



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: J390/16

In the matter between:

10 NUMSA OBO MEMBERS

Applicant

and

HITACHI CONSTRUCTION MACHINERY SA (PTY) LTD

Respondent

Heard: 19 October 2017

Delivered: 19 October 2017

Edited: 12 March 2018

EX TEMPORE JUDGMENT

20 MOSHOANA, J: This is an application in terms of section 158(1)(c), in terms of which the applicants seek to have an arbitration award issued on 2 May 2014 made an order of this court. The application is opposed by the respondent. The background facts are as follows:

During November 1995 a proposal was made with regard to the equalisation of the wage rates. On 28 November 1995, the Board of Directors of the respondent approved the proposal to be implemented at

the beginning of January 1996. The applicants contended that the respondent company failed to implement the terms of the collective agreement as approved in November 1995.

Around August/September 2012 the applicants referred a dispute in terms of section 16 of the LRA to the CCMA. On or about 18 September 2012, the parties reached a settlement at the CCMA in Benoni. Effectively the parties agreed that the CCMA should conduct a fact-finding investigation pertaining to the wage equalisation dispute referred to by the applicants. On 23 November 2012 the CCMA issued
10 an advisory award. The Commissioner advised thus:

1. That the employer, the respondent before me, must rectify a situation which undermines the 1995 agreement.
2. The parties to make an attempt to agree on how to deal with the discrepancies, which discrepancies, if not corrected, would amount to breach of the 1995 agreement.

The parties indeed met on 11 February and 25 February respectively, but could not reach an agreement. The applicants then resolved to refer a section 24 dispute to the Bargaining Council. On 2 May 2014 the arbitrator issued an award in terms of which the
20 respondent was found to have failed to implement clause 5 of the collective agreement. She then directed the respondent to implement the equalisation of rates in terms of clause 5 of the collective agreement.

The respondent was aggrieved thereby and launched a review application in this court. The review application was dismissed on

26 August 2015. On 6 November 2015 the applicants through its attorneys demanded compliance since the review was dismissed. In response, the respondent in a rather disrespectful manner, in my view, simply stated that it has implemented the equalisation rate in accordance with clause 5 of the collective agreement. As expected, and rightly so, the applicants demanded proof of such compliance. The applicants wilfully ignored this request. Resultantly, the applicants launched the present proceedings.

When hearing the matter, arguments were submitted on behalf
10 of both parties. In court Mr Whittenton for the respondent presented some arguments which the court found to be very disrespectful in a sense. On the one hand he submitted that the award was complied with, albeit that it was ambiguous. This argument is senseless and at the very least disrespectful of this court. I was shocked to hear such an argument from counsel, but nonetheless, that was the submission.

Section 158(1)(c) gives this court discretion to make an arbitration award an order of court. In order to exercise the discretion, the court must be satisfied that there is a valid and enforceable award and that the said award has not been complied with. At paragraph 30 of
20 the Founding Affidavit the applicant stated the following:

“I submit that the first respondent has failed to comply with the arbitration award attached hereto, marked as annexure ‘X”, by failing to implement the collective agreement reached in 1995 by failing to equalise the wages of the applicants’ members.

The applicant has no other recourse of enforcing the award other than it being made an order of court.”

In response to the evidence as contained in the Founding Affidavit, the respondent had the following to say:

10 “The contents of this paragraph is emphatically denied and it is reiterated that the first respondent exercised its discretion when implementing the equalisation of the wage rate as per the third respondent’s arbitration award, and as per the Honourable Justice Brassey’s judgment.”

These which I have just quoted amount to a bare denial and actually a meaningless answer to paragraph 30 of the Founding Affidavit. A party alleging compliance must present all the necessary evidence to prove compliance. It is not the duty of the applicant, as submitted by Mr Whittenton, to prove the manner how compliance should have happened. All what is required is the party who is resisting an application like this one before me to show that indeed it had complied.

20 During argument I requested Mr Whittenton to point out to me where in the affidavit it indicated that there was compliance. He directed me to the paragraph that I had just read into this judgment. I am therefore not convinced that there is compliance with the award. It occurred to me that during argument, when Mr Whittenton realised that the argument of compliance is thinning out, he attempted another

argument of ambiguity of the award.

He submitted that paragraphs 18 and 19 of the Award were ambiguous. This argument, of course, was self-defeating. How does one comply with an ambiguous award, as he earlier submitted? He sought to place reliance on the LAC judgment of *South African Post Office Ltd v CWU*, [2013] 12 BLLR 1203 (LAC). The LAC in that judgment stated as one of the factors to be satisfied in a section 158(1)(c) to be that:

10 “The award is sufficiently clear to have enabled the
 defaulting party to know exactly what it is required
 to do in order to comply with the award.”

To my mind, the award is clear, the respondent is to comply with clause 5 by implementing the equalisation rates in terms of clause 5. How much clearer does the award need to be? The fact that at some point it was contended that the respondent has complied suggests that the award is clear. During argument at the review application one of the submissions made is recorded in the judgment of the court, which is:

20 “Mr Soldatis, who appears for the applicants, says
 that there is compliance with clause 5 of the
 agreement, and he says therefore that he has no
 objection to the award that has been made if it is
 scrupulously construed upon its terms.”

Now, clearly that is the problem. The problem of the respondent is that it wants the award to be interpreted on its own terms when it is much clearer, however, as I have pointed out, it is difficult for me to

understand why the award is found to be ambiguous, and at the same time the respondent states that it has complied with it. It does not make sense at all.

I agree with Mr Ngako that a party cannot raise the defence of ambiguity and compliance at the same time. One cannot reprobate and approbate at the same time. I therefore conclude that the award is clear and understandable. Having rejected all the defences of the respondent, there is nothing that prevents this court to make the award an order of court, particularly in an instance where as I have concluded
10 that the respondent has failed to provide evidence of compliance with the award.

I now turn to the issue of cost. I find the opposition by the respondent to be wholly unreasonable. As I have pointed out, at the review proceedings Mr Soldatis, who appeared for the respondent, raised the issue of compliance and not the issue of the ambiguity of the award, as it is now attempted in this matter before me. He had no objection to the award.

The *volte-face* that is being made in relation to the ambiguity of the award suggests that the conduct by the respondent and its
20 representatives in defending what appears to have been a clear application of section 158 suggests that this court must express some discontent and actually frown upon that conduct with an appropriate order as to costs. In the result, I make the following order:

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ORDER

1. The award issued on 2 May 2014 is hereby
made an order of court.
2. The respondent is to pay the costs.

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MOSHOANA J
JUDGE OF THE LABOUR COURT

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NUMSA obo MEMBERS

Applicants

and

HITACHI CONSTRUCTION MACHINERY SA (PTY) LTD

Respondent

CASE NUMBER:	J390/16
RECORDED AT:	JOHANNESBURG
DATE HELD:	19 OCTOBER 2017
TRANSCRIBER:	AG VAN STADEN
DATE COMPLETED:	14 NOVEMBER 2017
NUMBER OF CD/AUDIO FILES:	1
NUMBER OF PAGES:	7

REPORT ON RECORDING

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