



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case No: P 223/16

In the matter between

V K NAIDOO

Applicant

and

THE MINISTER OF HOME AFFAIRS

Respondent

Heard: 12 October 2017

Delivered: 3 November 2017

Summary: An order directing the respondent to comply with a certified arbitration award may not be stayed pending the finalization of an application to review and set aside an arbitration award that no longer exists.

JUDGMENT

LALLIE, J

Introduction

[1] The applicant approached this Court mainly for an order in the following terms:

- “1 That the Respondent, the Minister of the National Department of Home Affairs appear at the Labour Court on the 20th September 2017 at 10h00 to show cause why he should not be found guilty of Contempt of Court in failing to comply with the Order of this Honourable Court under Case Number P223/2016 and as passed down on 3 March 2017.
- 2 That the Respondent may explain his conduct by way of Affidavit on the date of the hearing or before that date (although this will not excuse him from being present at Court).
- 3 That in the absence of providing an explanation to the satisfaction of the Court or failing to appear in Court despite being properly served, the Respondent be found guilty of contempt and that
 - 3.1 The Respondent be fine in an amount that the above Honourable Court deems appropriate; Or other alternative relief.
 - 3.2 The Respondent be fined in an amount that the above Honourable Court deems appropriate, alternatively that he/she be incarcerated for such period as the Court deems appropriate.”

[2] The application is opposed by the respondent who filed an application to stay the order of compliance issued by this Court on 3 March 2017 pending the outcome of the review application under case number PR 164/16. The respondent further sought an order staying the award which was certified on or about 17 May 2016 pending the outcome of the review application.

[3] The salient facts which preceded the applications before Court are that; the applicant is an employee of the Department of Home Affairs (the Department) and she referred a dispute to the PSCBC (the bargaining council) against the Department. On 7 March 2016 the bargaining council issued an arbitration award in terms of which it directed the Department to upgrade the applicant's

salary level to salary level 10 with effect from 1 August 2012. The Department was further directed to pay the applicant retrospective payment resulting from the upgrade by 30 April 2016. On 17 May 2016, the arbitration award was certified by the Commission for Conciliation Mediation and Arbitration (the CCMA) in terms of section 143 (3) of the Labour Relations Act¹ (the LRA). The applicant asked the respondent to comply with the arbitration award. The award was not complied with but in August 2016, the respondent filed an application to review and set aside the certified arbitration award. The applicant opposed the review application. In an attempt to compel the Department to comply with the certified arbitration award and to have the respondent sanctioned for the non-compliance, the applicant brought contempt of court proceedings against the respondent. The respondent opposed the application. In a judgment handed down on 3 March 2017, the respondent was found not guilty of contempt of court. He was however ordered to comply with the certified arbitration award.

The application for contempt of court

- [4] The respondent did not comply with the order of March 2017 and the applicant filed the application for contempt of court at hand on 28 June 2017 with a view to compel the respondent to comply with the order and to have the respondent sanctioned for the Department's non-compliance. The respondent opposed the application on the grounds that he is not in wilful default of the order of 3 March 2017. He submitted that the reason for the non-compliance is that he is exercising his right to have the certified award reviewed and set aside. The test for contempt of court is settled; it is whether the party who is not complying with an order of court is acting deliberately and *mala fide*². It is common cause that the respondent's non-compliance with the order of 3 March 2017 is deliberate. I accept the respondent's explanation that his conduct is not *mala fide* because he is pursuing his review application which will be rendered superfluous should the order be complied with. The correctness of the respondent's view is immaterial. Absent the element of

¹ Act 66 of 1995 as amended.

² See: *Pheko and Others v Ekurhuleni Municipality (No.2)* (2015) 6 BCLR 711 (CC); 2015 (5) SA 600 (CC). at para 47 and 50.

mala fides the respondent cannot be said to be in contempt of the order of 3 March 2017.

