IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J3325/12

In the matter between:

SATAWU obo I MOFOKENG & CHABALALA **Applicant**

and

KHULANI FIDELITY SECURITY **Respondent**

Heard:

Delivered:

JUDGMENT

LANDMAN AJ

Introduction

[1] The applicant, acting on behalf of its members, Ms Mofokeng and Ms Chabalala (the members), seeks an order declaring that the respondent (the members' erstwhile employer) is indebted to the members in the sum of R394 000.00 and that the respondent pay such sum to the members (the claim). The respondent opposes the application.

The background

[2] The background facts are as follows. On 13 February 2007, following arbitration proceedings, a Commissioner of the CCMA made the following determination in favour of the members that:

‘1. The dismissal of the Applicants (the members) was substantively and procedurally unfair.

2. The Respondent, Khulani Fidelity Springbok must reinstate the Applicants, Irene Mofokeng, and Pretty Susan Chabalala on the same terms and conditions or at sites with no less favourable conditions as from 1 March 2006.

3. The Respondent must also pay the Applicants R8 400.00 each, which is the equivalent of three months each as arrears payment.

4. The above amounts must be paid within fourteen (14) days of receiving this award.

5. No costs are awarded.’

[3] The respondent refused to reinstate the members and elected to review the arbitration award in the Labour Court. Pending the outcome of the review application, the respondent sought and obtained an order staying the execution of the arbitration award.

[4] The Labour Court dismissed the respondent’s review application on 18 October 2011 and made the arbitration award an order of court (the Court Order). A period of sixty-seven (67) months elapsed between the date of reinstatement recorded in the arbitration award, namely 1 March 2006, and the date upon which the review application was dismissed.

The current application

[5] On about 20 August 2012 the applicant instructed its attorneys to inform the respondent’s attorneys that the members no longer intend returning to work and demanded payment due to them as at the date of the Court Order. This application serves before me.

[6] In essence, the members each claim an amount of R2 800.00 per month from the date of reinstatement, namely 1 March 2006, multiplied by 67 months. The members thus each claim the sum of R197 000.00.

[7] The respondent opposes the application and filed an answering affidavit, albeit late. The respondent contends:

7.1. that the award is unenforceable in that the members would have been required to return to work on 1 March 2006 whereas the arbitration award was issued only on 13 February 2007. It should be pointed out that the members were dismissed on 23 May 2006;

1.2. that the members failed to tender their services in terms of the reinstatement award;

1.3. it is impossible to calculate the amount due to the members even if they had tendered their services;

1.4. the Commissioner's recordal of the date of reinstatement, namely 1 March 2006, was not a blatant error on the part of the Commissioner and points out that the members used that date as the applicable date when calculating the amount owing to them. The respondent contends that the applicants ought to approach the Commissioner in terms of section 144 of the Labour Relations Act[1] to vary and/or correct the date of reinstatement;

1.5. the members are not entitled to the amount claimed, "*due to the fact that the Applicants did not tender their services"*. The respondent refers to correspondence with the applicant's attorneys enquiring whether the members wished to be reinstated. The respondent avers that the applicant failed to respond to such correspondence, and, by so failing, the respondent contends, that members waived their right to reinstatement; and

1.6. the members assumed employment elsewhere during the period of the claim, and that the members had a duty to inform the respondent about their employment history during the period of the claim.

[1] 66 of 1995, as amended (LRA).

[8] The applicant filed a replying affidavit in which two points *in limine* are raised. First, the answering affidavit is fatally defective in that the respondent failed to identify the deponent to the affidavit by name and, secondly, the answering affidavit was filed out of time without an accompanying application for condonation and thus ought to be struck out.

[9] In response to the allegations made in the answering affidavit, the members contend:

9.1. that the respondent failed to raise the issue of the alleged incorrect reinstatement date until it did so in the answering affidavit and that, besides, the members reported for duty after the arbitration award had been issued namely on 1 March 2007. Thereafter the respondent chose to stay the execution of the arbitration award and resorted to delaying tactics in the course of the review application;

9.2. that the option of approaching the Commissioner to correct the date no longer exists as the award was subsequently made an order of Court. Besides, the respondent should have raised this defect in the award earlier;

9.3. the respondent raised the issue of their reinstatement only in June 2011 and did not intend complying with the award in full; and

9.4. The applicants did respond to the respondent's correspondence, accordingly, the allegation that the members had waived their rights to claim was incorrect.

