THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 908/21

In the matter between:

TSHENOLO WASTE (PTY) LTD	**Applicant**
and	
STANLEY SEKGORO	**First Respondent**
GODFREY KGATLHANE	**Second Respondent**
THE COMMISSION FOR CONCILAITION MEDIATION AND ARBITRATION	**Third Respondent**
T CHAKANE N.O	**Fourth Respondent**
SHERIFF OF KIMBERLEY AND GALESHEWE	**Fifth Respondent**
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA)	**Sixth Respondent**

Heard: 26 August 2021

Delivered: 02 September 2021 (In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 02 September 2021.)

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant approached this Court on an urgent basis for an order to set aside, alternatively permanently stay an enforcement award / writ issued against the Applicant.

[2] The application is opposed by the First, Second (the Respondents) and Sixth Respondents (NUMSA).

[3] The matter was heard on 26 August 2021 and in accordance with the provisions of the directive issued in respect of access to the Labour Court and the conduct of proceedings during the Covid-19 pandemic, the parties agreed to present arguments virtually via Zoom.

Background facts

[4] The Applicant had employed the Respondents as drivers in its waste disposal business. The Respondents were charged with counts of misconduct relating to dishonesty in that they had submitted false receipts for accommodation. A disciplinary hearing was held on 16 August 2019, where after the Respondents were found guilty of misconduct and dismissed.

[5] Aggrieved with the outcome of the disciplinary hearing, the Respondents referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). An arbitration award was issued on 21 September 2020 and the arbitrator found the Respondents' dismissal procedurally fair but substantively unfair. He ordered the Applicant to reinstate them retrospectively and to pay the Respondents four months' backpay (total sum of R 82 509,76). The Respondents were to report for duty on 5 October 2020.

[6] The Applicant's case is that it elected not to review the arbitration award and instead called for the Respondents to return to work and to face fresh disciplinary charges.

[7] On 18 November 2020 the Applicant issued notices to attend a disciplinary hearing to the Respondents and it is evident from the notice that the disciplinary hearing was set down for 30 November 2020. The Respondents did not participate in the disciplinary enquiry. They were found guilty of misconduct and dismissed.

[8] The Applicant has included statements in its founding affidavit that deal with the merits of the charges and the evidence against the Respondents relating to the charges of misconduct. This is an urgent application to stay an enforcement award / writ and the averments relating to the alleged misconduct of the Respondents and the evidence to support the Applicant's case in that regard, are irrelevant to the issues this Court has to decide. It is unclear why those averments were included in this application, as they were of no assistance to the Court in deciding the urgent application. It only burdened the Court with irrelevant averments, which should be avoided in urgent applications.

[9] The arbitration award issued on 21 September 2020 and varied on 25 September 2020, was certified in terms of the provisions of section 143(3) of the Labour Relations Act[1] (LRA) on 15 June 2021. An enforcement of award

[1] Act 66 of 1995, as amended.

was issued by the CCMA on 15 June 2021, directing the Fifth Respondent (the Sheriff) to attach the Applicant's moveable goods to raise the sum of R 82 409,76.

[10] On 27 July 2021 the Sheriff attached a vehicle with registration number JK 86 VF GP in pursuance of the enforcement of award issued on 15 June 2021. The goods under attachment were to be removed and sold on auction, unless the Applicant could provide proof that this Court was approached on an urgent basis before 18 August 2021 to stay the enforcement and execution.

[11] The Applicant filed an urgent application on 16 August 2021 for an order to set aside, alternatively permanently stay an enforcement award / writ issued against the Applicant.

The urgent application

The Applicant's case

[12] The Respondents had to report for duty on 5 October 2020 in accordance with the arbitration award. They failed to report for duty and thereby they failed to revive their contracts of employment. They further failed to attend a disciplinary hearing and they no longer have any rights in terms of the arbitration award.

[13] The Applicant's case is premised on the Labour Appeal Court (LAC) judgment in *Kubeka and others v Ni-Da Transport (Pty) Ltd*[2] *(Kubeka)* where it was held that:

> 'A requirement that back pay is only due and payable on reinstatement is in keeping with the remedial scheme and purpose of section 193 of the LRA. As Mr Watt-Pringle SC, counsel for the respondents, correctly submitted, if an employee in receipt of a reinstatement order could on the strength of the order alone claim contractual payment for the retrospective part of the order without actually seeking reinstatement (tendering prospective services), it would

[2] (2021) 42 ILJ 499 (LAC), [2021] 4 BLLR 352 (LAC).

