



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable

Case no: J 148/112

In the matter between:

**T L SEJAKE**

**Applicant**

and

**NALEDI LOCAL MUNICIPALITY**

**Respondent**

**Heard: 18 June 2013**

**Delivered: 24 July 2013**

**Summary: Application Section 158 (1) (c) of the Labour Relations Act of 1995. Arbitration award can be made an order of the Court.**

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**JUDGMENT**

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MOLAHLEHI, J

- [1] This is an unopposed application in terms of which the applicant seeks to have the arbitration award made under the auspices of the South African Local Government Bargaining Council (the bargaining council) under case number NWD081017 dated 14 June 2011, made an order

of the Court in terms of section 158(1) (c) of the Labour Relations Act of 1995.

- [2] The applicant who was prior to his dismissal an employee of the respondent was dismissed for absconding. He subsequent to his dismissal referred an alleged unfair dismissal dispute to the bargaining council. The arbitrator in determining the dispute under the auspices of the bargaining council found the dismissal to have been substantively unfair. It was for this reason that the arbitrator ordered that the respondent should reinstate the applicant. The award which the arbitrator made reads as follows:

‘I order the Respondent to reinstate the Applicant. I order no costs.’

- [3] Subsequent to the above award, the applicant made an application seeking clarification of the award. The arbitrator clarified his award in another award dated 17 November 2011. In clarifying the award, the ward the arbitrator made the following award:

‘I order the Respondent to pay the Applicant, his salary as if he was never dismissed.’

- [4] The prayers in the notice of motion reads as follows:

‘1. That the arbitration award dated 14 June 2011 and issued by L D MCAMENI of the SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL under case number NWC081017, attached to the founding affidavit of the applicant and marked annexure “A”, read with the variation order attached as annexure “A1” be made an order of the Court in terms of section 158 (1) (c) of the Act.

2. Payment of the amount of R110700-012 plus interest thereon at 15,5 % per annum from 1 January 2012 to date of payment;
3. An order that the applicant’s leave days due to him be reflected as 42 as at 31 December 2011;

4. That the cost of this application be paid by the Respondent on an attorney-an- client- basis
5. Further and /alternative.'

[5] As indicated earlier, this application is launched in terms of section 158(1) (c) of the Labour Relations Act of 1995 which empowers the Court to make any arbitration award or any settlement agreement an order of the Court.

[6] Section 158(1) (c) of the LRA provides a mechanism through which a successful party in the arbitration proceedings may enforce in the same manner as a judgment or order of Court. It is also a mechanism through which enforcement of an arbitration award can be expedited. It is for this reason that the Court has generally adopted a policy that the enforcement of arbitration awards should not be unduly delayed.

[7] In terms of section 158 (1) (c) of the LRA, the Court has the power to make an arbitration award and order of Court. In making an arbitration award an order, the Court has a discretion which it has to exercise judicially. In general, the Court will lean towards readily making an arbitration award an order of the Court to ensure that the arbitration award does hang and is honoured. In this respect, the Court in *Mzulwini v Fedelity Cleaning and Others*<sup>1</sup> quoting from Halsbury 4 ed Vol 2, paragraph 713 had the following to say:

'The court will grant leave to enforce the award as a judgment unless there is either a real ground for doubting the validity of the award or the award is not in a form in which it can be enforced as a judgment.'

[8] The Court will however not make an arbitration award that lacks clarity and details as to what is expected of the respondent. In *Sasko (Pty) Ltd v Buthelezi and Others*,<sup>2</sup> the case quoted with approval in *Mzulwini*, the Court held that:

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<sup>1</sup> (2000) 21 ILJ 1382 (LC) at para 5.

<sup>2</sup> (1997) 18 ILJ 1399 (LC).

'An award should resolve the dispute and should indicate to the respondent precisely what steps must be taken to comply with the award. It is clear to me that even if the findings were correct the respondent would not be able to comply with that award without knowing precisely what unfair labour practice was committed. Simply to be told that it relates to the non-promotion of the applicant does not assist in making sense of the award.'<sup>3</sup>

- [9] In that case, the Court recognised the importance of the policy that enforcement of arbitration awards should not be delayed unnecessarily.
- [10] In terms of the principles discussed above, the obligation of the respondent in the present instance it is clear. The respondent is required to reinstate the applicant. The issue which I debated with Mr Louw, representing the applicant concerned whether the arbitration could be made an order of Court where the back pay has not been quantified.
- [11] It is now well established that back pay is part and parcel of reinstatement where dismissal of an employee is found to be substantively unfair. It was aptly put by S Reddy in De Rebus March 2008, that “ back pay is an automatically component of reinstatement”.
- [12] It seems to follow that where the Court or the arbitrator makes an order for reinstatement without quantifying the back pay, then it is reasonable to imply that the back pay should be calculated on the basis of the salary which the employee received as at the date of dismissal. The salary which the employee received can be determined with ease and certainty by reference to the last payslip which the employee received prior to his or her dismissal.
- [13] In other words, the amount to be paid to the employee even if the reinstatement award is silent as to the quantum of the back pay can be determined with reference to the amounts stated in the pay slip. The

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<sup>3</sup> Ibid at 1403.

certainty of determining the amount of back pay, where the award has not been quantified should not in my view lead to any legal dispute as the amount can be determined with almost absolute certainty. In this respect, section 33 of the Basic Conditions of Employment<sup>4</sup> requires the employer to amongst others to provide an employee with information relating to the actual amount paid for wages including the calculation of that employee's remuneration.

[14] The issue of failure by the employee to mitigate his or her loss in as far as back pay is concerned cannot lead to a legal problem as the Constitutional Court has already pronounced in *Billiton Allunium SA limited LTd t/a Hillside Alluminium v Khanyile and Others*,<sup>5</sup> that an employee was under no obligation to mitigate loss by seeking alternative employment. In other words, the failure to prove attempts at looking for alternative employment does not affect the quantum of back pay and can therefore arise as a legal problem in the enforcement of an award.

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<sup>4</sup> Section 33 of the BCEA provides: '(1) An employer must give an employee the following information in writing on each day the employee is paid:

- (a) The employer's name and address;
- (b) the employee's name and occupation;
- (c) the period for which the payment is made;
- (d) the employee's remuneration in money;
- (e) the amount and purpose of any deduction made from the remuneration;
- (f) the actual amount paid to the employee; and
- (g) if relevant to the calculation of that employee's remuneration -
  - (i) the employee's rate of remuneration and overtime rate;
  - (ii) the number of ordinary and overtime hours worked by the employee during the period for which the payment is made;
  - (iii) the number of hours worked by the employee on a Sunday or public holiday during that period; and
  - (iv) if an agreement to average working time has been concluded in terms of section 12, the total number of ordinary and overtime hours worked by the employee in the period of averaging.

<sup>5</sup> (2010) 5 BLLR 465 (CC) at paras 40-41.

- [15] In the present instance, the applicant was dismissed on 28 July 2010 and the award ordering his reinstatement was made an order on 14 June 2011. It follows from the above discussion that the amount to be paid to the applicant in as far as back pay and any other amount associated therewith is concerned, can be determined with certainty from the last pay slip which the respondent was in law obliged to issue to him.
- [16] In my view and with due respect to the submission made by Mr Louw, I do not believe that this Court should concern itself with the issues raised in prayers 2 and 3 of the notice of motion. In all probabilities, these issues may be addressed in the affidavit submitted to the Registrar when dealing with the writ of execution in the event of failure to comply with the order by the respondent.
- [17] In light of the above, I am satisfied that the applicant has made out a case for making the arbitration award an order of Court in terms of prayer 1 (one) of the notice of motion.
- [18] In the premises, the arbitration award made under the auspices of the South African Local Government Bargaining Council under case number NWD081017 and dated 14 June 2011, is made an order of the Court in terms of section 158(1) (c) of the Labour Relations Act of 1995 with no order as to costs.

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Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr E Louw of Louw Attorneys

For the Respondent: No appearance.

LABOUR COURT