THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 331/19

In the matter between:

SATAWU obo ELVIS RAMOTSONGA **Applicant**

and

GVR VERVOER B.K TRIO VERVOER **Respondent**

Heard: **25 May 2022**

Delivered: **3 June 2022**

Revised: 6 February 2026

Summary: An application brought in terms of section 77(3) of the Basic Conditions of Employment Act No. 75 of 1997. Applicant claims arrear wages – contract of employment reinstated. Applicant is reinstated as a result he has a contractual claim for arrear wages. No dispute of fact that cannot be resolved on the papers. Held (1): The respondent is to pay to the applicant outstanding salary for the period February 2014 to June 2017. (2): The respondent to pay the applicant's costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application brought in terms of section 77 (3) of the Basic Conditions of Employment Act[1] (BCEA). After being reinstated as per an arbitration award, the respondent failed to pay to the applicant outstanding salary for the period when the applicant was reinstated but not paid any outstanding remuneration. This Court understands why the applicant chose motion proceedings. No dispute of fact was anticipated because Elvis Ramotsonga (Ramotsonga) was ultimately reinstated, as ordered, which reinstatement spelled revival of his contract of employment. By being reinstated, Ramotsonga acquired a contractual claim for arrear wages.

[2] Prior to hearing this application, the parties led by the respondent, suggested that since there is a dispute of fact, the matter should be removed from the motion roll and be referred to the trial roll for the purposes of hearing *viva voce* evidence on the aspect whether Ramotsonga tendered his services in February 2014 or not. This Court indicated that there is no basis for the application to be referred to oral evidence. Having indicated that, it afforded parties an opportunity to explore settlement. They failed to settle and the matter was argued. On the papers, the only relevant dispute was whether Ramotsonga was entitled to the arrear wages or not. In the Court's view, owing to a common cause fact that Ramotsonga was reinstated as ordered by July 2017, the question of entitlement to arrear wages became a question of law rather than fact. This Court may point out at this stage that as a general principle, the Court has a discretion to decide whether to refer motion proceedings to oral evidence where there is a dispute of fact that requires resolution[2]. Where a Court is not faced with a real and genuine dispute[3] of fact, as it is the case in this matter, a Court should, in the exercise of its

[1] No. 75 of 1997.

[2] See *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) and *Johnson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC)

[3] See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

discretion, refuse such an application, even when such an application is made before a Court hears the merits of the application. A genuine dispute of fact exists where there is a disagreement between opposing parties on facts legally relevant to a claim. The alleged dispute of fact, as it shall be demonstrated later in this judgment, is not relevant to the claim. It is nevertheless not irresoluble on the papers before Court.

Background facts

[3] The respondent employed Ramotsonga since 1 September 2009 as a driver. He earned an amount of R8654.04 per month. Around 7 October 2013, he was informed by his supervisor that he has been suspended and should leave the premises of the employer. Further, that he will be informed of the disciplinary action to be taken against him. Aggrieved thereby, Ramotsonga referred a dispute alleging an unfair labour practice to the bargaining council. Conciliation failed to resolve the dispute. Ramotsonga requested resolution by arbitration. The respondent failed to appear at the arbitration proceedings.

[4] The dispute was arbitrated in the absence of the Respondent. On 23 January 2014, Arbitrator Gerald Jacobs (Jacobs) rendered a default arbitration award. Amongst others, Jacobs ordered the respondent to reinstate the terms and conditions of Ramotsonga's employment and to pay him remuneration with retrospective effect from 7 October 2013. Further, he ordered Ramotsonga to tender his services to the respondent on 3 February 2014. On 4 April 2014, the default arbitration award was certified in terms of section 143 of the Labour Relations Act[4] (LRA).

[5] In the papers before me, Ramotsonga alleged that as of February 2014, the respondent refused or failed to comply with the arbitration award. He was only reinstated in July 2017. In June 2017, the respondent unsuccessfully attempted to rescind the arbitration award. In response to the papers before me, the respondent admitted that it only complied with the award – by

[4] No. 66 of 1995, as amended.

reinstating – Ramotsonga in July 2017 only. The respondent contended that in February 2014, Ramotsonga failed to tender his services as ordered by the arbitrator but only tendered services on 18 May 2017 and his tender was accepted in July 2017 when he was physically taken into service. In retort, Ramotsonga testified that on 3 and 4 February 2014, he tendered his services and one Van Rooyen refused to accept his tender. Since this assertion was made in reply, the respondent could not with the leave of Court file a further affidavit in response. Such leave was not sought nevertheless.

Evaluation

[6] This is a contractual claim. The only issue is whether Ramotsonga is entitled to the arrear wages. There is no dispute that the reinstatement ordered by Jacobs was with retrospective effect. Ordinarily, a reinstatement with retrospective effect ought to take effect once so ordered. In *casu*, Jacobs ordered Ramotsonga to tender his services on a specific date. However, there was nothing that will have prevented Ramotsonga to demand or tender his services after the order of retrospective reinstatement. By law, reinstatement simply means that the *status quo* remains[5]. Thus, the order of reinstatement meant that Ramotsonga should be treated as if he was never terminated.