> convert a reinstatement remedy (which requires a tender of services) into a compensation award (which does not), in excess of the statutory limitation on compensation awards. Such an outcome would be inconsistent with the purpose of sections 193 and 194 of the LRA. An unfairly dismissed employee must elect his or her preferred remedy and if granted reinstatement must tender his or her services within a reasonable time of the order becoming enforceable. If reinstatement has become impracticable through the effluxion of time, for instance where the employee has found alternative employment, he or she should seek to amend his or her prayer for relief to one seeking compensation.'

[14] In support of its case, the Applicant submitted that an employee must tender his services, failing which he cannot claim arrear wages and if an employer refuses to reinstate the employee, the contract of employment does not revive and once the dismissal becomes effective, the contract is terminated. If the contract is not revived through an act of reinstatement, there exists no claim for backpay if the employee did not tender his or her services in accordance with an arbitration award or an order of Court.

[15] The Applicant submitted that the Respondents are not entitled to the backpay, which they seek to claim through a writ of execution because they had not tendered their services and instead they elected to rather terminate the contract of employment. Consequently, their contracts of employment were not revived and they acquired no contractual right to backpay.

[16] The Applicant's case is further that even on the presumption that the Respondents have any rights in terms of the arbitration award, they did not follow the correct process in enforcing the award. They should have filed an application to make the arbitration award an order of Court and thereafter they should have filed an application for contempt of Court.

[17] The Respondents have no right to the amount claimed as they never tendered their services in accordance with the arbitration award.

The Respondents' case

[18] On 1 October 2020 the Applicant, through its attorneys, addressed a letter to NUMSA, indicating that in terms of the arbitration award, the Respondents are to be reinstated and must report for duty on 5 October 2020. The letter specifically advised that the Applicant's instruction was to file an application to review the arbitration award and that in view thereof, NUMSA was requested to inform the Respondents not to report for duty on 5 October 2020. As a result of the letter, the Respondents did not tender their services on 5 October 2020.

[19] The Respondents were never advised that the Applicant has opted not to proceed with the review application and that they should return to work. Instead, the Respondents were served with notices to attend a disciplinary hearing. The charges levelled against the Respondents were exactly the same as those they were charged with and dismissed for, which resulted in the unfair dismissal dispute that was arbitrated by the CCMA.

[20] The Respondents' case is that they never intended on not returning to work, but they were advised by the Applicant not to tender their services. The letter of 1 October 2020 as well as the subsequent issuing of disciplinary notices, is conduct which informed the Respondents that they were not welcome at the Applicant's premises. By instituting further disciplinary proceedings in November 2020, the Applicant acknowledged that the Respondents were its employees and that the Applicant has the power to discipline and dismiss them on 30 November 2020, which action revived the employment contract.

Analysis

[21] In *Kubeka* the LAC found that:

> 'The decision of the Constitutional Court in *Hendor* therefore leaves little doubt that a reinstatement order does not restore the contract of employment and reinstate the unfairly dismissed employees. Rather, it is a court order directing the employees to tender their services and the employer to accept that tender. If the employee fails to tender his or her services or the employer refuses to accept the tender, there is no restoration of the employment contract. If the

> employer fails to accept the tender of services in accordance with the terms of the order, the employee's remedy is to bring contempt proceedings to compel the employer to accept the tender of services and thereby to implement the court order.
>
> As the employees in *Hendor* in fact tendered their services and were reinstated, the Constitutional Court was not called upon to decide what the position would have been had the employees failed to take up reinstatement pursuant to the order. However, it follows plainly from the reasoning in both judgments that an employee granted retrospective reinstatement is not entitled to any of the contractual benefits of reinstatement, including back pay, without the contract being restored through actual reinstatement.'

[22] The crisp question *in casu* is whether the Respondents' contracts of employment were restored pursuant to an arbitration award ordering their retrospective reinstatement. If the employment contracts were restored, the Respondents are entitled to backpay and if not, they do not have any claim against the Applicant.

[23] The Applicant's case is premised on the LAC's findings in *Kubeka.* In my view the Applicant's reliance on *Kubeka* is misplaced for a number of reasons I will fully deal with *infra.*

[24] The facts of the two matters differ and they are to be differentiated from a factual point of view. In *Kubeka* the employer exhausted an appeal process after judgment was handed down in July 2013, in favour of the employees, reinstating them retrospectively. When the leave to appeal to the Constitutional Court was finally dismissed on 12 November 2014, the Court order of July 2013 became enforceable. The employees did not tender their services when the appeals process was exhausted in November 2014, but only approached the Labour Court in May 2017 for payment of arrear wages with effect from the retrospective date of the reinstatement until November 2014. Some of the employees however tendered their services shortly after the Labour Court ordered their reinstatement in July 2013.