Application to stay the order of 3 March 2017

- [5] The respondent sought an order staying the compliance order of 3 March 2017 pending the outcome of the review application under case number PR 164/16. In addition, he seeks an order staying the certified award pending the outcome of the review application. The respondent also sought an order ordering the Minister to furnish security in an amount the Court deemed reasonable. The applicant responded to the respondent's application by filing a notice to the effect that the respondent's application constituted an irregular step in the proceedings because there is no longer an arbitration award that is capable of being reviewed. He submitted that the application was of no force and effect and required the respondent to withdraw it. The respondent did not withdraw the application. The applicant did not file an answering affidavit. Her counsel argued on the respondent's papers. Counsel for the respondent took issue with the applicant's failure to file an answering affidavit and expressed the view that it was impermissible for the applicant's counsel to argue her case on the papers. I do not agree. Nothing precluded counsel for the applicant from basing his argument on the respondent's papers.
- [6] It is common cause that this Court has jurisdiction to stay its orders. The question whether the respondent has made out a case to have the order stayed has no effect on the jurisdiction. The respondent's application therefore did not constitute an irregular step in the proceedings.
- [7] The respondent submitted that he has the right to pursue the review application. The respondent relied on the following dictum of *CCMA v MBS Transport CC and Others*, *CCMA v Bheka Management Services (Pty) Ltd and Others*³ in arguing that both the order of 3 March 2017 and the certified award should be stayed:

³ [2016] 10 BLLR 999 (LAC); (2016) 37 ILJ 2793 (LAC).

“[40] I fail to understand the court *a quo*'s reasoning. Section 145 (3) is clear. The enforcement of an arbitration award may be stayed by the Labour Court. The section has no qualification or limitation. The enforcement of any arbitration award issued in terms of the Act may be stayed by the Labour Court. Therefore, the enforcement of a certified award which is deemed to be an order of the Labour Court in respect of which a writ was issued maybe stayed by the Labour Court pending its decision. The Labour Court may therefore stay the enforcement of an award pending its decision in the review application. It follows that the court *a quo*'s conclusion in relation to the Labour Court's jurisdiction to stay CCMA certified awards is incorrect”.

[8] The applicant conceded that the enforcement order of 3 March 2017 falls within the purview of the enforcement orders referred to in the above *dictum*. It was however argued on behalf of the applicant that an order granting the stay of the certified award could not be granted because there was no award to be stayed as in the order of 3 March 2017, the respondent was ordered to comply with the certified arbitration award. It was further argued that as the award did not exist any longer, the order of 3 March 2017 could also not be stayed pending the review of a non-existent arbitration award. The remedy open to the respondent, so went the argument, was to appeal against the order of 3 March 2017.

[9] Counsel for the respondent eventually conceded that the certified award no longer exists. Its enforcement could therefore not be stayed. He insisted that the enforcement order of 3 March 2017 should be stayed pending the review application. I accept the respondent's argument that it is possible to stay the enforcement order of 3 March 2017. However, each case is decided on its merits. In the enforcement order the respondent is ordered to comply with the certified arbitration award. In the review application the respondent seeks an order to have that very same certified award reviewed and set aside. Effectively, the respondent seeks the Labour Court to review its own judgment. The

order is incompetent as the Labour Court lacks jurisdiction to review its own judgments. An order of this court may not be stayed to afford the respondent an opportunity to seek an incompetent order. The respondent's application can, in the circumstances, not succeed.

[10] In the application for contempt of court the applicant sought a *rule nisi* for the respondent to show cause why the orders the applicant is seeking should not be made final. Both parties dealt with all the issues in full and placed me in a position to make a final order. The purpose of contempt of court proceedings is both to sanction the non-complaint party and to compel enforcement of a court order. The applicant did not prove that the respondent was in contempt of the court order of 3 March 2017. She, however, established valid grounds for the respondent to be compelled to comply with the order.

[11] The applicant sought a costs order against the respondent. I could find no reason both in law and fairness for not granting costs because the applicant should not be out of pocket when asserting her rights in terms of a court order.

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

Order

1. The respondent is not guilty of contempt of court.
2. The application to stay the compliance order dated 3 March 2017 pending the outcome of the review application under case number PR 164/16 is dismissed.
3. The application to stay the arbitration award certified on 17 May 2016 pending the outcome of the review application is dismissed.
4. The respondent is ordered to comply with the compliance order dated 3 March 2017.

5. The respondent is ordered to pay the applicant's costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Dyke SC

Instructed by: Brown Braude & Vlok

For the Respondent: Advocate Zondo

Instructed by: The State Attorney

Appearances:

For the Applicant:

For the Third Respondent: