

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J4016/2018

In the matter between:

LANGANANAI JOYCE RAMOVHA

Applicant

and

FIDELITY SECURITY SERVICES (PTY) LTD

Respondent

Enrolled: 20 May 2020

Decided on the papers

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 1 June 2020

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] With this application, the applicant seeks an order to have the arbitration award dated 1 March 2016 issued under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) be made an order of Court in accordance with the provisions of section 158(1)(c) of the Labour Relations Act (LRA).¹ The respondent opposed the application.
- [2] Arising from the declaration of the national state of emergency, the parties had agreed that the matter be disposed of on the papers. The applicant's attorneys of record in accordance with a directive issued by the Court on 11 May 2020 had filed supplementary heads of argument.
- [3] Following the referral of an alleged unfair dismissal dispute to the CCMA by the applicant together with four other employees, Commissioner D.K

¹ Act 66 of 1995, as amended

Nkadimeng had on 1 March 2016, issued an award, in terms of which the respondent was ordered to reinstate the applicant and the four other individuals, and to further pay to each of them, an amount of R22 800.00 in the form of back-pay.

- [4] This application was brought before the Court on 5 April 2019. In her founding affidavit, the applicant averred that the respondent has failed/refused or neglected to either reinstate or pay her the compensation amount in accordance with the arbitration award.
- [5] The respondent had opposed the application, in which it submitted that the applicant's application was an abuse of the Court's process, since she was aware of a review application which was pending before the Court. In substantiation of the defence, it was submitted on behalf of the respondent that;
- a) A review application was launched under case number JR750-2016, and that in this regard, a notice in terms of Rule 7A(8)(a); a notice in terms of Rule 7A(6) and a certificate in terms of Rule 7A(5) of the Rules of this Court were served on the applicant's attorneys on 23 May 2017.
 - b) The notice in terms of Rule 7A(6) was accompanied by a transcribed record and CCMA documentation, and an affidavit of service confirmed such service.
 - c) The applicant's attorneys of record had on 19 October 2017 addressed correspondence to the respondent's attorneys requesting proof that the record of proceedings had been served. This was responded to on 20 October 2017 with the required proof attached
 - d) On 31 October 2017, the applicant's attorneys of record had complained about the incomplete record and requested another copy. The respondent's attorneys responded on 31 October 2017, indicating that service was complete, and that another copy of the record would be provided if the applicant's attorneys paid for the pages.

- e) On 3 November 2017, the applicant's attorneys addressed correspondence to the respondent's attorneys indicating that payment for the pages was made on 1 November 2017 and that these would be collected from the respondent's attorney's offices on 6 November 2017.
 - f) In the midst of an exchange of the above correspondence, the applicant had then served and filed a notice to remove the cause of complaint in terms of Rule 11 which the respondent had opposed.
 - g) Only on 22 March 2018 did the applicant file an answering affidavit to the review application. The respondent had in its response, raised the fact that the answering affidavit was filed out of time without an application for condonation.
- [6] In her replying affidavit, the applicant denied that her application was an abuse of the Court's process and contended that the respondent has failed to prosecute its review with the necessary degree of urgency. She further averred that the respondent was aware that its review application was 'deemed dismissed', and that her attorneys had advised the respondent that a section 158(1)(c) of the LRA application was to be launched. In this regard, reference was made to correspondence sent to the respondent's attorneys on 19 October 2017 and 8 November 2017 indicating that the review application was 'deemed dismissed', and that the section 158(1)(c) application was to be proceeded with.
- [7] The applicant had further averred that the respondent was also made aware in the answering affidavit in the review application that its review application was deemed dismissed, and to the extent that there was no application before the Court to revive the review application, it was currently not before the Court.

The legal framework and evaluation:

- [8] This Court is enjoined with wide powers in terms of the provisions of section 158(1)(c) of the LRA² to make arbitrations awards and/ or settlement

² Section 158: Powers of Labour Court (1) The Labour Court may –

agreements orders of the Court. The Labour Appeal Court (LAC) in *South African Post Office Ltd v CWU obo Permanent Part-Time Employees*³ outlined the principles that Courts must take into consideration when exercising its discretion under section 158(1)(c) of the LRA. Thus, before the Labour Court can grant an order sought in terms of section 158(1)(c) of the LRA it must be satisfied that, at the very least the award satisfies the criteria set out in section 142A of the LRA; that 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 it; and, that there has not been compliance by the defaulting party with the terms of the award.