[25] The LAC held that the key issue to be decided in *Kubeka* was whether the employees' claim for backpay depended on the restoration of the contracts of employment and when the contracts of employment were restored, if at all. The same question arises *in casu.*

[26] As was confirmed in *Kubeka,* there is a crucial difference between an order for reinstatement and actual reinstatement pursuant to the right to reinstatement which the reinstatement order grants to an employee. An employee who is the beneficiary of a reinstatement order can elect not to enforce it. If the employee does not enforce the order (by tendering services and seeking committal for contempt if the offer is declined) the employment contract is not restored and the relationship does not resume. There can be no legal basis for any contractual claim for arrear wages until such time as the contract is restored by the agreement of the employer to accept the tender of the employees in respect of future services. Rights to back pay flowing from the reinstatement order can only arise once the contract is restored. Prior to the employer agreeing to restore the contact pursuant to an order to do so, there is no contract in existence and thus no juridical basis for a claim for arrear wages.

[27] The Respondents' version is that a union official had contacted the Applicant on 28 September 2020 and advised that the Respondents would be reporting for duty on 5 October 2020, in accordance with the arbitration award. In response, the Applicant's attorneys addressed a letter to Ms Mamello Gasa of NUMSA, indicating that the award would be taken on review and that the Respondents should be informed not to report for duty.

[28] The Applicant denied that NUMSA had contacted the Applicant regarding the fact that the Respondents would report for duty on 5 October 2020 and submitted that if the Respondents had indeed contacted the Applicant as alleged, reference to the conversation would have been made in the letter addressed to NUMSA on 1 October 2020.

[29] Whether or not the conversation between a NUMSA union official and the Applicant took place, is in dispute. However, in my view it is improbable that the

Applicant's attorneys would, without any trigger and for no apparent reason send a letter to Ms Gasa on 1 October 2020, to specifically address the issue of the Respondents reporting for duty on 5 October 2020. It is more probable that there was some sort of indication from the Respondents' side that they would report for duty on 5 October 2020, in compliance with the arbitration award and that such triggered the Applicant to instruct its attorneys to address a letter to NUMSA to ensure that the Respondents were made aware, well in advance, that they should not report for duty.

[30] The first factual difference between this matter and *Kubeka* is that *in casu* the Applicant's attorneys addressed a letter to NUMSA, prior to the date on which the Respondents were to report for duty, to advise that they should not report for duty. The reason provided was that the Applicant intended to review the arbitration award, which is a right the Applicant has in terms of section 145 of the LRA.

[31] However, the Applicant subsequently decided not to review the arbitration award, but to instead institute disciplinary action against the Respondents. This is another factual difference with *Kubeka* in that the Applicant *in casu* made an election to discipline the Respondents.

[32] The institution of disciplinary action is within the sole prerogative of an employer, as is it the employer's right to maintain discipline in the workplace[3]. In *National Union of Mineworkers and others v Randfontein Estates Gold Mining Co (Witwatersrand) Ltd*[4] it was specifically held that: *"Discipline is after all the prerogative and duty of management."*

[33] It follows that disciplinary action can only be instituted where an employer – employee relationship exists. In fact, the existence of an employment relationship is a prerequisite for the institution of disciplinary action. Furthermore, dismissal is defined in section 186(1)(a) of the LRA to mean that

[3] *Atlantis Diesel Engines (Pty) Ltd v Roux NO and another* (1988) 9 ILJ 45 (C).
[4] (1988) 9 ILJ 859 (IC).

an employer has terminated employment with or without notice. Logic dictates that an employer's right to dismiss, is limited to its own employees and is dependent on the existence of an employment relationship.

[34] *In casu* the Applicant instituted disciplinary proceedings against the Respondents on 18 November 2020. The Respondents were advised of the fact that a disciplinary hearing would be held on 30 November 2020 and should they refuse or fail to attend the hearing, the hearing would be held *in absentia.* The Respondents did not attend the disciplinary hearing on 30 November 2020, and the Applicant proceeded with the disciplinary proceedings in their absence. The chairperson of the disciplinary hearing entered a plea of '*not guilty'* in the absence of the Respondents and the evidence of Mr Tebogo Balepile, Ms Makhoana and Ms Klaasen was adduced. After the evidence was adduced, the chairperson found the Respondents guilty of misconduct and recommended their summary dismissal. The Respondents were subsequently dismissed.

