arbitration award. The applicant's attitude on the other hand, was that the award was right, and that he wanted justice from the respondent. He is recorded as saying *"But what you are saying I, those people for the bargaining council, they are the people that when you have got problems, you have to go to them. So if they have got a decision they make, people must comply with it. If they did not comply with it, then they must submit to the Labour Court, which is the step we should take then, because the thing that worries me is that I want justice to come, I want justice because there is nothing wrong that I did. I did not do anything wrong."* This statement is made toward the end of the recorded portion of the conversation between the applicant

and Mare. Mare fairly conceded that there was nothing in the transcript that supported his version that he reached an agreement with the applicant on the terms for which he contends. It is unlikely that the applicant, having made his position as clear as he did, would soon afterward reverse his position either by making a proposal to Mare that he would accept the sum of R52 490 in settlement, or by accepting such a proposal from Mare.

- [16] The respondent's conduct after the meeting on 17 May is also indicative of a lack of confidence in its version. First, Mare's sms sent to the applicant on 22 May 2011 refers to "Maxi's revised offer". It continues "They are willing to pay you the amount and agree you do not come back. " This is not the language of a party to an agreement concluded on unequivocal terms, where ratification by a principal was the only suspensive condition. The language of the sms is tentative – it suggests an offer made by the respondent and invites a response by the applicant. Had the parties reached a firm agreement on 17 May, the language would have been very different. It would have recorded the terms of the agreement and indicated that the applicant was bound by it. Secondly, Mare testified that after the applicant had taken steps to enforce the award, the respondent convened a disciplinary enquiry at which charges of unauthorized absence from the workplace and conduct negatively affecting the employment relationship were brought against the applicant. The legal absurdity of these charges and the subsequent 'dismissal' aside, the irresistible conclusion is that having failed to secure confirmation from the applicant of the terms of an agreement that the respondent alleged to exist, the respondent was prepared to resort to desperate and disingenuous measures to avoid compliance with the award.
- [17] There is no reason for me to doubt the evidence given by the applicant. He gave clear testimony on the steps he had taken to enforce the award granted in his favour, and the attempts by the respondent to frustrate the implementation of that award. As I have indicated, even if the transcript is not a perfectly accurate reflection of the applicant's meeting with Mare, it supports the applicant's version.

In my view, the probabilities favour the applicant and on the evidence before me, I am unable to conclude that the applicant and the respondent concluded an agreement in terms of which the applicant abandoned his right to reinstatement. It follows that the arbitration award should be made an order of court. The consequence of course is that the applicant is to be reinstated in the respondent's employ with retrospective effect, from 12 October 2010, and paid all monies due to him from that date, less only the amount already paid in terms of the award.

I make the following order:

1. The arbitration award issued by Commissioner MS Raffee on 31 March 2011 under case number DSP/ARB 10/11/31 is made an order of court.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Representation

Applicant: In person

For the respondent: Mr J Schabort, McGregor Erasmus Attorneys