



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 144/2022

In the matter between:

TSHEGOFATSO MARGARET KEEPILE

Applicant

and

LEKWA-TEEMAN LOCAL MUNICIPALITY

Respondent

Heard: 4 December 2024

Delivered: 03 April 2025

JUDGMENT

NAIDOO, AJ

Introduction

[1] This is a judgment determining a special plea (based on “lack of jurisdiction”) raised by the respondent, against a claim for arrear back pay owing to the applicant

in terms of an arbitration award handed down by the South African Local Government Bargaining Council (the arbitration award).

[2] According to the respondent's special plea, this court lacks jurisdiction to determine the applicant's claim for arrear back pay because even though the arbitration award ordered her *re-employment*, "*no agreement to re-employ the applicant was ever concluded by the parties and no employment relationship came into effect*".

Brief Chronology of Material Facts

[3] The arbitration award is dated 7 November 2014 and provides the applicant with the following relief:

'65. The dismissal of the Applicant member was both procedurally and substantively unfair;

66. I therefore order the *re-employment* of the Applicant member as from the date of her unfair dismissal (31st of July 2014) *on any post similar to the post the Applicant occupied before the dismissal*;

67. At a date of the Award the remuneration due to the Applicant Ms T Keepile as a result of the re-employment, amounted to (3 x R11 534-94 = R34 604-82) minus such deductions as the employer is in terms of law entitled.

68. The amount must be paid into the Applicant's Banking Account on 2014/11/30.

69. The Applicant is to tender services to the Respondent on the 13th November 2014.' [own emphasis]

[4] The respondent sent a letter to the applicant dated 21 November 2014, in which it notified the applicant that it was in the process of reviewing the arbitration award and that "*the status quo that prevailed at the time of the award should remain: that your contract of employment with the Lekwa-Teemane Local Municipality remains terminated pending a decision by the Labour Court*". The applicant was also advised "*not to report for duty until the finalisation of your matter as you are currently deemed not to be an employee of Lekwa-Teemane Local Municipality*".

[5] The respondent did institute a review application however, on 8 August 2017, the Labour Court dismissed the review application and made the arbitration award an order of court.

[6] The respondent filed a rescission application in which it stated under oath that should the rescission be granted and the respondent be unsuccessful in its review application, that the applicant *“will receive her full retrospective payment of her remuneration and be reinstated in her job”*.

[7] The respondent's rescission application was also dismissed and on 4 December 2019, the arbitration award was again made an order of court.

[8] The applicant sent a resignation letter to the respondent dated 4 December 2019, resigning from her position as *“Secretary to the Mayor of Lekwa Teemane Local Municipality”* and indicated that her *“last day of employment will be 04 December 2019”*. The applicant took up employment elsewhere since that date.

[9] The applicant contends in the statement of claim that the respondent paid her R36 604.82 in respect of her back pay. The respondent denies this.

[10] On 2 March 2022, the applicant instituted a contractual claim against the respondent in this court for the amount that the applicant would have earned from the date of the arbitration award (7 November 2014) until the date of resignation (4 December 2019) with interest.

[11] On 29 August 2023, the respondent filed its statement of response raising a special plea of lack of jurisdiction because no agreement of re-employment was ever concluded and so no employment relationship came into effect.

Summary of Material Submissions by the Parties

[12] In argument, the respondent made primarily the following submissions:

12.1 The applicant was never re-employed by the respondent and no contract was ever negotiated and entered into by the parties, following the

award of the Commissioner. As such the applicant did not tender any services following the award. Her failure to tender her services was fatal to her claim as she was never placed in a position whereby back pay would accrue to her.

12.2 The respondent relied on the decision of the Constitutional Court in *National Union of Metalworkers of SA on behalf of Fohlisa and others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)*¹ (*Hendor*) arguing essentially that back pay is only contractually owing upon the full restoration of the employment contract. This required more than a tender of services by the unfairly dismissed employees and the employer should also have accepted those employees back into its employ. If the employer fails to do so, the employee should institute contempt proceedings to compel the employer to do so. The respondent thus contends that prior to the respondent agreeing to restore the contract or pursuant to an order to do so, there is no contract in existence and thus, no judicial basis for a claim for arrear wages.

[13] The applicant contends that:

13.1 The respondent undertook to comply with the award in its rescission application, reinstate the applicant and pay her “*full retrospective payment*”.

13.2 The respondent complied with a portion of the award.

13.3 The respondent previously raised an exception to the statement of claim on the basis that: the arbitration award “*did not revive the contract between the parties*”; that no contractual agreement was in place between the applicant and the respondent for the period between 1 November 2014 and 31 March 2017 and, that because there was no agreement on the terms to re-employ the applicant, the applicant’s claim is without legal basis. This exception was dismissed by the Honourable Lallie J. According to the applicant, the special plea is essentially seeking to revive the exception.

13.4 It is disputed that there was no tender of services. In the pre-arb minute signed by the parties, the following is recorded as a disputed fact:

¹ (2017) 38 ILJ 1560 (CC); [2017] 6 BLLR 539 (CC).

'The Applicant tendered her services, however, was advised not to report for duty until the finalisation of the review proceedings. This stance was again confirmed via a letter dated 21 November 2014.'

13.5 The respondent rejected the tender because there was a review application, therefore a contempt application was not competent.

Analysis

[14] The arbitration award orders the *re-employment* of the applicant from the date of her unfair dismissal (31st of July 2014). The applicant's case is that the respondent failed to re-employ her in terms of an arbitration award and that she suffered the loss of her remuneration that she would have earned had she been re-employed.

[15] The respondent raised an exception that the statement of claim did not disclose a valid cause of action and that the arbitration award did not revive the employment contract, which was dismissed by the Honourable Lallie J on the basis that these arguments only took issue with whether or not the applicant's claim had any merit, but did not render them excipiable.

[16] The respondent now seeks to raise that there was no employment relationship between the parties, however, it has failed to identify any basis as to why this court would be deprived of jurisdiction to hear a claim for "back payment" in terms of an arbitration award.

[17] The issues pertaining to whether or not there was a proper tender of services, whether or not this tender was accepted or rejected or whether or not the respondent complied with a portion of the award and in so doing, indicated that it would not be challenging the award are all matters for the trial court to determine in assessing whether the applicant has made out a case for payment of arrear back pay.

[18] The court does have jurisdiction to determine the applicant's claim, whether or not such claim has any merit is for the trial court to determine.

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

Order

1. The respondent's special plea based on lack of jurisdiction is dismissed.
2. There is no order as to costs.

P. Naidoo

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate M Louw

Instructed by: A Botha Attorneys

For the respondent: Advocate M Vilakazi

Instructed by: Sibeko Attorneys