



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH
JUDGMENT

Reportable

CASE NO: PR 164/16

In the matter between:

DEPARTMENT OF HOME AFFAIRS

Applicant

and

PUBLIC SERVICE CO-ORDINATING

BARGAINING COUNCIL

First Respondent

K KAYSTER N.O.

Second Respondent

PSA obo VK NAIDOO

Third Respondent

Application heard: 15 November 2017

Judgment delivered: 24 November 2017

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator). In the award, issued on 7 March 2016, the arbitrator ordered the applicant to upgrade the salary of the third respondent (the employee) from level 9 to level 10, with effect from 1 August 2012. Prior to the hearing of the application, it was agreed with the parties' respective representatives that a preliminary issue raised by the employee relating to the status of the review application given orders granted by this court on 3 March 2017 and 3 November 2017 respectively, would be determined. The nature and ambit of the point raised by the employee will become apparent from the background recorded below.
- [2] The material facts are briefly the following. On 17 May 2016, on application by the employee, the CCMA certified the award in terms of s 143 of the Labour Relations Act (LRA). On 23 August 2016, the applicant filed an application to review and set aside the award. On 2 September 2016, the employee filed an application seeking to hold the minister in contempt on account of a failure to comply with the award. The court ordered that the minister appear either in person or by counsel on 4 November 2016 to show cause why he should not be found guilty of contempt. On 4 November 2016 the matter was argued and judgment reserved. On 3 March 2017, the court (per Lallie J) made the following order:
1. The respondent is not guilty of contempt of court.
 2. The respondent is ordered to comply with the certified arbitration award under case number PSCBC 747-14/15.

3. The respondent pay the applicant's costs on the attorney and client scale. Costs include the costs reserved on 14 October 2016.

[3] A perusal of the judgment indicates that the applicant had acknowledged receipt of the arbitration award on 9 March 2016, but denied that it had any knowledge that the award had been certified. The court concluded that the applicant had genuinely believed that in the face of the pending review, it was entitled not to comply with the award and thus not *mala fide*. In relation to enforcement of the award, the court noted that s 143(1) provided that the certified arbitration award was final and binding, and enforceable as if it were an order of this court. The court continued: '*A certified award therefore has the same effect as an arbitration award which has been made an order of court in terms of section 158 (1) (c) of the LRA*'.

[4] On 12 October 2017, the matter again came before the court, again in the form of a contempt application. This time, the employee sought in order to hold the minister in contempt for a failure to comply with the order granted on 3 March 2017. The applicant opposed the application, and sought a stay of the order, pending the outcome of the review application. The court again found that the element of *male fides* had not been satisfied, on the basis of the proffered explanation that the exercise of the right of review entitled the applicant to refuse to comply with the order. In relation to the application to stay, the court held as follows:

[8] The applicant conceded that the enforcement order 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 a 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 the 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.

- [5] The court went on to dismiss the application to stay, and ordered the applicant in the present proceedings to comply with order dated 3 March 2017.
- [6] In these proceedings, the employee submits that for the reasons reflected in this court's judgment delivered on 3 November 2017, the arbitration award is no longer capable of being reviewed.
- [7] The relevant principles are well-established. This court has long held that the fact of a pending review is not a bar to the court making any arbitration award that is sought to be reviewed and set aside an order of court (see *Ntshangana v Specialty Metal CC* [1998] 3 BLLR 305 (LC)). It is equally well-established though that where an arbitration award is made an order of court, that order is fatal to any pending application to review the award, if only because the arbitration award ceases to exist. In *Blue Marine (Pty) Ltd v CCMA & others* [2003] 9 BLLR 853 (LC) Ndlovu AJ (as he then was) said the following:

[15] It is important to realise that once the award is made an order of the court the award, from which such order was made, falls away. In other words, the two instruments cannot co-exist alongside each other. Therefore, upon the award being made an order of the court, there can be no question again of an application for review, aimed at reviewing and setting aside the same award. By

then, the award no longer exists. Any party who feels aggrieved by the award, can then only look for remedy to challenge the court order (derived from the award) and not the award.

- [8] More recently, in *Gauteng Department of Education v Saunders: In re Saunders v Gauteng Department of Education and others* [2015] 12 BLLR 1187 (LAC), the Labour Appeal Court observed:

[32] It is trite that once an arbitration award has been made an order of court, it is no longer reviewable. The order is of final effect and is, therefore, appealable.

- [9] In the present instance, the applicant submits that the existence of the compliance order does not preclude the court from proceeding to hear the review application, whatever its merits. The applicants contends that to hold otherwise would have the effect that the doors of the court would be closed to it, and that it would be denied the rights it has under s 145 to review the arbitration award. To resolve what it describes as the 'conundrum' posed by the orders granted by Lallie J, the applicant proposes an application to vary the orders made by Lallie J insofar as the period of compliance is concerned, at least while the review application remains pending, alternatively, that the employee could provide a written undertaking not to seek enforcement of the award pending the outcome of the review. The applicant goes so far as to suggest that but for the 'marathon of contempt of court applications' the matter could well have been resolved by this time.

- [10] While the applicant's submissions have the ring of pragmatism to them, they fail to address the substantive issue – whether the effect of the orders granted by Lallie J renders the review application moot. The wording of the order granted on 3 March is clear and unambiguous – the applicant was ordered to comply with the award. Similarly, the order granted on 3 November 2017 states that the applicant is required to comply with the order made on 3 March 2017. I fail to appreciate how under these circumstances it can be said that it remains open to the applicant to contest the award by way of review. The fact remains that there

are two orders by this court which, on the authorities referred to above, have had the effect that the award no longer exists and is therefore incapable of review. Put another way, the application for review is moot, at least in the sense expressed in *National Coalition of Gay and Lesbian and others v Minister of Home Affairs and others* 2000 (2) SA 1 (CC) where the court said that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy (at para 21, footnote 8), or where, in the words of *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA), making a determination will have no practical effect. (See *Tecmed Africa (Pty) Ltd v Minister of Health and another* [2012] 4 All SA 149 (SCA).)

- [11] In so far as the applicant complains that a finding to the contrary would deny it the statutory right of review, this is a situation of its own making. It was open to the applicant to seek leave to appeal against both the order of 3 March 2016 and that of 3 November 2017 – it failed to do so, for reasons that are not apparent. It does not assist the applicant now to suggest that it ought to be entitled to exercise its right of appeal against either or both orders made by Lallie J. The consequence, of course, is that the applicant remains bound by no less than two orders of this court both of which require compliance with the award.
- [12] In relation to costs, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. In my view, those interests are best satisfied by an order that the applicant pays the costs of these proceedings. The history of this matter is a sorry one. The employee has for more than 18 months sought to enforce the award issued in her favour. The review application on which the applicant has so heavily relied to avoid or delay the enforcement of the award was filed on 15 July 2016, some 85 days late. While there is an application for condonation for the late filing of the review, it would appear that the prosecution of the review application was conducted at a pedestrian pace in circumstances where all of the applicant's advisers must have been aware of the applicable time limits. This is so in circumstances where the statutory purpose of expeditious dispute resolution in

relation to reviews has been underlined in a number of recent judgments by this court that emphasise the tighter approach to be adopted to applications to condone the late filing of reviews, and also by an amendment to the LRA which requires parties to a review application to seek a hearing date within six months of filing the application. In her efforts to secure the enforcement of the arbitration award, the employee was within her rights to seek to hold the minister in contempt - it is rich for the applicant now to suggest that these efforts are the reason for the delay in finalising this matter. In short, the requirements of the law and fairness dictate that the employee should not be out of pocket in relation to the costs of her opposition to the review application.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge

REPRESENTATION:

For the applicant: Adv. M Zondo, instructed by the state attorney

(Att Ms. Govender fax 041 585 2687)

For the respondent: Adv. Dyke, instructed by Brown Braude & Vlok Inc.

(Att Mr C Jessop fax 041 365 3681)