



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J2332/10

In the matter between:

**Applicant**

**NUMSA obo ALFRED KHUMALO**

and

**M&D SPECIALISED FASTENERS CC**

**Respondent**

**Heard: 1 July 2014**

**Delivered: 22 January 2015**

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JUDGMENT

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MOTHIBI, AJ

Introduction:

[1] This is an application in terms of section 158(1) (c) of the Labour Relations Act 66 of 1995 ("the LRA") in terms of which the Applicant has asked that an arbitration award dated 14 March 2008 ("the award") be made an order of this Court.

[2] The Respondent has opposed the application.

Analysis:

- [3] The award which the Applicant seeks to be made an order of court was issued on 14 March 2008. It is common cause between the parties that on or about 12 November 2008, the award was certified in terms of section 143 of the LRA by the Commission for Conciliation, Mediation and Arbitration ("CCMA").
- [4] The certification of the award by the CCMA on 12 November 2008 occurred after the Respondent failed to reinstate the Applicant. The Respondent advised the Applicant in a letter dated 11 June 2008 that it intended to take the award on review.
- [5] Notwithstanding the Respondent's letter of 11 June 2008 expressing its intention to approach this Court to review the arbitration award, it did not do so.
- [6] Consequently and as I have said above, the Applicant approached the CCMA and had the award certified in terms of section 143. The certification of the award was made on 12 November 2008.
- [7] The Respondent failed to comply with the certified award.
- [8] On or about 3 June 2011, the Applicant served an unsigned notice of motion and supporting affidavit applying for the award to be made an order of this court. The unsigned notice of motion and commissioned affidavit were filed with this Court on or about 9 June 2011.
- [9] The Respondent did not, upon receipt of the unsigned notice of motion and signed affidavit file papers opposing the application.
- [10] It only filed its opposing affidavit on or about 4 March 2013. The opposing papers were filed pursuant to Applicant filing a signed notice of motion on or about 18 February 2013.
- [11] The Respondent has taken issue with the Applicant's failure to bring its section 158 application on the basis of a signed notice of motion. In short, the

Respondent's case is that the arbitration award that the Applicant seeks to make an order of court has prescribed because prescription was not interrupted when the Applicant brought its application in terms of an unsigned notice of motion. The Respondent's argument is that it was only served with the application in terms of section 158 of the LRA on 18 February 2013 when it was served with the signed notice of motion. On its construction therefore there was no proper service when the Applicant on or about 3 June 2011 served on it an unsigned notice of motion. It submits that the notice was materially defective.

[12] Accordingly, if the Respondent's argument is to be accepted this application was only initiated after more than three years had elapsed since the award was issued on 14 March 2008.

[13] The issue to be determined by this Court therefore is whether in as much as it is common cause that the notice of motion was unsigned, the court has discretion to condone this irregularity.

[14] The parties in their submission to this Court are in agreement that notwithstanding the peremptory wording contained at rule 7(2) of the rules of this Court which requires an application to be brought on a notice of motion signed by the Applicant, that the court should not be unduly formalistic in its approach when dealing with an unsigned notice of motion and has a discretion to condone such noncompliance with its rules. In *High Tech Transformers (Pty) Limited v Lombard* (2012) 33 ILJ 919 (LC) it was held that:

'It appears from the clear wording used in rule 7(2) that it is peremptory and therefore a requirement to sign a notice of motion. It is, however, accepted that, despite the fact that it appears to be peremptory to sign the notice of motion, the court should not be unduly formalistic and inflexible and that circumstances may exist which require a court to condone an irregularity or a non-compliance with the rules of the Labour Court'.

[15] It is common cause between the parties that when the Applicant served its affidavit in pursuit of this application, it failed to ensure that the notice of motion was signed. Furthermore, they agree that I have discretion to condone

such noncompliance. In the circumstances, if I were to condone the failure by the Applicant to sign its notice of motion on 3 June 2011 then it would follow that the Respondent's submission that the arbitration award which the Applicant seeks to be made an order of court has prescribed would fall away. This is so having regard to the fact that the award was certified on 12 November 2008. The prescription period would accordingly, run until November 2011. The application on the unsigned notice of motion was made in June 2011.

