



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 660/16

In the matter between:

BOPAPE, RESHOKETSWE DESIREE

Applicant

and

MINTEK SOC LTD

Respondent

Heard: 01 November 2017

Delivered: 10 July 2018

JUDGMENT

MAHOSI.J

Introduction

- [1] This is an opposed application in terms of section 158(1)(C) of the Labour Relations Act¹ (LRA), to make an arbitration award issued by commissioner Katlholo Wabile (commissioner) under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number GAJB485-11 an order of court.
- [2] Prior to outlining the applicant's case in detail and considering the issues which gave rise to the claim, it is necessary to summarise the facts which form relevant background to the dispute between the parties.

Material background facts

- [3] The respondent employed the applicant from 1 June 2008 as the General Manager: Corporate Services. Following a disciplinary enquiry, the applicant was dismissed on 13 December 2010. Dissatisfied with the respondent's decision to dismiss her, the applicant referred a dispute to the CCMA. Following an unsuccessful bid at conciliation, the dispute was referred to arbitration.
- [4] At the end of the arbitration, the commissioner issued an arbitration award in terms of which he found that the dismissal of the applicant was substantively unfair. The commissioner ordered the respondent to reinstate the applicant.
- [5] The respondent subsequently instituted an application under case number JR1819/11 for an order to review and set aside the arbitration award. However, the said application was dismissed by this Court. The respondent further instituted an application for leave to appeal which was also dismissed.
- [6] The Respondent reinstated the applicant into its employ on or about 1 December 2014. The applicant was paid an amount of R5 787 901.00 (Five million seven hundred and eighty-seven thousand nine hundred and one rand only) as back pay. The respondent submitted that the payment of the back pay was done under protest and with an express reservation of its rights. On 19 June 2016, the

¹ Act 66 of 1995 as amended.

respondent launched an application in the Gauteng Local Division of the High Court against the applicant in which it sought the applicant to disclose her source of income between the period of her dismissal and her reinstatement pursuant to the arbitration award. The applicant tendered her resignation on or about 16 July 2015 and referred an alleged constructive dismissal to the CCMA which is still pending. On 15 September 2017, the High Court application was dismissed with costs.

- [7] The applicant submits that the amount the respondent was required to pay her as back pay amounted to R7 127 809.00 (seven million one hundred and twenty-seven thousand eight hundred and nine rand). The applicant is of the view that when the respondent paid her an amount of R5 787 901.00, it partially complied with the arbitration award. According to the applicant, the remaining amount as at February 2016 is R1 339 908.00 (one million three hundred and thirty-nine thousand nine hundred and eighty rands).
- [8] The respondent submitted that the applicant's claim for the remuneration that she would have earned after the date of her reinstatement cannot be the subject matter of a section 158(1)(c) application as it did not flow from the arbitration award. According to the respondent, the applicant's claim is a contractual claim which claim she would have been entitled to had she tendered her services after the date of her reinstatement and having sought an order from this Court for such an amount to be paid.

Applicable law and analysis

- [9] Central to the issues in this matter is whether the claim for the period between the date of the award and the actual date of implementation is covered by reinstatement. The principles governing the legal effect of the reinstatement order are found in the judgment of *Coca-Cola Sabco (Pty) Ltd v Van Wyk*² where the Labour Appeal Court (LAC) succinctly stated as follows:

² [2015] 8 BLLR 774 (LAC).

[17] The money paid to an unfairly dismissed employee consequent to a retrospective reinstatement order is not compensation. Compensation and back-pay may only be granted in the alternative and are mutually exclusive. The back-pay ordered by the commissioner can therefore only refer to the period between the date of dismissal and the date of the order and does not entitle an employee, without more, to remuneration between the date of the award and the actual date of implementation. The Labour Relations Act does not cater for such relief.'

[10] The LAC further held as follows:

[28] When there is a delay in the implementation of the reinstatement award and the employer refuses to pay an employee money that may be due between the period of the award and the implementation thereof, the *lis* between them has not been judicially resolved. It is only after a contractual claim in the civil courts or under section 77 of the Basic Conditions of Employment Act has been instituted and pronounced upon that it can be said that the employer is a judgment debtor against whom a writ may be issued. The order of reinstatement is not a judgment dealing with the consequent damages for the breach of the contract.

[29] The risk that an employer takes relating to the accumulated financial burden, caused by delays in the review and appeal process, has nothing to do with the cause of action. The risk to the employer remains and the rewards to the employee would also be intact if the claim is prosecuted properly and timeously.

[30] In summary, a reinstatement award does not cover the period between the award and its implementation. Should an employer refuse to pay an employee for the said period then the employee has a contractual claim - which is a totally different cause of action - against the employer.'

[11] The respondent referred this Court to the judgment of *NUMSA obo Fohlisa and Others v Hendor Mining Suppliers (a division of Marschalk Beleggings (Pty) Ltd*³

³ 2017 (7) BCLR 851 (CC) at para 131.

to support its argument that the payment of remuneration which was allegedly earned after the date of reinstatement of the applicant is not a claim which flows from the arbitration award. In the said judgment, the Constitutional Court stated as follows:

‘If the second and further applicants kept their part of the bargain, they would be entitled to remuneration. If they did not keep their part of the bargain, they would not be entitled to remuneration. Therefore, if there was a dispute on whether they were entitled to remuneration for any day or number of days during the second period that would be a contractual dispute. Their claim would be a contractual claim. The debt that they would be seeking to enforce would be a contractual debt – and not a judgment debt whereas in regard to the first period it was simply a case of seeking to enforce an existing court order...’

- [12] It is trite that a reinstatement order only serves to revive the contract of employment and an employee who tenders his or her service, while the employee is exercising its review and appeal remedies to exhaustion, does so in terms of the employment contract.
- [13] In this case, it is not in dispute that the applicant’s claim is for remuneration earned after the date of reinstatement. This period is clearly not covered by reinstatement. In paying the applicant the amount of R5 787 901.00, the respondent complied with the arbitration award. Therefore, the applicant has failed to show that the arbitration award was partially complied with. As such, the applicant failed to make out a case for an order to make the arbitration award an order of this Court.
- [14] There is, therefore, no reason for this Court to grant the applicant an order which would enable her to have a writ of execution issued against the respondent. The respondent can be said to be a judgment debtor against whom a writ may be issued only after a contractual claim in the civil courts or under section 77 of the

Basic Conditions of Employment Act⁴ (BCEA) has been instituted and pronounced.

[15] I have had regard to the issue of costs and taking into account the requirements of law and equity, I believe this is a matter in which there should be no order as to costs.

[16] In the circumstances, I make the following order

Order

1. The applicant's application is dismissed.
2. There is no order as to costs.

D Mahosi

Judge of the Labour Court

⁴ Act 75 of 1997.

Appearances

For the applicant: Mr M.M Bill of Motsoeneng Bill Attorneys

For the respondent Advocate MJ Van As

Instructed by: Webber Wentzel Attorneys

LABOUR COURT