

SOUTH AFRICA / JUDGMENT

CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others (J1807/15, J1706/15, JA94/2015) [2016] ZALAC 34; [2016] 10 BLLR 999 (LAC); (2016) 37 ILJ 2793 (LAC) (28 June 2016)
[2016] ZALAC 34

COURT

Labour Appeal Court

BEFORE

C J Musi, Davis, Murphy

CASE / FILE NUMBER

J1807/15, J1706/15, JA94/2015

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Source record**INTHE****LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG****Reportable****Court****Case No: J1807/2015****Appeal****Case no: JA94/2015****In the****matter between:**

CCMA

Appellant

and

LC

CASE NO: J1807/15

MBS

TRANSPORT CC

First Respondent

DUSTIN

JULIUS

Second Respondent

SHERIFF

OF MAGISTRATES COURT: KWAMHLANGA

Third Respondent

LC

CASE NO: J1706/15

BHEKA

MANAGEMENT SERVICES (PTY) LTD

Fourth Respondent

JONATHAN
KEKANA
Fifth Respondent
SHERIFF,
SANDTON
SOUTH
Sixth Respondent

Heard: 10 May 2016

Delivered: 28 June 2016

Summary: Enforcement of arbitration awards – interpretation of section 143 of the LRA – court finding that certified awards are enforceable as if they were orders of the Labour Court in respect of which a writ had been issued – interpretation of section 143 does not justify practice that registrar of the Labour Court should issue writ of execution – once monetary awards are certified by the CCMA's director they are executed as if they were orders of the Magistrates' Court. Contempt of court may be instituted in the Labour Court for non-monetary award. Labour Court may stay execution of certified award pending the review application. The purpose of the new amendment of section 143 is to expedite execution of awards – Labour Court erred in finding that CCMA not having power to issue writ of execution . Legislature provides for a fiction that grant power to CCMA which it does not have. Labour Court's judgment set aside. Appeal upheld.

Coram: Davis JA, Musi JA and Murphy AJA

JUDGMENT

C J MUSI JA

[1] This appeal which, is with the leave of the court a quo, is against the judgment of the Labour Court (Phatshoane AJ) wherein it dismissed two urgent applications to stay enforcement awards issued in terms of section 143 of the Labour Relations Act 66 of 1995 (the Act) by the Commission for Conciliation, Mediation and Arbitration (CCMA).

[2] The Court a quo made the following order:

‘1 It is declared that the Commission for Conciliation Mediation and Arbitration (the CCMA) does not have jurisdiction to issue writs of execution in respect of the arbitration awards issued by it.

2 In respect of MBS Transport CC v CCMA and others Case No: J1807/15:

2.1 That the writ of execution or the enforcement award dated 22 April 2015 issued under Case No GATW79-15 pursuant to s 143 of the Labour Relations Act, 66 of 1995, against the movable property of MBS Transport CC, be and is hereby set aside.

2.2 No order is made as to costs.

3 In respect of Bheka Management Services v Kekana and others Case No: J1706/15:

3.1 That the writ of execution or the enforcement award dated 03 August 2015 issued under Case No GAEK1491-15 pursuant to s 143 of the Labour Relations Act, 66 of 1995, against the movable property of Bheka Management Services be and is hereby set aside.

3.2 That the application by Bheka Management Services (Pty) Ltd to be absolved from furnishing security succeeds.

3.3 No order is made as to costs.'

[3] The two matters were consolidated by the court a quo because the issues to be decided were similar. In MBS Transport CC V CCMA and Others (Case no J1807/15), the applicant (employer) sought a rule nisi calling upon the respondents to show cause why an enforcement award, issued by the CCMA, should not be stayed pending the finalisation of a review application to set aside the arbitration award which was granted in favour of the employee. The arbitrator had found that Dustin Julius (the employee) was unfairly dismissed and issued an award that the employer should pay him R59 200.00 compensation.

