



**THE LABOUR COURT OF SOUTH AFRICA**

**JOHANNESBURG**

Case no: JR 2326/2006

Reportable

In the matter between:

**KHWAILE RUFUS MALATJI**

**Applicant**

and

**MINISTER OF HOME AFFAIRS**

**First Respondent**

**DEPARTMENT OF HOME AFFAIRS**

**Second Respondent**

Heard: 8 July 2016

Delivered: 19 January 2017

**Summary: Labour Court on review substituting award of arbitrator of General Public Services Sector Bargaining Council - Effect of Judgement on interest payable on sum of money – Meaning of “substituting” - Parties disagree on meaning and hence whether interest payable from date of Arbitration Award or date of Judgement of Labour Court – Application of section 143(2) of the Labour Relations Act on when interest payable – Impact of ruling of Labour Court in review proceedings – Jurisdiction of Labour Court.**

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## JUDGEMENT

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**HARPER, AJ**

***Introduction:***

- [1] The Applicant seeks an order declaring that the First and Second Respondents are liable to pay interest at 15,5 % per annum to the Applicant as from 1 September 2006 in respect of an arbitration award made under case number PSGA 126/05/06. The award was issued by Z Mdladla (the arbitrator) at the General Public Services Sector Bargaining Council (the Bargaining Council). The Applicant also seeks an order in respect of the costs against the Respondents jointly and severally, the one paying the other to be absolved.
- [2] The dispute is accordingly about whether interest should be payable from 1 September 2006 or as from the date of the judgment of the Labour Court which dealt with the review application.
- [3] The Bargaining Council is correctly not cited as a Respondent because the remaining issue in dispute is not relevant to the Bargaining Council.
- [4] Following a review lodged at the Labour Court the award of the arbitrator was “substituted *in toto*” by Snyman AJ in a judgment dated 2 April 2013.

***Summary of Facts:***

- [5] On 28 April 2005, some eleven years ago, the Applicant was dismissed by the Respondents.
- [6] He referred a dispute to the Bargaining Council and was reinstated by the arbitrator in terms of an award dated 14 August 2006 and varied by an award dated 30 August 2006. He was also granted back pay.
- [7] The variation award provided that if the compensation was not paid by 30 September 2006 then it should accrue interest on the normal basis. The

award did not refer to section 143(2) of the Labour Relations Act<sup>1</sup> (the LRA) which deals with the issue of interest payable pursuant to arbitration awards sounding in money.

- [8] In response to the arbitration award, the Respondents launched a Review Application and for various reasons which are not relevant to this judgment, the matter was only heard by the Labour Court during February 2013.
- [9] On 2 April 2013 Snyman AJ set aside and substituted the award of the arbitrator “*in toto*” and granted the Applicant compensation equivalent to 9 (nine) months’ salary, being an amount of R399, 750.00. The Respondents have paid the compensation to the Applicant.
- [10] As a consequence of a dispute arising in respect of the period during which interest should be paid on the compensation, in a letter dated 25 February 2014 the Respondent’s attorneys advised the Applicant’s attorneys that interest was only payable as from the date of the judgment of the Labour Court, being 2 April 2013 and hence not from 1 September 2006.
- [11] The Respondents paid the interest for the period between 2 April 2013 and 24 February 2014 to the Applicant.
- [12] The Applicant contends that the interest should be payable from 1 September 2006 to 1 April 2013.
- [13] Accordingly the Labour Court is required to determine whether interest should be payable in respect of that period in terms of section 143(2) of the LRA.

### ***Analysis of Argument:***

- [14] Advocate Pio for the Respondents submitted that the amount of interest which may be payable is determined by the interpretation of the words “substituting *in toto*” in the judgement of the Labour Court and certain other relevant factors which are discussed below.
- [15] Advocate Beaton SC for the Applicant referred to section 143(2) of the LRA which provides as follows:-
- “If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award ..... unless the award provides otherwise”. (My emphasis).*

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<sup>1</sup> 66 of 1995, as amended

- [16] On the face of it section 143(2) of the LRA is straightforward. In terms of section 143(2) the date when the interest commences to accrue on the sum of money is from the date of the arbitration award unless the award sets another date. Accordingly in respect of this matter interest should have commenced to earn on the sum of money as from 1 September 2006 in terms of section 143(2) of the LRA unless the arbitration award set another date. The Variation Award of the arbitrator set the date of payment as being 1 September 2006.
- [17] Section 143 of the LRA does not deal with the circumstances where the award of an arbitrator is later substituted by an order of the Labour Court. It should be noted that as a consequence of the existence of section 143(2) of the LRA, it is not necessary for an arbitrator to specifically deal with the issue of interest in the arbitration award. Provided that the arbitration award orders a party to pay a sum of money, in terms of section 143(2) of the LRA interest by application of statute is automatically payable from the date of the issuing of the arbitration award unless the arbitrator set another date for the payment of interest. It is however preferable for the arbitrator to refer to section 143(2) of the LRA in the award.
- [18] Should an arbitrator for a lawful reason wish to determine that interest should either not be payable on the sum of the money or that it should be payable from another date, he should specifically deal with that issue in the award by giving reasons. As indicated section 143(2) of the LRA specifically empowers the arbitrator to make a different award on the payment of interest on the sum of money.
- [19] Section 143(2) of the LRA does not refer to the Labour Court in the same context for the reason that section 143 deals with the effect of arbitration awards and not judgments of the Labour Court. In review proceedings there is a direct link between section 143(2) of the LRA and the review process itself because the Labour Court is being asked to review the arbitration award and essentially acts as the arbitrator to the extent determined by it in the Judgement. The Labour Court is therefore entitled to review the issue of interest and decide whether to grant interest from the date of the arbitration award or from a later date or not grant interest at all. Where the Labour Court changes the date on which the interest will be payable and it is prejudicial to the employee, reasons should be given by the Labour Court. This would also

apply where the Labour Court declines to grant interest on the amount owed to the employee.

- [20] My view is fortified by the provisions of section 145(a) of the LRA which empowers the Labour Court to determine the dispute “in the manner it considers appropriate”. The powers of the Labour Court in relation to that subsection are dealt with succinctly in *Rustenburg Platinum Mines Ltd v the CCMA and others*<sup>2</sup> where Njanu AJ, stated:-

“Section 145(4)(a) gives the Court, the widest possible powers necessary to determine disputes. Such powers given to the Court in this section are those powers given to the Arbitrator. Put differently, when the Court exercises its discretion in terms of Section 145(4)(a), it sits as an Arbitrator in the Arbitration hearing”. (My emphasis).

- [21] Accordingly the Labour Court in a judgment dealing with a review application can either elect to deal with the issue of interest or decide not to deal with that issue. If the Labour Court is silent on the issue of interest in a Judgement it does not generally follow that section 143(2) of the LRA which deals with the payment of interest on a sum of money lapses in respect of the payment of interest granted in terms of section 143(2) of the LRA. Hence the Labour Court replaced the award “*in toto*”. Where however the arbitration award has dealt with the issue of interest and the Labour Court decides to substitute the award “*in toto*” then the Labour Court either expressly or by necessary implication has dealt with the issue of whether interest should be payable on the sum of money. In other words the issue of whether interest should be payable does not become an issue still to be dealt with in legal proceedings.
- [22] Where there is a complaint about the interest payable, it would be preferable for the aggrieved party to lodge an appeal to the Labour Appeal Court in order to request it to make a different award on the issue whether interest should be payable or not.
- [23] A Judge of the Labour Court in a matter such as this one is constrained when dealing with the judgment of a Judge sitting at the same level and does not have jurisdiction to overrule the judgment of the fellow Judge.