[7] The respondent made a meal about the dispute over whether Ramotsonga tendered services on 3 February 2014 or not. It is not the respondent's case that as a result, Ramotsonga lost or waived his reinstatement order. If that was its case, it should not have taken him back into employment in July 2017 after it failed to overturn the reinstatement order. By reinstating Ramotsonga, the respondent revived the employment contract. Above all, it acquiesced to the reinstatement order of Jacobs. It matters not whether Ramotsonga failed to tender in February 2014. Of importance, for a contractual claim for arrear wages is the physical reinstatement, which has as a legal effect the revival of the employment contract. Once revived, an employee enjoys a contractual

[5] See: *Equity Aviation Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2008] 12 BLLR 1129 (CC).

claim. Effectively, a claim for arrear wages, is one for specific performance. One of the known defences where a contractant claims contractual performance is *exceptio non adempleti contractus*. It is available in reciprocal contracts, an employment contract is one. Such a defence has not been appropriately pleaded in this matter. The respondent was obliged to properly plead such a defence[6]. On the respondent's own version, Ramotsonga tendered his services in May 2017. The question is, if the respondent was not aimed at dislodging the reinstatement order of Ramotsonga, it should have accepted his tender then and not proceed to seek a rescission. The probabilities are that, as alleged by Ramotsonga, the respondent failed and refused to comply in February 2014. Absent waiver, this Court cannot accept the respondent's case that in February 2014, Ramotsonga failed to tender his services. Question is, why would Ramotsonga fail to tender his services in February 2014 and choose to do so in May 2017? The conclusion this Court must reach is that Ramotsonga indeed tendered his service in February 2014 and his tender was not accepted. Before me Mr De Villiers for the respondent submitted that the respondent was under an impression that the award was only compensatory in nature and did not carry a reinstatement order. That submission inadvertently provides an answer to why in February 2014 and May 2017 Ramotsonga was not taken back. In our law, where a party does not accept the tender, an obligation to still pay wages even if services are not provided remains. In *Myers v SA Railways and Harbours*[7] Solomon JA aptly stated the law to be as follows:

> "If however, it was due to his employer that he had been unable to perform his work, then he would be entitled to be paid notwithstanding that no service had been rendered by him".[8]

[6] See *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) at 163.

[7] 1924 AD 85.

[8] *Myers* at 90. See also *Singh v SA Rail Commuter Corporation t/a Metrorail* (J812/07) [2007] ZALC 31 (26 April 2007).

[8] The Labour Appeal Court (LAC) in *Kubeka and Others v Ni-Da Transport (Pty) Ltd*[9] made it abundantly clear and said:

> "[41] …These employees were in effect reinstated by the respondent at different dates of their re-employment/reinstatement and remained employed in November 2018 when the reinstatement order became enforceable. It may be assumed that they tendered their prospective services which tender was accepted by the respondent. They accordingly have a contractual right to back pay enforceable in terms of section 77 (3) of the BCEA. Their claim for back pay is limited to the period from their dismissal up until date of re-employment because after their date of re-employment, they were employed by the respondent and received their salaries…"

[9] Therefore, based on *Kubeka*, once an employee is reinstated, the contractual right to back pay accrues to that employee. In *casu*, there is no dispute that Ramotsonga was reinstated. As such, his contractual right to back pay accrued to him from July 2017. Recently, the LAC in *Fidelity Fund Security Services v Ngqola*[10] confirmed that legal position and concluded thus:

> "[19] In the circumstances, I conclude that the respondent was indeed reinstated and her contract of employment ensued until she resigned on 16 February 2016. Consequently, the Labour Court cannot be faulted when it calculated her arrear salary to the date on which she resigned."

[10] Accordingly, since Ramotsonga was reinstated, he is entitled to his contractual back pay. The fact that he may have failed to tender his services at some point is of no consequences given his reinstatement. The argument by Mr De Villiers that in *Kubeka* the LAC held that once a tender is not made, a back pay claim does not accrue, amounts to a partial reading of the *ratio decidendi* of the judgment. It is indeed the current law that what earns an employee a contractual right is not the tender *per se* but the physical

[9] (2021) 42 ILJ 499 (LAC) at para 41.
[10] (JA 61/21) [2022] ZALAC 87 (7 April 2022)

reinstatement – acceptance of the tender. In *casu*, the tender made on 18 May 2017 on the respondent's own version was only accepted in July 2017. Had the respondent not accepted the tender, the contractual right would not have accrued[11].

[11] Regarding costs, this is a civil claim and costs follow the results.

[12] In the results the following order is made:

<u>Order</u>

1. The respondent (GVR Vervoer B.K t/a Trio Vervoer) is ordered to pay to Ramotsonga an amount of R354 815.64 together with interest at a prescribed rate.

2. The respondent must pay the costs of the applicant.

G. N. Moshoana

Judge of the Labour Court of South Africa.

[11] See para 39 of *Kubeka* (Id fn 4).

Appearances:

For the Applicants: Ms N Masondo of Mafenya Attorneys, Johannesburg.

For the Respondent: Mr M De Villers of De Villers & Du Plessis Attorneys, Silverton.