



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 3506/09

In the matter between:

L.J. MASHAO

Applicant

and

PHD PHARMACEUTICAL HEALTH CARE

Respondent

Heard: 11 July 2017

Delivered: 10 August 2017

JUDGMENT

DEALE, AJ:

Introduction

[1] The Applicant applies for an order for the Respondent to pay the Applicant's arrear salaries for the period 11 January 2010 to 9 September 2016 (the back-pay period).

- [2] The claim arises from a judgment of this Court on 26 August 2016 under case number JR 3605/09. The judgment dismissed a review application and made an award of reinstatement dated 30 November 2009 an order of court.
- [3] The Respondent opposes the application on the grounds, amongst others, that it has paid the specified back-pay and complied with the award. In addition, it submits that the award did not specify that the Applicant's reinstatement was with retrospective back-pay for the period as claimed. It also contends that in any event, the Applicant did not report for duty or tender his services as required by the award.

Background

- [4] On 23 June 2009, the Applicant was dismissed from his employment with the Respondent as a Replenishment Supervisor.
- [5] On 30 November 2009, the Applicant secured a reinstatement award from the CCMA under case number GATW 8437/09 (the "Award"). The following portions of the Award are relevant to this application:

"...

29. The dismissal of the applicant, Lebeko Mashao was substantively unfair.
30. The respondent is ordered to reinstate the applicant, Jonas Mashao to his previous position effective from 25 June 2009 on the same terms and conditions as those that prevailed before his dismissal. The applicant is directed to report for duty on 11 January 2010 at 08:00.
31. The respondent is further ordered to pay to Mr. Mashao back pay as calculated below:
- R5060-00 (monthly salary) x 5 (period unemployed from 25 June 2009 to 25 November 2009) = R25300-00. The period between 25 November 2009 and 11 January 2009 should be regarded as unpaid leave.

32. The provisions in paragraph 30 and 31 must be complied with within 14 calendar days of this award being received by the respondent, failing which the applicant may elect to invoke the mechanisms in section 143 of the [LRA], to seek enforcement of this award.

33. I make no order as to costs"

[6] On 8 January 2010, the Respondent filed an application in this Court to review the Award. The Respondent failed to take further steps to prosecute the review. For this reason, the Applicant made an application to dismiss the review.

[7] On 26 August 2016, Molahlehi J delivered a judgment, which dismissed the review application due to the unreasonable delay. It also made the Award an order of Court.

[8] The Respondent complied with paragraph 31 of the Award by paying the back-pay of R25 300, less statutory deductions, to the Applicant. It did not pay the back-pay for the period which forms the subject matter of this judgment.

Points in Limine:

[9] The Applicant's attorney, Mr Sehunane withdrew the Applicant's *points in limine* in the hearing.

[10] The Respondent's *point in limine* goes to the root of the purpose of the Applicant's application and will be dealt with in what follows. For this reason, it is not necessary to deal with it as a preliminary issue.

Evaluation:

[11] The Award directed the Applicant to report to the Respondent for duty on 11 January 2010 at 08h00¹.

[12] Mr Sehunane, stated in paragraph 6.5 of his Supporting Affidavit that –

¹ Award at para 30).

“6.5 The Applicant was advised by the Respondent not to report for duty pending the finalization of the review application filed by the Respondent.”

[13] The Respondent’s representative, Ms Roxanne Doman replied to this submission in paragraph 19 of her Opposing Affidavit on the Respondent’s behalf as follows –

“19. The content hereof is disputed. The applicant at no stage returned to work or asked to continue with his employment. In fact, from 2009 to 2016 the applicant never returned. The Applicant fails to provide specific details as to when he reported, to who he reported, who informed him not to report for duty and whether the Respondent was in fact placed on terms in any way. The applicant is therefore put to the proof thereof.”

[14] There was no further evidence or information provided in the hearing to determine whether the Applicant reported for duty or not. In any event, the issue is rendered irrelevant for the reasons which follow.

[15] The Constitutional Court has recently dealt with the issue of back-pay in circumstances in which the implementation of an award has been considerably delayed pending the outcome of a review application. In *National Union of Mineworkers of South Africa OBO M Fohlisa and 41 Others vs Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd*² the court confirmed that “reinstatement” means that the court orders that –

“[48]...the employee must be “put back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. This means that the court is ordering that the employee not only be taken back to his or her job, but that he or she be afforded her or his benefits under the contract. The benefits include payment of remuneration. Surely that covers the date of the reinstatement and the date on which the reinstatement actually takes place.”

² [2017] 6 BLLR 539 (CC),

- [16] In this case, it was common cause that the Applicant's reinstatement actually took place on 12 September 2016. This is confirmed in paragraph 5.1 of the Respondent's Opposing Affidavit. The reinstatement was a consequence of Molahlehi J's judgment on 26 August 2016.
- [17] The practical effect of the Molahlehi J judgment was to revive the Award and require its implementation. The implementation logically included the reinstatement of the Applicant from 11 January 2010 as specified in the Award.
- [18] Before the most recent amendments to the Labour Relations Act³ (LRA) in January 2015, the effect of making an application for review in terms of section 145 of the LRA was to suspend the implementation of the award pending the outcome of the review. The addition of section 145 (7) of the LRA removed the automatic suspension. The award will now only be suspended if the applicant files satisfactory security to cover the payments due to the employee in terms of the award.
- [19] The Award in this case dated 30 November 2009 pre-dates the section 145 (7) of the LRA amendment. It follows that the Award was suspended under the "old" practice pending the outcome of the Respondent's application for review.
- [20] The Respondent filed its application for review on 8 January 2010. This was a mere 3 days before the date of reinstatement on 11 January 2010. The effect of filing the application before the date of reinstatement was to invoke the "old" practice which applied at that time – namely, to suspend the implementation of the Award pending the outcome of the Respondent's review.
- [21] Since the suspension of the Award was automatic, it would have been pointless for the Applicant to have reported for duty on 11 January 2010 as directed in the Award. It follows that the issue of whether he reported for duty on 11 January 2010 is rendered irrelevant and of no consequence

³Act 66 of 1995

to the determination of his entitlement to back-pay for the intervening period.

- [22] The relevant date for the purpose of implementing the Award is the date of the Molahlehi J judgment on 26 August 2016. It established the “actual” date of reinstatement which the parties agreed was 12 September 2016. It also revived the “original” date of reinstatement specified in the Award as 11 January 2010.
- [23] The revival of the original date of reinstatement in turn can only mean that the reinstatement was retrospective from the date of actual reinstatement on 12 September 2016 back to the date of the original date of reinstatement on 11 January 2010.
- [24] For these reasons, the Respondent’s submissions to the effect that the reinstatement is not retrospective cannot be sustained. This has been put beyond doubt by the Constitutional Court in the *Hendor* judgement.
- [25] The Respondent has made issue with the Applicant’s conduct post the actual date of reinstatement. However, the conduct after the actual date is not relevant to the Applicant’s legal entitlement to retrospective relief for the period before the actual reinstatement. The Respondent could have dealt with the Applicant’s absenteeism in the post actual date in terms of its disciplinary policies.
- [26] I conclude from this reasoning that the Applicant is entitled to the remuneration, otherwise called “back-pay” that he would have earned in his employment with the Respondent for the period from 11 January 2010 to 12 September 2016. The Applicant claimed from 9 January 2010 but it will be accurate to align the date with the date specified in the Award.
- [27] The Applicant has calculated the back-pay due for salaries during the period as R546 486.00. He also applies for leave pay in the sum of R46 289.16 which he would have accrued in the period.

[28] The Respondent did not dispute the calculation of the R546 486.00 portion of the claim for arrear salaries in its opposing papers or at the hearing. It must therefore be assumed that it accepts the quantum of this aspect of the claim as correct for the purpose this judgement.

[29] The Respondent did not appear to have expressed its view on the Applicant's R46 289.16 claim for leave pay in addition to the arrear salaries. However, the Applicant's claim for accrued leave pay for the period cannot be sustained. This is because he assumes he would not have taken his annual paid leave during the entire period and that he would instead have worked for the full period of 6 years without taking leave. This is not a reasonable assumption to infer from the facts of this case to entitle the Applicant to the payment of leave pay.

Costs

[30] This case has played out over more than 6 years since the original Award directed the Respondent to reinstate the Applicant in his employment with the Respondent. This has come at considerable cost to all concerned – but mostly at the Applicant's cost as an individual at the lower end of the pay scale.

[31] It is clear that the reason for the delay was caused by the Respondent's action in filing its application for review. It is less clear what the Respondent's true intention was in doing so. Was it motivated by a genuine belief in its prospects of success in getting the Award set aside? Or was it motivated by a deliberate strategy to suspend and delay the implementation of the Award over several years in the hope that the strategy would exhaust the Applicant financially to the point that he would simply give up and abandon his entitlements under the Award? The Respondent's failure to pursue the review application with no explanation points strongly to the latter motive as the more probable. This must attract an order for costs against the Respondent in the ordinary course.

[32] The Applicant applied for the costs order to be made on a punitive scale. There is some merit in doing so. However, it was common cause that the

Respondent did engage in meaningful negotiations with the Applicant in an attempt to settle the matter, albeit without success. This to some extent mitigates the Respondent's degree of blameworthiness sufficiently to escape a punitive costs order.

[33] In the premises, the following order is made:

Order:

1. The Respondent is ordered to pay the sum of R546 486.00 into the Applicant's nominated bank account on or before Friday 19 August 2017.
2. Interest will accrue at the rate of 10% per annum on any balance which may be outstanding from 20 August 2017 until date of payment.
3. The Respondent is ordered to pay the Applicant's taxed costs for this application.

P Deale

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

M. Sehunane

Instructed by:

Sehunane Attorneys

For the Respondent:

Daniel Berry of Guardian Employer's
Organization

LABOUR COURT