[10] After a considerable delay, the respondent filed a further affidavit deposed to by Anna Elizabeth Oost, the respondent's group General Manager. Ms Oost states that the purpose of the affidavit is to address the applicant's points *in limine* and, in the interest of justice, to bring to the Court's attention facts, which only became known on 24 June 2014, concerning the members' employment during the period of the reinstatement order. In her affidavit:

10.1. She says that she deposed to the answering affidavit and that the omission of her name from the affidavit was due to an oversight;

10.2. she concedes that the respondent failed to seek condonation for the late filing of the affidavit and seeks to do so now. The failure to seek condonation was an oversight. The affidavit was filed late because the respondent's attorneys of record, Mr Wheatley, was under the impression that the *dies non* applied and that he was obliged to file the answering affidavit only after 15 January; and

10.3. the application for a stay of execution was restricted to the monetary amount of the arbitration award, namely the payment of three months' arrears (wages). Besides, the application to stay was dated 4 June 2007 and the members were able, yet did not, report for duty in the three months following the 1 March 2007. Accordingly, the existence of the stay of execution did not preclude the members from reporting for duty.

[11] The applicant chose to file a further affidavit in response. The applicant contended that:

11.1. a mere oversight was not a sufficient excuse for the omission of Ms Oost's name as the deponent to the answering affidavit;

11.2. there was doubt whether Ms Oost deposed to the answering affidavit as her job title differed in the two affidavits allegedly deposed to by her; and

11.3. condonation should not be granted and cited a number of reasons why this should be so.

[12] The applicant admits that Ms Mofokeng found alternative employment from July 2006, that is to say from the date of her dismissal from the respondent's employ, and that Ms Chabalala was employed elsewhere between the date of her dismissal and February 2012. Nonetheless, the applicant emphasizes that the members are "*not seeking compensation but are seeking back pay for the*

period during which the [r]espondent refused to comply with the reinstatement order".

[13] The applicant contends that the members' employment history, and whether they were able to tender their services while the review application wound its way through the court system until its conclusion, is irrelevant. The applicant avers that the members were nevertheless at all times willing to report for duty.

Evaluation

[14] I shall first consider the respondent's explanation for omitting the name of the deponent from the answering affidavit and the respondent's application for condonation for the late filing of its answering affidavit. I am satisfied that Ms Oost was the deponent to the answering affidavit and that the applicant's suspicions in this regard are unfounded. There is no doubt in my mind that the same person signed the answering affidavit and the further affidavit by the respondent, and that that person was Ms Oost. The applicant is not prejudiced by the respondent's oversight.

[15] As to the respondent filing its answering affidavit 35 days late, I find that sufficient grounds exist to condone the late filing. The delay of thirty-five days, in the circumstances of this case, is not excessive. In any event, the explanation given by Mr Wheatley of his misunderstanding regarding the *dies non* is a *bona fide* explanation. Although his conduct involves a measure of negligence, I do not consider it to be of such a nature that it should have the effect of depriving the respondent from putting its case before the Court. The applicant is not prejudiced by the delay.

[16] I now to turn to the merits of the application before me. This is an application to declare monies owing to the members due and payable and ordering that the respondent pay such monies to the members.

[17] It is appropriate to record my views concerning the respondent's argument that date of reinstatement recorded in the arbitration award should stand until

corrected by the Commissioner in terms of section 144 of the LRA.[2] The Commissioner is *functus officio* and his award is now an order of court. In my view, the Commissioner made a bona fide and patent mistake and that for purposes of this judgment that the date of reinstatement should read "1 March 2007". This is the only way in which one can make sense of the Commissioner's award made in February 2007. Any other approach would mean that the Commissioner intended to order reinstatement from a date prior to the date of the members' dismissal, which he is prohibited from doing. Moreover, the Commissioner awarded an amount equivalent to three months' wages to the members as an "arrears payment". The Commissioner surely intended to compensate the members for a portion of the wages lost by the members in the period between the date of their dismissal and the date of the award. It is inconceivable that the Commissioner intended to award compensation and retrospective reinstatement. The Commissioner made his award on 13 February 2007 and ordered reinstatement to take effect from a date shortly thereafter, namely 1 March 2007. The Commissioner accordingly committed a patent error by recording the date as "1 March 2006". The date in the court order making the award an order of court must also be read as 1 March 2007.

[18] The applicant limited the claim for wages, in its heads of argument, to R 334 400-00. This reflects a concession that the date of reinstatement is patently incorrect.

[19] The issue is whether, on the applicant's own papers, it has made out a cause of action. The applicant bases its cause of action on the reinstatement order made by the Commissioner and, on a proper reading of the founding affidavit, claims wages that the members would have earned had the respondent

[2] Section 144 is entitled "Variation and rescission of arbitration awards and rulings" and provides:

"Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling—

(a) erroneously sought or erroneously made in the absence of any party affected by that award;
(b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;
(c) granted as a result of a mistake common to the parties to the proceedings; or
(d) made in the absence of any party, on good cause shown."

reinstated them for the period 1 March 2007 to 18 October 2011. In its heads of argument, the applicant states: "*The [r]espondent's indebtedness is founded on the CCMA arbitration award issued on 13 February 2007 which was made an order of the court on 18 October 2011.*"

[20] The claim is not one for back pay and nor is the claim one for the "arrear payment" ordered in terms of prayer 3 of the arbitration award. On my understanding of the applicant's founding affidavit, the claim is based squarely on prayer 2 of the reinstatement award. The applicant has not formulated the claim as one for contractual damages. The claim is based on the incorrect premise that the wages in terms of a reinstatement order are payable and can be claimed as of right from the date of the reinstatement order to the date of actual reinstatement. In other words, the applicant contends that the monies are due and owing by virtue of the mere existence of a reinstatement award which has not been implemented and, accordingly, a failure to tender to work during that period is irrelevant, as is the fact of the members being employed elsewhere.

