

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

CASE NO J1119/00

In the matter between:

THE SOUTH AFRICAN DEMOCRATIC

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FOURTH APPLICANT

FIFTH APPLICANT

SIXTH APPLICANT

AND

THE HEAD OF THE NORTHERN PROVINCE

RESPONDENT

JUDGMENT

NKABINDE AJ

Introduction

- [1] The applicants have approached this court for the award dated 10 February 2000 to be made an order of court in terms of s. 158 (1) (c) of the Labour Relations Act No. 66 of 1995 (“the Act”). They also seek an order of costs against the respondent.

[2] The first applicant is the South African Democratic Teachers Union (commonly known as SADTU), which represented the second to the sixth applicants during the conciliation process. The second to the sixth applicants (collectively referred to as the “individual applicants”), were teachers in the employ of the respondent. Their appointments, as will become apparent hereunder, were unfairly withdrawn by the respondent, the Department of Education in the Northern Province . I shall refer to the respondent as Department.

[3] The award sought to be made an order of court reads as follows:

“In the light of the above reasons, I find that the withdrawal of the appointments of the Grievants by the Employer was unfair. I therefore, order the re-instatements of the Grievants to the principalship posts, with retrospective effective” (presumably effect) “within seven (7) days of receipt of this award.”.

[4] I may mention from the outset that the “Department” has accepted the decision of the arbitrator that the individual applicants were unfairly withdrawn from their principal posts.

[5] The Department opposed this application on the basis that-

5.1 the award does not require the individual applicants to be re-instated in the exact positions in which they were immediately before the withdrawal of their appointments and that their re-instatement to the ranks of principal and awarding them the concomitant benefits connected to that rank would constitute substantial compliance with the award;

5.2 the arbitration award is impossible to implement in that the posts to which the individual applicants were appointed as principals were filled after the withdrawal of the individual applicants’ appointments;

5.3 removing the present incumbents from such posts is likely to lead to further labour dispute and unrest of the schools and the removal will not be approved by the School Governing Bodies and may lead to actions against the applicants preventing them from taking up the posts.

5.4 the department had made a settlement offer-

- 5.4.1 promoting the individual applicants, without re-instatement, to the rank of principal;
- 5.4.2 paying them as if they were principals retrospectively from the date of their first appointments; and
- 5.4.3 depending on the recommendation of the relevant School's Governing Body, appointing the individual applicants as principals at schools where principals posts may be vacant or may become vacant in future.
- 5.5 the individual applicants have unreasonably rejected the settlement offer;
- 5.6 making the arbitration award an order of court will serve no purpose;
- 5.7 a review application by the Department is pending; and
- 5.8 the present incumbents were not joined as parties to the arbitration proceedings.

The factual background to the dispute

- [6] The history of this matter is briefly that the individual applicants had been appointed by the Department as principals at five different schools. After the interviews had been completed the individual applicants were given letters of appointment. The letters of appointment were, however, subsequently withdrawn by the Department. The applicants (including SADTU), alleging that a dispute existed between them and the Department concerning the withdrawal of their appointments, referred the dispute for arbitration. The arbitrator granted the award which is the subject matter of this proceedings. The applicants launched this application on 5 April 2000.
- [7] On 2 June 2000 the Department filed its statement of defence and an application for review of the award in terms of the Act, as well as an application for condonation for the delay in filing the review application.

Condonation

- [8] The Act provides for the review of matters under the Labour Court's jurisdiction in three sections. These are sections 145, 158(1)(g) and 158 (1) (h). It is not clear under what

section the Department is seeking to review the award. I consider it reasonable to assume that the Department sought to review the award under section 145 because section 145 deals with review of award under the auspices of the Commission for Conciliation, Mediation and Arbitration the (CCMA); section 158 (1) (g) deals with reviews of administrative functions not specifically covered in sections 145 and 158 (1) (h). Section 158 (1) (h) deals with the review of actions of the State as an employer (See: *Carephone (Pty) Ltd v Marcus N O & Others* [1998] 11 BLLR 1093 (LAC)). I shall, for the purpose of this judgment, not concern myself with the provisions of sections 158 (1) (g) and 158 (1) (h).

