



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Reportable

CASE NO: J 554/13

In the matter between -

**NATIONAL EDUCATION HEALTH AND
ALLIED WORKERS UNION**

First Applicant

MADIMETJA CHARLES GALANE

Second Applicant

And

**DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Respondent

Heard: 31 March 2014

Delivered: 8 May 2014

Summary: Application to make the arbitration award an order of the Court. The factors to take into account on considering application to make an arbitration award an order of the Court. The Court is in doubt about validity of the arbitration award. The respondent filed review but failed to apply for condonation for its late filing.

JUDGMENT

Introduction

- [1] This is an application in terms of which the applicant seeks to have the arbitration award made under the auspices of the General Public Service Sectoral Bargaining Council (the bargaining council) under case number GPBC 2046/12, made an order of the Court in terms of section 158(1) (c) of the Labour Relations Act of 1995 (the LRA).
- [2] The applicant who was prior to his dismissal employed by the respondent as the administrative clerk was dismissed for fraud, theft and four other acts of misconduct related to gross negligence. Following his dismissal the applicant referred a dispute concerning an alleged unfair dismissal to the bargaining council. The conciliation process having failed the matter was referred to arbitration. The arbitrator found the dismissal of the applicant to have been both procedurally and substantively unfair and ordered the respondent to reinstate him.
- [3] The respondent has since filed an application to review and set aside the arbitration award. It is common cause that the review application was filed late and that respondent is still to file condonation for the same. The record of the arbitration hearing is also still to be filed.
- [4] As indicated earlier this application is launched in terms of section 158(1) (c) of the LRA which empowers the Court to make any arbitration award or any settlement agreement an order of the Court. It is trite that Section 158(1) (c) of the LRA provides a mechanism through which a successful party may enforce in the same manner as a judgment or order of Court the arbitration award. It is also a mechanism through which enforcement of an arbitration award can be expedited. It is for this reason that the Court has generally adopted a policy that the enforcement of arbitration awards should not be unduly delayed.
- [5] In considering whether to make an arbitration award an order the Court has a discretion which it has to exercise judicially. In general the Court will lean towards readily making an arbitration award an order of the Court to ensure

that the arbitration award does not hang but rather that it is honoured. In this respect the Court in *Mzulwiniv Fedelity Cleaning*¹ the Court held that:

“The court will grant leave to enforce the award as a judgment unless there is either a real ground for doubting the validity of the award or the award is not in a form in which it can be enforced as a judgment.”

- [6] In this matter the arbitrator arrived at the conclusion that the dismissal was unfair on the basis that the respondent’s right to institute disciplinary proceedings against the applicant had prescribed in terms of the Prescription Act of 1969. The arbitrator found that the right to subject the applicant to discipline for the alleged misconduct had prescribed because the respondent had failed to institute disciplinary proceedings within the 60 days period from the time the applicant was suspended as provided for in Resolution 1 of 2003 of the Public service Bargaining Council (the PSCBC). In this respect the arbitrator had the following to say:

“5.2.9 If we take all of these circumstances into consideration, there can be no doubt that, the respondent’s right to institute disciplinary hearing against the applicant was already terminated by extinctive prescription when the 5th and 29th August 2011 disciplinary hearing was convened in that, a period of 3 years, at the time, had elapsed. Therefore, the respondent convened a disciplinary hearing at the time it was no longer actionable and justiciable, and further at the time it was denied access to the disciplinary hearing against the applicant in respect of the alleged charges, by operation of the law, re extinctive his prescription, following from Prescription Act, as were as by virtue of Clause 7 (2) (C) Of Resolution 1 of 2003.

5.2.10 in the premises, the respondent is deemed to have waived its right to dismiss the applicant for the charges alleged.”

- [7] I have serious doubt as to the application of the Prescription Act to the facts of this case. I also have doubt as to the waiver of the right to discipline the applicant after the expiry of the 60 days. The finding by the arbitrator does not

¹ [2000] JOL 6338 (LC).

seem in this respect to be in line with the decision of this Court in *Lekabe v Minister: Department of Justice and Constitutional Development*²², where it was held that:

“[17] Turning to the specific issue in the present instance, in my view it could never have been the intention of the parties that clause 2.7(2) (c) of the SMS Handbook should take away the right of an employer to discipline an employee on the expiry of the 60 (sixty) days from the date of suspension. In essence the case of the Applicant in the present instance is that the right of the Respondent to proceed with the disciplinary hearing prescribed on the expiry of the 60 (sixty) days from the date of his suspension.

[18] In my view clause 2.7(2) (c) deals with suspension and not the disciplinary action. There is nothing in this clause that says an employer would lose the right to discipline an employee on the expiry of the 60 (sixty) days from the date of the suspension. I have not been able to find even a basis for implying the interpretation sought by the Applicant or the one given by the Court in *Lovejoy Malambo*. At best, as I see it, the suspension falls away after the 60 (sixty) days unless the chairperson of the disciplinary hearing extends that period.

[19] The purpose of clause 2.7(2) (c), as I see it, is to address the problem of protracted suspensions which demoralizes and unfairly prejudice the suspended employee. It would appear that the mischief which the parties sought to address with the provisions of clause 7.2 was to deal with what Andre Van Niekerk J in *Mosweu Paul Magotlhe v The Member of the Executive Council for Agriculture Conservation and the Environmental and Another* soon to be reported case number J2622/08, regarded as the tendency by certain employers to:

‘... regard suspicion as a legitimate measure of first resort to the most groundless suspicion of misconduct, or worst still, to view suspicion as a convenient mechanism to marginalise an employee who has fallen from the favour.’

²² (2009) 30 ILJ 2444 (LC).

[19] Thus the right of the employee in the event that the employer does not uplift the suspension on the expiry of the 60 (sixty) days is to file an unfair labour practice claim or bring an application to have an order directing the employer to uplift the suspension. I need to emphasize that in my view it could never have been the intention of parties that the right to discipline by an employer would fall away on the expiring of the 60 (sixty) days.

[8] In light of the above I am of the view that in the circumstances of this case it would not be appropriate to exercise my discretion in favour making the arbitration award an order of Court at this stage. I do however note with concern the manner in which the respondent has dealt with the matter since the arbitration was issued. In this respect the review application was filed late but to date no condonation application has been filed and there is also lack of clarity as concerning the filing of the record of the arbitration hearing.

[9] In my view the better approach to adopt in the circumstances of this case is stay these proceedings and place the respondent under strict time frames to comply with the rules.

Order

[10] In the premises the following order is made:

1. The application to make the arbitration award made under case number GPBC 2046/12, stands down pending compliance by the respondent with the following:
 - a. Filing condonation for the late filing of the condonation application.
 - b. Filing condonation for the late filing of the review application.
 - c. Filing of the condonation for the late filing of the records if necessary.
2. The respondent shall file all the above condonation applications within 14 (fourteen) days of date of this order.
3. Failure by the respondent shall entitle the applicant to approach the Registrar and request that matter be re-enrolled.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr K N Chaupe

Instructed by: NEHAWU

For the Respondent: Advocate Makoti

Instructed by: State Attorney