[4] In Bheka Management Services (Pty) Ltd v Jonathan Kekana and Others, the employee (Mr Kekana) was dismissed. The arbitrator found that his dismissal was substantively unfair and ordered his retrospective

reinstatement. The arrear salary was calculated, by the arbitrator, as R11 600.00. He ordered the employer to pay the employee the said amount before 30 June 2015.

[5] Mr Julius was not paid compensation and Mr Kekana was not paid his back pay, in terms of the respective arbitration awards. Both awards were certified by the Director of the CCMA and enforcement awards were issued. The respective employers, on being made aware of the enforcement awards, applied on an urgent basis to the court a quo to stay the respective enforcement awards.

[6] When the unopposed stay applications came before the court a quo, it mero motu raised the point whether it could grant an order staying writs issued by the CCMA. As indicated above, the court a quo was of the view that the Labour Court had no such power.

- [7] Although the CCMA was cited as a respondent in both applications, it did not oppose the applications. It was also not forewarned that the point would be raised by the court a quo. When the judgment of the court a quo became available, the CCMA approached it with an application for leave to appeal, because of the far reaching implications of the

judgment.

- [8] The Director of the CCMA filed an affidavit in support of the application for leave to appeal. Leave to appeal was granted.

- [9] Section 143 of the Act provides:

“143 Effect of arbitration awards”

- 1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued unless it is an advisory arbitration award.
 - 2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the award provides otherwise.
 - 3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).
 - 4) If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court.
 - 5) Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court.
 - 6) Subsections (1), (4) and (5), as amended by the Labour Relations Amendment Act, 2014, takes effect on the date of commencement of the Labour Relations Amendment Act, 2014, and applies to an arbitration award issued after such commencement date.’ (My emphasis.)
- [10] The court a quo correctly stated that any decision, judgment or order of the Labour Court may be served and executed as if it were a decision,

judgment

or order of the High Court.[1] The court a quo found that it is clear from the language of section 143 that an award of the CCMA may be enforced as if it were an order of the Labour Court provided a writ has been issued in respect thereof.

[11] The learned Judge concluded that:

‘[13] On the plain reading of s 143 and Rule 40 of the CCMA, it is apparent that the CCMA has not been statutorily assigned the authority to issue writs. To the extent that the practice manual suggests that once an award is certified, it can be executed upon delivery to the Sheriff, without a writ having been issued by this Court, the stipulation must be ultra vires. The sheriffs are appointed by the Minister of Justice and Correctional Services for the lower or superior courts. They perform

functions within the area of jurisdiction of those courts for which they have been appointed by or under any law.’[2]

[12] The learned judge correctly pointed out that the CCMA is not a court of law and that an application to set aside a writ can only be made to the court that issued the writ. The court a quo concluded that:

‘A stay of a writ issued by the CCMA or by the Magistrates’ Court fall outside the ambit of this Courts’ powers. Seen in this context, the litigants are non-suited to set aside the writs issued by the CCMA which are the subject of impending review proceedings before the Labour Court.’

[13] The court a quo further concluded that there is no reason why the writs issued by the CCMA should be stayed pending review in circumstances where they are a nullity for lack of jurisdiction.

[14] The court a quo declared that the CCMA does not have jurisdiction to issue writs of execution in respect of arbitration awards issued by it. It consequently set aside both “enforcement awards”.

[15] It is trite that, when interpreting any document, regard must be had to the language used as well as the context under which the document saw the light of the day. This holds true for any document including contracts and legislative texts. There is no need for any ambiguity before the context is considered.[3]

[16] The successive amendments of section 143 and the reasons therefore as set out in the affidavit of the Directors of the CCMA gives a very instructive background to the section. In *Hleka v Johannesburg City Council*, [4] it was said that in order to ascertain the real meaning of words used by the legislature and the evil that it intended to remedy, it is permissible to have regard to:

1. What the law was before the measure was passed.
2. What the mischief or defeat was, for which the law did not provide.
3. What remedy the legislature appointed and
4. The reason for the remedy.[5]

After considering the above factors, I am then enjoined to construct section 143 in such a way that it shall suppress the mischief and advance the remedy.[6]

[17] Section 143(1) as originally enacted by Act 66 of 1995 provided as follows:

‘1 An arbitration award issued by a commissioner is final and binding and may be made an order of the Labour Court in terms of Section 158 (1) (c), unless it is an advisory arbitration award.’

