

Sneller Verbatim/PJ

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JR662/03

2003-05-26

In the matter between
AST HOLDINGS

Applicant

and

WRIGHT A TAZMAN

Respondent

J U D G M E N T

REVELAS J: The applicant, AST Holdings, brought proceedings in the Labour Court in Port Elizabeth that a written execution issued by the CCMA be stayed, pending the outcome of a review of an arbitration award made by an arbitrator appointed by the fourth respondent (the Commission for Conciliation, Mediation and Arbitration, or "the CCMA")

The first respondent was dismissed by the applicant for alleged poor performance. The first respondent then referred the dispute to the CCMA about an alleged unfair dismissal. The

arbitrator who eventually arbitrated the matter found that the dismissal was both procedurally and substantively unfair, basing his observations in this regard on certain concessions made on behalf of the representative for the applicant in this matter.

A certificate was issued in terms of which the arbitration award obtained the status of a court order. The first respondent then proceeded to execute in terms of the award and the applicant now seeks to stay these execution proceedings.

The award was issued and received by the applicant on 5 December 2002. The applicant therefore should have filed its review application by 20 January 2003, but only did so on 17 March 2003. Therefore, the application for review was brought well out of time. A condonation application was filed thereafter and the explanation given for the late filing of the application was *inter alia*, that the deponent struggled to find a commissioner of oath to attest to the affidavit. The attorney of record for the applicant also blames his personal assistant in his office for the late filing of the application.

The applicant has to date hereof, neither indexed nor paginated the court file. The Labour Court on a previous occasion, required a substantive application for the condonation for the late filing of the heads of argument which I have condoned. I do however take this further delay into account in assessing the overall laxity of the

applicant.

The first respondent argued that at 20 March 2003, the date on which the arbitration award was certified, no review application of the award existed, due to the fact that the application was not issued prior to service, and was not supported by an affidavit since the document attached to the notice of motion was not signed and the applicant failed to file the original document to court.

It was also argued that the arbitration award may only be enforced as if it were an order of the Court, provided that the arbitration award certified by the CCMA and is final and binding. It was then argued that I do not have the power to review the CCMA award since once it has been certified, the arbitration award has the status and is for all intents and purposes regarded as an order of Court and therefore may not be reviewed by a Labour Court judge on review.

It was further submitted that an arbitration award is only capable of being reviewed by the Labour Court once the certificate has been rescinded or set aside which has not been done in this case. It may be doubtful whether the court order status of an award elevates it to a court order and judgment *per se*, which is only subject to appeal by the Labour Appeal Court. That seems to be contrary to the whole purpose of the amendment.

In this particular matter, the applicant has brought no application to have the certificate rescinded or set aside. Whereas, this is a further indication of the applicant's lax attitude, it is doubtful whether is failure to do so is an absolute bar to review. However this question is still open to debate, since the recent amendment, in my view, does introduce new questions about the powers of the Labour Court to review awards.

However the answer to this application before me lies in the many delays, and not a failure to have the certificate set aside first.

The first respondent has put forward facts to demonstrate that the applicant was afforded a fair and proper opportunity to oppose the application for certification of the award but failed to do so and he

argues further that, at this late stage, the applicant should not be afforded such an opportunity under the guise of these proceedings. With regard to the argument that there was no proper review application before this Court, I believe that the arguments advanced in respect of those propositions are somewhat over- technical and *per se*, do not preclude me from granting the applicant the relief it seeks. However, there are other factors present which tend to support a view that the applicant was never serious in complying with the award and in this regard I refer to the allegations made by the applicant in its founding affidavit.

The applicant has not put forward an adequate explanation for the delay in launching the review proceedings. It was eight months out of time which is a substantial period of time. I have read the award and I do not believe that the applicant's prospects of success are very good. Review proceedings do not automatically have the effect of delaying the enforcement of arbitration awards.

The very purpose behind the amendment introducing the certification was to enable parties to execute without having to approach the Labour Court, thus giving effect to the main object of the Act, namely the speedy resolution of disputes.

The application in terms of section 143(3) of the Act was served on the CCMA and at the Port Elizabeth offices of the applicant, as well as on the applicant's appointed representative as early as 10 February 2003. The application was served under cover of a letter by the CCMA advising the applicant that it had 14 days within which to oppose the application and that is the application for the certification of the award and the issue of the writ of execution in terms of section 143(3) of the Labour Relations Act, 66 of 1995 as amended ("the Act").

On 16 March 2003 the application for review was served on the first

respondent's attorneys, but was not served on the Director of the CCMA charged with certifying the award and the Director, accordingly had no knowledge of the application. The award was then certified by the Director of the CCMA.

The applicant alleges that on 27 March 2003 it served and filed opposing papers in section 143(3) application. These papers were only received by the first respondent's attorneys by registered mail on 9 April 2003 subsequent to the issue of the writ of execution. The first respondent complained that to date the applicant has failed to proffer any explanation in support of the allegation that it only became aware of the section 143(3) application in the third week of March 2003.

The first respondent's attorney also deposed to an affidavit wherein she stated that the applicant was alerted to the existence of the writ by way of a courtesy letter from her dated 9 April 2003, advising the applicant's attorneys of the first respondent's intention of executing the writ.

The first respondent argued that the applicant was afforded due process and had the opportunity to object to and oppose the certification of the award in the normal course of events, but had not done so for reasons best known to itself. The first respondent has also placed into question the applicant's allegation that it was unaware of the writ. He contends that the applicant was aware of the existence of the section 143(3) application as early as February 2003 when the application was served on it. The applicant should therefore have been aware by the time it sought to oppose the application by the end of March 2003, some four and a half weeks later, the award may then have been certified.

The applicant has clearly delayed in launching the review application. I have already stated what I have observed in respect of the applicant's prospects of success. The applicant also made much of the allegation that the first respondent refused to accept an offer of payment of the amount due in terms of the writ. However, from the papers it is apparent that the offer was made to the deputy sheriff and not to the first respondent.

I have considered all these factors and most important of all, the position of the first respondent. He obtained an award in his favour. On the face of it the award seems to be unassailable. In my view, this review application was brought with the sole purpose of stalling proceedings. The applicant did not impress me as a litigant who pursued its case with any vigour. Only at the last minute, and all too often, too late, it acted.

It also did not paginate and index the court file as mentioned. In the circumstances the application is dismissed with costs.

E. Revelas