[9] It is necessary to quote section 145 in full . It reads as follows:

“145 Review of arbitration awards

(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the awards was served on the applicant, unless the alleged defect involves corruption: or

(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(2) A defect referred to in subsection (1), means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner’s powers; or

(b) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may-

determine the dispute in the manner it considers appropriate ;or
make any order it considers appropriate about the procedures to be followed to determine the
dispute.”.

[10] The said award was made on 10 February 2000. It is common cause that it
was sent to the respective parties on 15 February 2000. The Department was
required, in terms of section 145, to apply to this court for an order setting aside the
arbitration award within six weeks of the service of the award. The Department
filed the application for review and condonation on 2 June 2000 i.e after the
prescribed time limit.

[11] The law with regard to condonation applications is well settled and had been laid down in a
number of court decisions. The factors which emerge from such decisions and are usually
relevant are the degree of lateness, the explanation therefor, the prospects of success and (in
some instances), the importance of the case. (See: **Melane v Santam Insurance Co. Ltd**
1962 (4) SA 531 at 532C; NEHAWU v Nyembezi (1999) 5 BLLR 463 (LAC) at para.
[5]; Ferreira v Ntshingila 1990 (4) SA 271 (A) at 281D; Darries v Sheriff Magistrate’s
Court Wynberg & Another 1998 (3) SA 34 (SCA) at 40J - 41A). Another most material
factor in determining whether condonation should be granted or not is an element of actual
or potential prejudice to the opposing party (See: **Shepherd V Mossel Bay Liquor**
Licensing Board 1954 (3) SA 852 (C)).

[12] The reasons advanced for the delay are contained in paragraphs 2.5 and 2.6 of the affidavit
in support of the application for condonation. It is explained that-

12.1 The Department failed to bring this application earlier because it always regarded the re-
instatement of the individual applicants to the rank of principal and not necessarily in the
post they occupied before their removal to constitute compliance with the award, and

12.2 The Applicants’ unreasonable approach, caused the delay.

[13] The Department has not dealt with the prospects of success at all. The Department, as I have

indicated above failed to apply within the prescribed period. I must now examine the explanation given to determine whether the period that has elapsed was, in the light of all the circumstances, reasonable and acceptable. Firstly, it is stated that the applicants' unreasonable rejection of the offer has caused the delay. I need to mention at this stage that it is somewhat incorrect and misleading to state that the Department had made an offer to the applicants with a view to settling the case. The correspondence between the parties hereto clearly indicates that no offer was ever made by the Department to the applicants. All that the Department did was to propose a round table conference to discuss what the Department "was prepared to consider in an attempt to settle the matter". Not an offer. Secondly, it is stated that the Department always regarded that the re-instatement of the applicants to the rank of principal and not necessarily in the posts they occupied before the withdrawal constituted compliance with the award. A matter for great concern is that, notwithstanding this view by the Department, no offer was made between 10 February 2000 and 2 June 2000 when the offer was mentioned for the first time in the statement of defence. I need to mention that the offer, in any event, is certainly, not in substantial compliance with the award. The Department merely offered to-

- “(a) promote the applicants concerned to the rank of principal; and
- (b) remunerate them accordingly.”.

This is not what the award entails.

[14] Having examined the explanation given by the Department, it seems to me that the delay was based on a deliberate and wilful decision not to comply with a lawful and binding award. I am fortified in my view by what the Department has stated in its defence, *inter alia*, that-

- (a) if the award is made an order of court in terms of s. 158 (1) (c), i.e. if the Department is ordered to reinstate the individual applicants retrospectively-
“... the making of the award an order of court would serve no purpose...”, and
- (b) if the review application is refused the department will have no option but-

“to commence retrenchment procedure in respect of each of the relevant applicants.”.

[15] The Department has not given an acceptable and/or satisfactory explanation for its delay. The said explanation, in my view, displays a blatant disregard for the decision of the arbitrator. There is no doubt that the applicants have suffered and continue to suffer prejudice as a result of the failure to implement the award. In the circumstances, I am not satisfied at all that good cause has been shown for this court to excuse the Department's delay. Accordingly and without any need to enquire into the merits, I consider it appropriate, as I hereby do, to refuse condonation.

Argument on the application to make the award an order of court

[16] Counsel for the applicants submitted that there is no merit in the contention that the award is impossible of being implemented because-

- (a) the impossibility was of the Department's creation;
- (b) even on the Department's view of what the award entails, there is still nothing impossible about its implementation. For this he relied on **Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court & Others 1985 (3) SA 150 (N)** which was confirmed on appeal and is reported in 1986 (3) SA 786 (A); (1986) 7 IJL 489 (A).

Mr Van der Riet submitted further that the Department is, by referring to possible unrest at the Schools and to its intention to retrench the individual applicants if the award is made an order of court, using an unacceptable strategy to create an emotional pressure on the applicants and a bullying attitude. He further submitted that the individual applicants have suffered prejudice as a result of the delay in implementing the award.

[17] Counsel for the respondent submitted that if the award means what it entails, making such award an order of court will serve no purpose in that it would constitute *brutum fulmen*. In this regard he referred this court to the case of **Amalgamated Engineering Union V**

Minister of Labour 1949 (3) SA 637 (A) at 660, where the learned Judge of Appeal indicated that-

“The court will not, for instance, issue a decree which will be a *brutum fulmen* because some person who will have to co-operate in carrying it into effect will not be bound by it. Or again, the Court will not, in a suit between A and B, order B to do something that affect C, if C, by reason of his not being joined in the suit, will not be bound by the judgment and will therefore be able to resist any attempt by B to obey the order.”.

The Law

[18] One of the supervisory functions of this court is the power to make an award an order of court. This is the order which the applicants seek and which the Department is resisting. This power is conferred by s. 143 read with s. 158 (1) (c) of the Act. These provisions, in so far as are relevant, read as follows:

- 1) An arbitration award issued by a commissioner is final and binding and may be made an order of the Labour Court in terms of s. 158 (1) (c), unless it is an advisory arbitration award.
- 2) ...
- 1) The Labour Court may-
...
- c) make any arbitration award or any settlement agreement, other than a collective agreement, an order of the Court.”.

[19] The power to make an award an order of court is a discretionary one. The discretion must however be exercised judicially. The trend in the decisions of this court indicates that this court, generally speaking, is more in favour of lending enforceability of an award save where, for example, it is alleged that the arbitrator failed to apply the rules of natural justice or acted contrary to the rules or regulations designed to ensure compliance with the precepts of natural justice.

[20] The pivotal question is whether the award is capable of being implemented. This question turns on the meaning of the word “reinstate” or “reinstatement”. I shall, when dealing with this question, also consider the non-joinder point raised by the Department. In determining the meaning of the word “reinstate” or “reinstatement” it becomes necessary to visit the empowering provision(s) of the Act. One of the remedies available to an employee unfairly treated by his/her employer is reinstatement. The relevant section in this regard is section 193 of the Act. The relevant provisions are as follows :

“193 (1) If the Labour Court or an arbitrator ... finds that a dismissal is unfair, the court or arbitrator may-

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
.....”

[21] It is trite law that in interpreting the provisions of a Statute the court should apply the golden rule of construction. This rule is restated by Joubert JA in Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 (A), as follows:

“The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the word of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, eg where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.”. (At 804 B-C)

[22] It is equally appropriate to follow this approach in the instant case when determining what the legislature intended in enacting the provisions in s. 193, above. I must also have regard to the context in which the word is used in the award. The order in terms of the award simply requires the-

“reinstatement of the Grievants to the principalship posts with retrospective effect.”.

