



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: J1007/15

In the matter between:

WITNESS MLAUDZI

Applicant

and

METRO SOUTH TOWING CC

Respondent

Heard: 20 January 2017
Delivered: 20 January 2017
Edited: 08 February 2017

Summary: Once an arbitration award has been certified in terms of section 143 – no need for section 158(1)(c) order – as this amounts to duplication and delay in enforcing the arbitration award – Both employer and employee are required to comply with the terms of an arbitration award. Section 158(1)(c) applications sometimes counteract the purpose of the Labour Relations Act 66 of 1995.

EX TEMPORE JUDGMENT

MABASO, AJ

Introduction and Background

- [1] Mr Witness Mlaudzi (the employee) was employed by Metro South Towing CC (the employer) until he was dismissed on 02 February 2015. Following his dismissal, he referred an unfair dismissal dispute to the Dispute Resolution Centre for the Motor Industry Bargaining Council in Randburg. Following its non-resolution at the conciliation stage, the dispute proceeded to arbitration, before Commissioner SI Bhabha (the Commissioner).
- [2] Subsequent to the finalisation of the arbitration, the Commissioner issued an arbitration award under the Bargaining Council's case number MINT44482N, dated 15 April 2015, and ruled that the dismissal of the employee by the employer was both procedurally and substantively unfair. He, consequently, ordered that the employer should pay the employee an amount of R15 600, which is equivalent to three months of his salary, and that he must be reinstated to his position without any loss of benefits as from 01 May 2015. Further, the employee was ordered to report for duty on 01 May 2015.
- [3] The employee in his affidavit confirmed that the employer did not attend the arbitration, therefore the default arbitration award was issued. He is also deliberating on the contents of this arbitration award. He further states that on 04 May 2015 he reported for duty, as the reason for him to report for duty on this date was that 01 May 2015 was a public holiday. And he spoke to one Ms Annemarie of the employer, who was presented with a copy of this arbitration award and Ms Annemarie informed the employee that she would consult with their attorney. Therefore, the employer failed and/or refused to comply with the terms of the arbitration award. Consequently, the employee obviously had to leave the premises of the employer. I am advised that to date

the employee has not been paid a salary by the employer, and has not been reinstated. This is a dual application – made in terms of section 158(1)(c) of the Labour Relations Act¹ and section 77(3) of the Basic Conditions of Employment Act².

Section 158(1)(c) Application

[4] The employee wants the arbitration award to be made an order of court, and he decided to approach this Court by way of notice. The Labour Relations Amendment Act, 2014³ has introduced important new developments to the LRA, more pertinent to this case are the amended provisions in section 143. Section 143 provides, among other things, that an arbitration award issued by a commissioner is final and binding and it can be enforced once it has been certified by a director of the Commission for Conciliation, Mediation and Arbitration (CCMA).⁴ Subsection (4) provides that if the other party fails to comply with an arbitration award which has been certified in terms of subsection (3) which orders the performance of an act that— “...*any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court.*” In reading this provision, it is clear that there is no need to approach this Court in terms of section 158(1)(c) if the arbitration award has been certified. In this matter, it has been stated that the arbitration award has not been certified as the employee was not certain as to whether a CCMA or Bargaining Council had to be approached for the certification since the award was issued by the Bargaining Council.

¹ 66 of 1995 (LRA), (as amended).

² 75 of 1997. Section 77 delineates the jurisdiction of the Labour Court and subsection (3) provides:

“(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.”

³ 6 of 2014. See section 20 of this Act which amended section 143 of the LRA.

⁴ See section 143 (1) and (3) of the LRA.

[5] Section 158(1)(c) says: “*That the Labour Court may... make any arbitration award ...an order of court*”. The word “*any*” thereto is not defined in the LRA. Therefore, it is normal that parties will always assume, correctly so, that this Court can make any arbitration award an order. The amendment as mentioned earlier came into effect on 01 January 2014, before this dispute was referred to the Bargaining Council. The explanatory memorandum thereto which, among other things, provides that—

“Amendments to this section are intended to further streamline the mechanisms for enforcing arbitration awards of the Commission and to make these mechanisms more effective and accessible.”

It further states that—

“...Secondly, in the case of awards, such reinstatement which are enforced by contempt proceedings in the Labour Court, the need to have an arbitration award made an order of the Labour Court before contempt proceedings can be commenced is removed.” (Emphasis added.)

[6] It indicates that there is no need for applications of this nature (section 158(1) (c)). It will be remiss of me not to mention the recent judgment of the Constitutional Court which deals with the issue of prescription of an arbitration award, *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others*⁵ decided on 15 December 2016. As much as it deals with the prescription aspect, it accentuated on the mechanism to enforce arbitration awards, as it held that there are two ways to which an award may be enforced; namely: section 143 route and the other route will be section 158(1)(c) of LRA.⁶

[7] Taking into account *Myathaza*'s judgment, even if one were to doubt the relevance of section 158(1)(c), it is clear that section 158(1)(c) is still applicable (despite the amendment mentioned above). However, there is no

⁵ [2016] ZACC 49. (*Myathaza*)

⁶ *Myathaza* id at paras 24-6.

need for parties to approach this Court in terms of this section once an award has been certified, but the Court cannot just dismiss section 158(1)(c) application on the basis that it has been certified. This Constitutional Court judgment also emphasises the point of speedy resolution of employment law-related matters. Moreover, its paragraph 50 reads thus:

“...Furthermore, the LRA scheme reveals shorter periods for the enforcement of awards. A party in whose favour an award was made must enforce it without further delay, unless the party against whom the award was issued challenges it on review.”