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<sup>2</sup> (2007) 28 ILJJ 417 (LC) at para 14

- [24] Therefore subject to applying the meaning of “substituting” correctly it follows that the payment of interest on a sum of money in terms of section 143(2) of the LRA would fall away where an order of the Labour Court sets out and replaces the arbitration award on the issue of interest.
- [25] In this matter Snyman AJ through “substituting *in toto*” the award of the arbitrator elected to not grant interest on the sum of money payable to the Applicant. In my view a Judge of the Labour Court is entitled to issue such an order provided that it is fair and lawfully sound.
- [26] Unfortunately Snyman AJ’s order in so far as it affects the payment of interest does not provide the reasons for that ruling. His Court is seized with a legal issue which arises from a review and it would be inappropriate for the Labour Court in these circumstances to speculate on why Snyman AJ did not grant interest on the sum of money to the Applicant and in particular in the context of section 143(2) of the LRA which, as indicated, provides for the payment of interest and in a sense this constitutes statutory support on the issue of the payment of interest.
- [27] It is also worth noting that section 145 of the LRA does not specifically deal with the issue of when interest should commence accruing on a sum of money. As indicated the Labour Court can exercise its inherent jurisdiction<sup>3</sup> to vary that part of the award which deals with the payment of interest on a sum of money. The exercise of that power would be subject to a defect existing in relation to an award dealing with the payment of interest. The nature of the defect is generally known and the categories are dealt with in section 145(2) of the LRA. That is however not the question which is raised in these proceedings.
- [28] The word “substitute” in summary means:-

“Put (a personal thing) in the place of another”<sup>4</sup>.

- [29] In my view, however, a review in these circumstances is quintessentially a corrective process<sup>5</sup> and it should not normally therefore be interpreted to

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<sup>3</sup> Kindly complete footnote

<sup>4</sup> The new Shorter Oxford English Dictionary 1993, p2064

<sup>5</sup> Reviews in the LC, A Myburgh and C Bosch, first edition, p117

prejudice the party who has been granted a sum of money unless the Labour Court for sound reasons specifically determines that the interest payable on a sum of money should either be paid from a specified later date or not at all. In respect of either of these options, the order could be punitive in nature and hence contrary to the tenets of fairness and the objectives of the LRA. Hence it would be important for the Labour Court to give reasons where an adverse order on interest is issued by the Labour Court.

- [30] Advocate Pio in summary submitted that the Respondents had successfully reviewed the arbitration award. This is correct in part as the reinstatement was set aside but there was a finding of substantive unfairness by the Labour Court and compensation was granted in an amount of (9) nine months. Hence, again, for that reason it is unusual that the issue of interest was not dealt with in the order.
- [31] The Award of the Arbitration in respect of the compensation payable and the reinstatement was substituted "*in toto*" by an Award that the Third Respondent is entitled to compensation in an amount of 9 months' salary.
- [32] What is critically important is that Snyman AJ did not deal with the issue of interest in the judgment save to the extent that he substituted the Award of the Arbitrator "*in toto*" with an Award granting 9 months' compensation to the Second Respondent. He did not refer to section 143(2) of the LRA. That was his finding and it stands until it is dealt with by a higher Court.
- [33] Furthermore in my view the substitution of the Award by Snyman AJ was intended to correct or rectify the Award of the Arbitrator and was not intended to penalise the Second Respondent by permitting that interest should only be paid as from the date of the issuing of the judgment. Had Snyman AJ intended there to be a prejudicial outcome, he would have dealt with the issue of the payment of interest specifically and being fully cognisant with the provisions of section 143(2) of the LRA.
- [34] I am bound by the Judgment of the Labour Court. It is for this reason that it would have been preferable to lodge an appeal against the Judgment.
- [35] I therefore conclude that I do not have jurisdiction to overrule the Judgment of Snyman AJ on the issue of paying interest on the sum of money.

[36] In these circumstances it is fair and appropriate that costs should not follow the result.

**Order**

[37] I hereby order as follows:

1. The application is dismissed;
2. Each party shall be responsible for its own costs.

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**R Harper**

Acting Judge of the Labour Court of South Africa

**Appearances:**

On behalf of the Applicant: Advocate R G Beaton SC

*Instructed by:* *Rooth and Wessels Inc.*

On behalf of the Respondent: Advocate P C Pio

*Instructed by:* *The State Attorney Pretoria*

LABOUR COURT