[23] The ordinary meaning of the word “reinstatement” in the context in which the word is used in the award, does not appear to require the employer to reinstate the individual applicants in the very positions or posts which they occupied prior to the withdrawal of their appointments: It would be impossible to reinstate them to such positions “with retrospective effect”. The order, in my view, requires the Department to reinstate the individual applicants with retrospective effect on terms and conditions of employment which are not

less favourable than the terms and conditions applicable to them prior to such withdrawal. In the words used by Mr Van der Riet, the Department does not have to kick the present incumbents out. It follows, thus, that the award is capable of being implemented. I am fortified in my view by what Thirion J stated, when he had occasion to determine the meaning of the word “reinstate” within the context of s. 43 of the Labour Relations Act 28 of 1956 (as repealed), in **Consolidated Frame Cotton case**, above, that -

“... where a dispute has arisen concerning the termination of an employee’s employment, it is competent for the industrial court to make an order requiring the employer to reinstate the employee in his employ, despite the fact that the employee’s employment was terminated through redundancy and the position in which reinstatement is sought no longer exists and the employer is unwilling to have the employee reinstated.”. (At 158 J - 159A).

The Appellate Division confirmed Thirion J’s view on appeal in Consolidated Frame Cotton, at 494H-I.

[24] Accordingly, I find that the award is not impossible to implement. I am not unmindful of the practical problems which may flow from or accompany such compliance. Such problems, if any, are not relevant to the question whether the award should be made an order of court or not (See: Grogan, above, 114).

[25] As regards non-joinder of the present incumbents to these proceedings, I need only say that the award, as it stands, does not prejudice the rights of any party who is not before this court. The case of Amalgamated Engineering Union, supra, was, in my view, a clear case of joinder. It however bears little, if any, resemblance to the instant case.

[26] Of great concern to me is the fact that the Department has expressly demonstrated its intention to disobey the order if the award is made an order of court (para 14, above) .I shall have partly failed in my duty if I do not, upon consideration of the facts and the circumstances of this case, express this court’s disapproval of the conduct of the Department. In an era of the constitutional supremacy and rule of law such as that which prevail in our country, conduct displayed by the Department should be discouraged. The

Department has deliberately and blatantly disregarded the law and the underlying purpose and structure of the Labour Relations Act. It has stated in its statement of defence, that if this court refuses its review application and make the award an order of court it will retrench the individual applicants. This is distasteful indeed; It goes in the face of the rule of law; It undermines the constitution and is repressive. I am not aware of any authority that countenances behaviour of this kind. I need sound a *caveat* by referring to the well articulated and famous Speech, by Mr Justice Brandeis of the US Supreme Court, quoted with approval by the Honourable Acting Chief Justice Mr Chaskalson in his Speech that-

“In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously ... government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example ... if the government becomes a law breaker, it breeds contempt for the law, it invites every man to become a law unto himself, it invites anarchy.”.

I could not agree more. The Provincial Department of Education in question needs to realise that it is the “potent, the omnipresent teacher” to the people of this country. It must lead by example.

[27] In the result, therefore, I make the following order:

- 30.1 The arbitration award dated 10 February 2000 be and is hereby made an order of Court in terms of section 158 (1) (c) of the Labour Relations Act 66 of 1995 (as amended); and
- 30.2 The respondent/Department is ordered to pay the costs of this application.

B.E. NKABINDE
ACTING JUDGE OF THE LABOUR COURT

: H VAN DER RIET SC
: P VAN DER BYL SC

TS : CHEADLE THOMPSON AND HAYSOM

NT : THE STATE ATTORNEY

: 23 MARCH 2001

: 30 MARCH 2001