[18] The Director of the CCMA indicated in her affidavit that one of the major problems with CCMA awards was that employers paid no attention to them because they were aware of the cumbersome enforcement provisions of the Act. It is self-evident that this procedure was onerous, time consuming and expensive. It created a two stage procedure in cases where the employer failed to comply with an arbitration award. The employee would get an award in his/her favour at the CCMA and thereafter he or she had to go to the Labour Court (at great expense) and apply for the award to be made an order of court before such award could be enforced. This also had an adverse effect on the Labour Court rolls because of the section 158(1)(c) applications.

[19] Section 143 was amended by the Labour Relations Amendment Act, 2002 to read:

1. An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award.
2. If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act (Act No. 55 of 1975), unless the award provides otherwise.
3. An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).
4. If a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.”

[20] This amendment gave rise to what the court a quo described as the settled practice in terms of which writs of execution in respect of arbitration awards made by the CCMA were issued by the Registrar of this court prior to execution by the sheriff. This procedure was also unacceptable because a party armed with an arbitration award in his/her favour still had to go to the Labour Court for the Registrar to issue a writ.

[21] The Labour Relations Amendment Act 2014 which came into effect on 1 January 2015 further amended Section 143 to read in the form quoted at paragraph 8 above.

[22] The explanatory memorandum that was tabled with the Labour Relations Bill, 2012 which became the Labour Relations Amendment Act 2014, set out the purpose of the last Amendment to section 143 in the following terms:

‘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. Firstly, an award which has been certified by the Commission can be presented to the Deputy-Sheriff for execution if payment is not made. This removes the need for the current practice in terms of which parties have a writ issued by the Labour Court. This has proved to be time-consuming and expensive, particularly for applicants in a centre where there is no Labour Court. Secondly, in the case of award such as 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. Finally, the enforcement of awards to pay money will occur in terms of the Rules and Tariffs applicable to the Magistrate’s Court, thus simplifying and reducing the costs of these proceedings. These amendments are anticipated to simplify and expedite the enforcement of arbitration awards by the Commission and bargaining councils’.

[23] The successive amendments to section 143 clearly indicate that the legislature wanted to provide a remedy to address the problems

surrounding the enforcement of arbitration awards. It clearly states that the purpose of the amendment is inter alia that certified awards can be presented to the sheriff for execution if payment is not made.

[24] The state of the law before the current section 143 was passed was that there was still uncertainty as to how arbitration awards should be enforced. The “settled practice” was unacceptable because parties still had to go to the Labour Court in order for the Registrar to issue a writ. In areas where there is no Labour Court a person with a monetary arbitration award in his/her favour would have to travel to the Labour Court (sometimes more than once) to have a writ issued by the Registrar.

[25] The legislature decided, as I will demonstrate below, to make certified CCMA awards enforceable in terms of section 143 without the need to go to the Labour Court. The procedure created by section 143 makes it easier, inexpensive, effective and accessible for a person to enforce a certified arbitration award.

[26] I now turn to look at the words used in section 143. In terms of section 143(1), an arbitration award may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued. I disagree with the court a quo’s assertion that the clear language of section 143 “is that the award of the CCMA may be enforced as if it were an order of the Labour Court provided a writ has been issued in respect thereof.”

[27] The court a quo erred when it added the word “provided” in its interpretation. There is no word in section 143 that approximates the word “provided”. The crux of the matter lies in the words “as if it were”. An understanding of those words and their implication unlocks the entire interpretation problem.