- [8] Given the authorities aforementioned; the purpose of the LRA; and that when reading a section in a statute, you need to read the entire Act to understand the meaning of such section; especially if there is some ambiguity in such section. I must admit that one might be tempted to conclude that the word “any”, in section 158(1)(c), taking into account the purpose of the LRA and other authorities, will have to be revisited by the legislature, maybe being specific as to whether, is section 158(1)(c) route still necessary, in respect of making an arbitration award issued in terms of section 138 of the LRA, an order of the Labour Court if there is no pending review application against such award.
- [9] This Court, back in 2011, in the matter of *SATAWU obo Phakathi v Gheko Services SA (Pty) Ltd and Others*⁷, Basson J held that section 158(1)(c) applications are not a prerequisite for contempt proceedings.⁸ Once a party is armed with a certified award, such party has a right in approaching this Court by way of contempt application. Therefore, section 143 (and *Gheko's* matter) is authoritative, in that the only requirement is for a party to certify the arbitration award. Despite all of these, in respect of section 158(1)(c), I conclude that the applicant has made a proper case in support of this application, meaning, the employee is granted prayer 1.1. of the notice of motion.

⁷ (2011) 32 ILJ 1728 (LC). (*Gheko Services*)

⁸ *Id* at para 19.

Section 77 of the Basic Conditions of Employment Act

[10] This Court has jurisdiction in terms of section 77(3) of the BCEA to hear an application where an employee seeks an order directing his employer to pay him outstanding salary. The Labour Appeal Court (LAC) in *Coca-Cola Sabco (Pty) Ltd v Van Wyk*⁹ shed some light regarding confusion in respect of whether a party has to approach a Court or the Registrar of this Court in order to take steps to claim outstanding salary from their employers where an award had been issued in respect of reinstatement. The LAC had to deal with the following question: What is the effect of a reinstatement order? It indicated that the effect of the reinstatement order is to revive the contract of employment which existed between the parties at the time of dismissal.¹⁰ And it further stated that—

“Ordinarily an employer that complies with an order of retrospective reinstatement and back pay would 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 tendered his services during that period.”¹¹ (Emphasis added.)

[11] Taking into account this authority, I am satisfied that the employee did report for duty as he has indicated in his affidavit. In *Coca-Cola Sabco* the LAC further stated that—

“Since the LRA does not cater for relief between the date of the award and the date of implementation, how then should be reinstated employee recover that money if he tendered his services, during that period?”¹²

⁹ [2015] 8 BLLR 774 (LAC); (2015) 36 ILJ 2013 (LAC). (*Coca-Cola Sabco*)

¹⁰ Id at para 16.

¹¹ Id at para 18.

¹² Id at para 19.

As I have indicated that this judgment states clearly that the reinstatement order revives the employment relationship that existed at the time of dismissal. And what is required concerning this the LAC said:

“She/he is therefore entitled to payment in terms of a 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 will among other things have to prove that the contract of employment is extant; that she or he tendered his or her labour in terms thereof and that the employer refuses or is unwilling to pay him or her in terms of that contract. The employer, on the other hand, would have all the contractual defences at her or his disposal.”¹³

[12] My view about this paragraph is that an employer has a right to raise any defence, for example, to say that the employee did not comply with the terms of the award by reporting for duty. And obviously, under those circumstances, that will be a whole new ball game. However, in this case, it is clear that the employee did report for duty and he was not reinstated as per the terms of the arbitration award. Instead, Ms Annemarie said: “*I will consult with my lawyers*”. And to date, I am advised that the employee has not been paid. And then, under those circumstances, I am satisfied that a case has been made in terms of prayer 1.2 of the notice of motion.

[13] I requested the counsel for the applicant to prepare a draft order. I have looked at the draft order which clarifies the issue of the total amount owed to the employee by the employer. Paragraph 3 of the arbitration award is very clear as it says an amount of money that he was earning per month is R5 200. And then calculating these amounts to the end of December 2016, it amounts to R98 800. Under those circumstances, I am inclined to make the draft order an order of this Court.

[14] In respect of costs, the counsel for employee decided not to pursue the issue of costs.

¹³ Id at para 24.

Order

[15] In the premises, I make the following order as per draft order marked "x":

1. The arbitration award under case number MINT 44485N, dated 17 April 2015 and issued by Commissioner S.I Bhabha under the auspices of the Dispute Resolution Centre for the Motor Industry Bargaining Council, is herein made an order of this Court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995;
2. The Respondent is ordered to pay the Applicant further remuneration from 01 May 2015 to 31 December 2016 in the total of R98 800.00 (Ninety Eight Thousand Eight Hundred Rand Only);
3. Interest at the prescribed rate on the R98 800.00 (Ninety Eight Thousand Eight Hundred Rand Only), from the date of this order.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: C Britz
Instructed by: Narain Attorneys

For the Respondent: No Appearance

LABOUR COURT