- [16] In exercising my discretion on whether to condone the Applicant's failure to sign its notice of motion when it initially filed its application in June 2008 I must exercise such a discretion '... judicially upon a consideration of the circumstances of the case and with due consideration as to what will be fair to both sides' (see *High Tech Transformers (Pty) Limited v Lombard* at paragraph 21 to 22).
- [17] With the foregoing in mind, I condone the Applicant's failure to sign the notice of motion and find in the circumstances that when it brought its application on or about 3 June 2011 the award had not been extinguished by prescription in terms of the Prescription Act 68 of 1969. I find that the Applicant, through the replying affidavit of Ms Norman Craven of NUMSA has given this Court an acceptable explanation for the failure by the Applicant to file a signed notice of motion on or about 3 June 2011. The Applicant has been candid with this Court and has not tried to obfuscate matters by denying its failure to sign the notice of motion. This is particularly so having regard to the fact that the Applicant was represented by a lay person with no legal qualification nor formal legal training and who had only recently been appointed by NUMSA as its Regional Legal Officer. His experience insofar as labour law was concerned and in particular the LRA was, according to the affidavit signed by Ms Craven, 'through conducting arbitration proceedings in the CCMA and Bargaining Councils'. He had no experience in preparing Labour Court pleadings and was accordingly, unaware of the rules of the court. I see no reason why the Applicant should be penalised in the circumstances. Furthermore, it appears that as soon as NUMSA became

aware of the fact that the notice of motion filed in June 2011 was not signed, it took steps to correct this irregularity by filing a signed notice of motion on or about 18 February 2013.

- [18] It is unfortunate that the Respondent, when served with the unsigned notice of motion as well as accompanying affidavit did not at that stage alert the Applicant to its non-compliance with rule 7 but rather chose to sit back with the view of profiting from this omission and adopting a formalistic approach to this application.
- [19] Justice and fairness dictates that the Applicant should not be deprived of his right to be reinstated in circumstances where the respondent has failed to adhere to an order of the CCMA and further failed to challenge such an order in the event that it was dissatisfied with it. Indeed notwithstanding the Respondent's initial written communication to the Applicant that it would review the award it failed to do so.
- [20] I agree with the Applicant that the irregularity which the respondent seeks to rely on in opposing this application should be condoned in circumstances where it was committed by a lay person who had no formal legal training. I further accept that the Applicant was forced to approach this Court for an order in terms of section 158 of the LRA in circumstances where the Respondent refused or failed to comply with the arbitration award for no good reason. The Respondent did not comply with the award notwithstanding the fact that it was certified by the CCMA in terms of section 143.
- [21] In the circumstances, I condone the Applicant's failure to sign the notice of motion filed in terms of section 158(1)(c) of the LRA and as a consequence the application was brought on or about 9 June 2011.
- [22] In the light of the fact that the application was brought before it prescribed and in the light of the fact that the Respondent has failed, without good reason, to comply with the arbitration award I make the award an order of this Court.

Costs:

[23] I am of the view that the Respondent's approach and conduct since the award was issued deserves to be censured. When the award was issued it initially indicated its intention to review and set aside the award but failed to do so. It further, notwithstanding the fact that the award was certified by the CCMA failed to adhere to the award. The Respondent's failure to alert the Applicant to the fact that its notice of motion was unsigned when it was first served upon it on or about 3 June 2011 suggests to me that the Respondent was determined to place as many obstacles as possible in the Applicant's path in pursuit of his rights as enshrined in the Constitution. In the circumstances, the Respondent is ordered to pay the costs of this application.

Order:

- i. I accordingly, make the following order:
  - a. The arbitration award dated 14 June 2008 is made an order of this Court.
  - b. The Respondent is ordered to pay the costs of this application.

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Mothibi, AJ

Acting Judge of the Labour Court of South Africa

**APPEARANCES:**

For the Applicant: Mr David Cartwright

Instructed by: David Cartwright Attorneys

For the Respondent: E Wessels

Instructed by: Du Toit Pelser Attorneys