[21] In *Coca Cola Sabco (Pty) Ltd v Van Wyk*[3] the LAC held that—

> 'Ordinarily an employer that complies with an order of retrospective reinstatement and back pay will not only pay the back pay but also the remuneration that the employee was entitled to between the date of the order and the implementation date, if the employee tenders his services during that period'.

[22] In the case before me, the reinstatement order (paragraph 2 of the arbitration award) has no retrospective effect. Nevertheless, as I shall demonstrate below, I find that the LAC's approach in *Coca Cola* apposite to the present matter as the respondent failed to pay any sum in respect of the period between the date of reinstatement (that is, 1 March 2007) to 18 October 2011 (the date chosen by the applicant as the cut-off date for the claim).

[3] [2015] 8 BLLR 774 (LAC); (2015) 36 ILJ 2013 (LAC) at para 18. (*Coca Cola*)

[23] The question in this case is the same as that posed by the LAC in the *Coca Cola* judgment, namely, "*how then should a reinstated employee recover that money if he tendered his services, during that period?"*[4]

[24] The starting point, as the LAC recognised, is to acknowledge that a reinstatement order of the parties will therefore*, "as in the beginning, again be governed by the contract of employment".*[5]

[25] The LAC went on to hold that:

> 'Therefore if the employee, after the reinstatement order and during the time that the employer exercises its review and appeal remedies to exhaustion, tenders his/her labour he/she does so in terms of the employment contract. She/he is therefore entitled to payment in terms of the contract of employment. The claim is therefore a contractual one, wherein the employee would have to set out sufficient facts to justify the right or entitlement to judicial redress. The employee would *inter alia* have to prove that the contract of employment is extant; that she/he tendered his/her labour in terms thereof and that the employer refuses or is unwilling to pay him/her in terms of that contract. The employer on the other hand will have the contractual defences to his/her disposal.'[6]

and

> 'The Court a quo was, in my view, incorrect in its conclusion that "awards of reinstatement, by their very nature, require the payment for the full period up to and including the date of compliance". All that an order for reinstatement does is to revive the contract of employment'.[7]

[26] The LAC considered the avenues open to an aggrieved employee and observed that:

> 'When there is a delay in the implementation of the reinstatement award and the employer refuses to pay an employee money that may be due between the period of the award and the implementation thereof, the lis between them

[4] Id at para 19.
[5] Id at para 22.
[6] Id at para 24.
[7] Id at para 25.

> has not been judicially resolved. It is only after a contractual claim in the civil courts or under section 77 of the Basic Conditions of Employment Act has been instituted and pronounced upon that can be said that the employer is a judgment debtor against whom a writ may be issued. The order of reinstatement is not a judgment dealing with the consequent damages for the breach of the contract.'[8]

[27] I understand the effect of the judgment of the LAC to be that an employee who wishes to seek payment of wages in terms of a reinstatement award must do so by instituting a civil claim either in the civil court or in this Court under section 77 of the Basic Condition of Employment Act.[9] Such claim is one for contractual damages and must contain necessary averments, including that the contract of employment is still extant, that she tendered her labour in terms of the contract and that her employer refuses or is unwilling to pay her in terms of the contract of employment.

[28] The applicant has failed to formulate its claim as one for contractual damages and has failed to make the necessary averments. In particular, the applicant has not averred that the members' contracts of employment are extant and that the members tendered their services in terms of their contracts of employment. That the members aver in their replying affidavit that they tendered their services is of no import as such allegations are required to be made in the founding affidavit and not in a replying affidavit.

[29] The application in its present form is defective and fails to support a claim for contractual damages. I have considered whether I should dismiss the application but I am of the view that the applicant should be afforded the opportunity of filing a supplementary founding affidavit to bring the claim in line with what is required. The respondent will not be materially prejudiced as the respondent retains the right to raise any defence open to it. It appears likely that the respondent will at least raise the defence that the members failed to tender their services. If necessary, this narrow issue of whether the members tendered their services can be referred for oral evidence.

[8] Id at para 28.
[9] 75 of 1997.

[30] As to costs, costs should be reserved for the court hearing the amplified application.

Order

[31] In the premises, I make an order in the following terms:

1. The applicant is granted leave to file a supplementary founding affidavit to amend its claim in accordance with this judgment.

2. Should the applicant not file such an affidavit within 14 days, the application shall be deemed to be dismissed with costs.

3. Costs are reserved for the court hearing the amplified application.

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A. Landman

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:

Instructed by:

FOR THE RESPONDENT:

Instructed by: