



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case no: J 2591/17

In the matter between:

FAIS OMBUD

Applicant

and

MPHO RAMETSI

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

JOHN SIAVHE N.O.

Third Respondent

Heard: 11 October 2017

Delivered: 17 November 2017

JUDGMENT

MAHOSI J

Introduction

- [1] This is an urgent application to stay the enforcement of a ruling issued by the third respondent ("the commissioner") on the 31st of July 2017, under case number GATW 8645/17 pending the review application filed with this Court on the 22nd of August 2017 under case number J1766/17.

Material facts

- [2] On or about 23rd of May 2017, the applicant instituted disciplinary proceedings against the first respondent on the basis that she had committed certain acts of misconduct. Pursuant to that, the applicant placed the first respondent on suspension with full payment of her employment benefits. The parties agreed that the disciplinary enquiry would be conducted by a commissioner of the second respondent ("CCMA") in terms of section 188A of the LRA which proceedings were held at the applicant's premises on the 11, 12, and 20th of July 2017.
- [3] On the 31st of July 2017, the commissioner issued a ruling in favour of the first respondent. In his ruling, the Commissioner found as follows:
- '51. The employee, Mpho Rametsi, should be counselled for the admissions she made; such counselling shall take effect from the day it would be conducted. The fact that she apologised and was sorry for what happened demonstrates her remorsefulness.
52. Mpho's suspension is therefore uplifted with immediate effect, and she will have to report for duty on Friday the 11th of August 2017.'
- [4] On the 8th of August 2017, the applicant informed the first respondent in writing not to report for duty as it had decided to have the arbitration award reviewed. The applicant further informed the first respondent that it was to discontinue paying her salary. Furthermore, the applicant sought an undertaking from the first respondent that the ruling would not be enforced pending the review application which undertaking was not given.

[5] On the 18th of August 2017, the review application was served on the first respondent's attorneys. On the 22nd of August 2017, the first respondent applied for the certification of the award in terms of section 143 of the LRA. Subsequently, on the 24th of August 2017, the first respondent then proceeded with the contempt of court application that was heard on the 15th of September 2017. In this case, the court issued the following order:

- '1. The First Respondent's Ombud, Ms Noluntu Bum ("the Second Respondent") must appear in the Labour Court on 17 November 2017 at 10H00 to show cause why they should not be found guilty of contempt of Court for failing to comply with the Order of this Court dated 31 July 2017.
2. The first respondent and/or second respondent may explain their conduct by way of affidavit on the date of the hearing or before that, although this will not excuse them from being present in Court.
3. In the absence of providing an explanation to the satisfaction of the court of failing to appear in court despite being properly served, the first respondent and the second respondent be found guilty of contempt and the first respondent and the second respondent be incarcerated for such period as the court deems appropriate, or other alternatively..'
4. Service of this could be effected personally on the first and second respondents.
5. The first and second respondent be ordered to pay the cost of this application on attorney and client scale.

[6] Subsequent to being served with the above order, the applicant brought this application on an urgent basis.

Applicable legal principles and evaluation

[7] In this case, the commissioner issued the ruling in terms of section 188A of the LRA. The ruling of the arbitrator in an inquiry held in terms of section 188A has the same status as an arbitration award and that the provisions of sections 143 to 146 apply with the changes required by the context to any

such ruling.¹ Section 143 of the LRA deals with the effect of arbitration awards, and it states as follows:

- (1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award.
- (2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975, unless the award provides otherwise.
- (3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).
- (4) If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court.
- (5) Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court.

[8] It is common cause that at the time the review application was launched, the applicant did not apply for an order to stay the enforcement of the ruling. Section 145(7) clearly states that the institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8). In this case, the certified award was for the performance of an act, which was not done. Therefore, the first respondent was entitled to

¹ Section 188A(8) of the LRA.

institute contempt proceedings in terms of section 143(4).² In *Moghaka Local Municipality v Motlounj and Others*,³ this Court stated as follows:

‘Typically, security is often only provided when the applicant is compelled to bring an urgent application to stay the execution of a writ and the security tendered is then placed before a judge in court when the urgent application is considered. . . . The difficulty for an applicant on review is that until the court has made a ruling under section 145 (7) to the effect that it is satisfied that the security provided meets the requirements of section 145 (8), in the absence of an undertaking from the employee party that no further steps will be taken to enforce the award in light of the security provided, the applicant has no guarantee that it will not be surprised by a sheriff arriving at its premises to execute the deemed writ. Unless an alternative procedure is developed, an applicant who cannot secure the agreement of the employee party not to attempt to enforce the award once security has been lodged, will have little option but to approach the court as the applicant did in this case, *albeit* that in this instance, the first respondent was relying on a writ issued by the registrar and not on a writ that was deemed to be issued in terms of s 143(1) of the LRA.

[9] In this case, the applicant could not secure an undertaking with the first respondent not to proceed with the enforcement of the ruling, hence this application. I will assume that the application is urgent. The applicant’s first hurdle is that the applicant failed to furnish security to the satisfaction of this Court in accordance with section 145(8) which states as follows:

‘(8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must—

- (a) in the case of an order of reinstatement or re-employment, be equivalent to 24 months’ remuneration; or
- (b) in the case of an order of compensation, be equivalent to the amount of compensation awarded.

² *CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others* [2016] 10 BLLR 999 (LAC).

³ (2017) 38 ILJ 649 (LC) at para 27

- [10] The second question is whether this Court may stay the enforcement of a ruling in terms of which the employee's suspension was uplifted. What makes the facts of this case unusual is that the applicant, subsequent to receiving the ruling, did not only prevent the employee from resuming her work but also stopped paying her salary.
- [11] The applicant's submissions that the charges against the first respondent both individually and accumulatively warranted a sanction of dismissal could have merit. However, the fact that there could be merit does not automatically justify the applicant's submission that it will suffer irreparable harm if it is forced to continue paying the first respondent's salary pending the review application. Neither does it justify its submission that the first respondent will suffer no prejudice should the court grant the order to stay the execution of the ruling.
- [12] I agree with the first respondent's contention that the applicant is not entitled to stay the enforcement of the award on the basis of the contempt proceedings. The applicant should raise its arguments when the contempt proceedings are heard. It is apparent that the first respondent is prejudiced by the applicant's decision to terminate her employment salary and benefits. The applicant never dismissed the first respondent. As such, her contract of employment with the applicant remains valid and enforceable pending the review application.
- [13] The applicant's decision to stop paying the first respondent's benefits was ill-conceived. It is trite that the launching of the review application has an effect of restoring the status *quo ante*. It follows that, as the first respondent was on suspension with full benefits prior to the ruling, her status should remain unchanged pending the review application. As such, even if this Court were inclined to grant the order to stay the enforcement of the award, the court order would only have an effect of suspending the upliftment of the first respondent's suspension. However, the applicant would still have a legal obligation to retain the first respondent's status of being on suspension with full payment of her employment benefits.

[14] In light of the above, I am of the view that the applicant has failed to make out a case for staying the enforcement of a ruling issued by the third respondent. In this case, it would not be in the interest of justice to stay the enforcement of the ruling of the commissioner. I see no reason also in the circumstances of this case why costs should not follow the result.

Order

[15] In the premise, the following order is issued:

- i) The applicant's application to stay the enforcement of the ruling issued by the third respondent on the 31st of July 2017, under case number GATW 8645/17 is dismissed with costs.

Mahosi J

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANTS:

Mr Tulula Ningiza

Ningiza Horner Attorneys

FOR THE THIRD RESPONDENT:

Mr De Bryn

De Bruyns Attorneys

LABOUR COURT