[9] The Court's discretion however to make an arbitration award an order of Court is constrained by the provisions of section 145(3) of the LRA, in terms of which the Court in the face of a review application may stay the enforcement of the arbitration award pending its decision. Under the provisions of section 145(7) of the LRA however, the institution of review proceedings does not suspend the operation of the arbitration award, unless the applicant (the respondent in this case), has furnished security to the satisfaction of the Court. To the extent that the arbitration award in this case ordered a reinstatement and backpay, the security envisaged under the provisions of section 145(8), entails 24 months remuneration, or the amount equivalent to the amount of compensation ordered by the Commissioner.

[10] As to whether this Court should exercise its discretion and grant the order sought by the applicant must be considered against a variety of disconcerting factors arising from her pleadings, the heads of argument and the supplementary heads of argument filed on her behalf.

10.1 The first concern is that as can be gleaned from the pleadings, the applicant for the first time in the replying affidavit raised an issue surrounding the 'deemed dismissal' of the review application. Furthermore, it was the first time in the written heads of argument and

(a)...

(b)

(c) make any arbitration award or any settlement agreement an order of the Court.

³ [2013] ZALAC 20; (2014) 35 ILJ 455 (LAC); [2013] 12 BLLR 1203 (LAC) at para [21]

the supplementary heads of argument that detailed submissions were made as to the reason the review application ought to be deemed withdrawn, and also the first time that issues were raised pertaining to the delay in instituting the review application, and the failure to seek condonation in that regard.

- 10.2 It is trite that a case ought to be made out in the founding papers, and not in the reply or the heads of argument. It is in the founding affidavit that it is expected of the applicant to accordingly disclose facts that would make out a case for the relief sought, and sufficiently inform the other party of the case it was required to meet⁴. In the end, the applicant must stand or fall by the allegations made in the founding affidavit. This is so in that it is a trite principle of our law that the court will not allow a new matter in reply, when no case was made in the original application or if the reply reveals a new cause of action⁵.
- 10.3 In the light of the above legal principles, all that the applicant did in her founding affidavit was to give a background leading to the arbitration award, and a general statement that the respondent had failed/refused or neglected to comply with the arbitration award. Not once did she mention anything about the pending review application, even if she was of the view that the application was not properly before the Court.
- 10.4 The failure to mention, let alone advance any attack on that review application in the founding affidavit was fatal in my view. In the end, the contents of her founding affidavit were clearly not sufficient for the Court to exercise its discretion in her favour, particularly in the light of the more detailed answering affidavit, in which it was averred that the review application was properly before the Court.
- 10.5 Even if the Court was inclined to have consideration to the new issues raised in the replying affidavit or the heads of argument, in accordance

⁴ See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 278 (T); *Juta & Co Ltd v De Koker* 1994 (3) SA 499 (T) at 508 B-D

⁵ See *Mashamaite and others v Mogalakwena Local Municipality and others, Member of the Executive Council Coghsta, Limpopo and another v Kekana and others* [2017] ZASCA 43; [2017] 2 All SA 740 (SCA) at para 21; *Obsidian Health (Pty) Limited v Makhuvha* [2019] JOL 46118 (GJ)

with Clause 11.2.3 of the Practice Manual of this Court, if the applicant in review proceedings fails to file a record within the prescribed period, the applicant will be deemed to have *withdrawn* the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given⁶.

10.6 One would assume that the point being raised by the applicant in her replying affidavit was that as a consequence of delays in filing the transcribed record, the review application was deemed to be withdrawn, and not 'deemed dismissed' as she contended. Be that as it may, and as already concluded, no such case was made out in the founding affidavit.

[11] One appreciates the applicant's frustrations with the fact that she is in possession of a favourable arbitration award which she cannot enforce. To the extent that she was of the view that the respondent was intent on frustrating her in enforcing her award, no case was made out for the purposes of an order under section 158(1)(c) of the LRA. A simple assertion that respondent has not complied with an arbitration award, when there is a review pending without attacking that review application, is not sufficient for this Court to apply its discretion in favour of the applicant.

[12] I have had regard to the requirements of law and fairness insofar as an award of costs is concerned. Even though the applicant's application in its form was ill-conceived, I am of the view that any costs order is not warranted in this case.

[13] Accordingly, the following order is made;

⁶ Paragraph 11.2.3 provides;

'If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.'

Order:

1. The applicant's application in terms of section 158(1)(c) of the Labour Relations Act is dismissed.
2. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicant:

Grovè Attorneys

For the Respondent:

Crawford Attorneys