[35] The Applicant made much of the fact that the Respondents did not participate in the disciplinary hearing. Nothing turns on that as the Applicant advised them of the consequences should they fail to attend the hearing and in fact the Applicant proceeded *in absentia* when the Respondents failed to attend the disciplinary hearing. The fact that the Respondents did not attend the disciplinary hearing, did not terminate the employment relationship. The outcome of the proceedings and the implementation of the sanction of dismissal brought the employment relationship to an end.

[36] Ms Martin for the Applicant submitted that the disciplinary hearing held in November 2020 is a nullity, because the employment relationship was not revived. There is no merit in this submission.

[37] The Applicant instituted disciplinary action against the Respondents because it was faced with an arbitration award which reinstated them, which the Applicant elected not to review, and consequently thereby accepted the outcome of the arbitration proceedings. The disciplinary hearing was instituted on the same charges and was clearly an attempt to dismiss the Respondents for a second

time to avoid the long term consequences of their reinstatement. The Applicant could not have instituted disciplinary action against the Respondents in any capacity other than being their employer.

[38] The Applicant seeks to underplay the effect and the consequences of instituting disciplinary action against the Respondents in November 2020. The Applicant could only institute same if the *status quo ante* was restored and the Respondents were reinstated as employees of the Applicant. This is more so where the charges levelled against the Respondents were the same charges they were previously charged with and dismissed for. The intention in November 2020 was clearly to charge, discipline and dismiss the Respondents, which the Applicant ultimately did on 30 November 2020.

[39] The Applicant submitted that the Respondents are not entitled to the writ of attachment since there was no tender of services, but instead the Respondents elected to terminate the contract. This is factually incorrect.

[40] The effect of *Kubeka* can never be that employees no longer have any rights in terms of an arbitration award reinstating them, in circumstances where they are specifically told by an employer not to report for duty on the date they were ordered to report for duty and where the employer subsequently institute disciplinary proceedings and dismiss them. Where employees do not report for duty as a result of the specific instruction of their employer not to report, cannot be equated to circumstances where employees have lost interest or never intended to report for duty, after being reinstated by an arbitration award or and order of court. It cannot be that in those circumstances employees would forfeit rights they had obtained by way of an arbitration award. To hold otherwise would undermine the principles of fairness and would condone unfair and opportunistic conduct.

[41] *Kubeka* is clearly distinguishable in that the case concerned employees who failed to tender their services when the order became enforceable and an employer who took no steps to revive an employment relationship, nor did it conduct itself as if an employment relationship was in existence.

[42] In short: when the Applicant advised the Respondents not to tender their services and subsequently instituted disciplinary action against them, the contract of employment was restored. The Applicant's conduct in instituting disciplinary proceedings is the conduct of an employer, taking action against its employees, where an employment relationship is extant.

[43] The Respondents are entitled to the four months' backpay awarded to them in terms of the certified arbitration award. They are entitled to take steps in execution and there is no basis in law for this Court to set aside or permanently stay the enforcement award.

Costs

[44] The last issue to be decided is the issue of costs.

[45] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. Ms Martin for the Applicant submitted that each party should be ordered to pay its own costs. She argued that in view of *Kubeka* it was not improper for the Applicant to bring this application. Ultimately Ms Martin had left the issue of cost within the discretion of this Court.

[46] Ms Letsholo for the Respondents submitted that the application should be dismissed with costs as the Applicant should have been aware that when the disciplinary action was instituted, the employment contract was revived. The writ of execution that was issued was not defective and there is no merit in this application.

[47] In *Zungu v Premier of Kwa Zulu-Natal and Others*[5] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging

[5] (2018) 39 ILJ 523 (CC) at para 24.

parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[48] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. In my view this is a case where it is appropriate to make a cost order. The Applicant's interpretation of *Kubeka* was misguided, given the conduct of the Applicant in disciplining and dismissing the Respondents, subsequent to an arbitration award that reinstated them.

[49] The Respondents had to defend a meritless urgent application and fairness dictates that they cannot be expected to endure enormous costs defending litigation that ought not to have been brought in the first place.

[50] In the present circumstances, the interests of justice require that the Applicant pays the Respondents' costs.

[51] In the premises, I make the following order:

Order

1. The application is dismissed;
2. The Applicant is to pay the First, Second and Sixth Respondents' costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate S Martin
Instructed by: A C Schmidt Inc Attorneys

For the First, Second and Sixth Respondents: Ms K Letsholo from Letsholo Manasoe Inc Attorneys