- [28] The words “as if” are defined as, “as the case would be if”;^[7] in other words, it means in the same way that it would be if.
- [29] By using the words “as if it were”; the legislature created a legal fiction. The CCMA is not a court of law and writs are issued by courts of law and not administrative tribunals like the CCMA. In order to overcome this reality, the legislature had to create this fiction. The legislature deemed the CCMA to have a status which it would not otherwise have, and consequently established an arrangement which, without the fiction, would be objectionable because it is incompatible with legal principle. There are many fictions in law, e.g. once a legal child is legally adopted, the biological parents become legal strangers to the child, i.e. they are treated by the law as if they were not related to the child. Likewise, the adoptive parents are treated as if they were the biological parents of the child. A legal fiction therefore requires us to assume as fact that which we know is not true.
- [30] Therefore, section 143(1) read with section 143(3) means that when an arbitration award is certified by the Director, it may be enforced as if it were an order of the Labour Court in respect to which a writ has been issued. We must therefore not only assume that it is an order of the Labour Court but also assume that a writ has been issued in respect of that order.
- [31] The practical effect of section 143(1) and 143(3) is that a certified arbitration award may be enforced without the need for a writ to be issued by any court or the CCMA.
- [32] Section 143(5) provides that an arbitration award sounding in money must be treated for the purpose of enforcing or execution it as if it were an order of the Magistrate’s Court. The Deputy-Sheriff may enforce and execute orders of the Magistrate’s Court and therefore the Deputy-Sheriff would, by virtue of section 143(5), have the power to enforce and execute a certified arbitration award.
- [35] Section 143(5) deals with awards sounding in money only. Section 143(4) on the other hand provides as follows:
- ‘If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payments of an amount of money, any other party to the award may without further order enforce it by way of contempt proceedings instituted in the Labour Court.’
- [36] Section 143(1) tells us what the status of a certified award is. Subsections (4) and (5) tell us how it should be enforced. The effect of subsection (5) is, if the certified award to be enforced sounds in money, it is enforced and executed as if it is an order of the Magistrates’ Court. It does not become an order of the Magistrates’ Court. It is still assumed to be an order of the Labour Court in respect of which a writ was issued; however if it sounds in money it is treated for enforcement and execution purposes only as an order of the Magistrates’ Court. The words “despite subsection (1)” in subsection

- (5) makes it plain that despite the assumption in subsection (1) a certified award sounding in money may be enforced and executed as if it is an order of the Magistrates' Court. There are Magistrates' Courts in all districts in the country and this makes the enforcement of certified awards sounding in money accessible to most workers. The enforcement order in terms of section 143 clearly empowers the sheriff to execute in the same manner as would be the case if he or she received a warrant signed and issued by the registrar of the Magistrates Court.
- [36] If the certified award to be enforced is for the performance of an act which was not done, then contempt proceedings may be instituted in the Labour Court, in terms of subsection (4). This may be done because in terms of subsection (1), the certified award is assumed to be an order of the Labour Court in respect of which a writ has been issued.
- [37] The court a quo should have found that a certified arbitration award may be enforced in the same way that it would be if it was an order of the Labour Court in respect of which a writ was issued.
- [38] The court a quo seems to have laboured under the mistaken view that the CCMA actually issues writs. This is evident from paragraph 1 of its order which reads:
- 'it is declared that the CCMA does not have jurisdiction to issue writs of execution in respect of the arbitration awards issued by it'
- [39] The CCMA does not issue writs in the conventional way. The certified award is the equivalent of a Labour Court order in respect of which a writ has been issued. The certified award is therefore not only assumed to be an order of the Labour Court but it must also be assumed that a writ was issued in respect of that order. The certified award is therefore the writ. The conclusion that there is no reason why writs issued by the CCMA should be stayed pending review in circumstances where they are a nullity for lack of jurisdiction is therefore incorrect.
- [40] Section 145(3) of the Act provides that the Labour Court may stay the enforcement of an award pending its decision. The court a quo reasoned that the Labour Court properly stayed writs issued by the Registrar of the Labour Court in terms of the old practice. The learned Judge however opined that the position changed when the 2014 amendment to section 143 became operational, because the CCMA issued their own writs or enforcement awards in respect of its own arbitration awards.
- [41] I fail to understand the court a quo's reasoning. Section 145(3) is clear. The enforcement of an arbitration award may be stayed by the Labour Court. The section has no qualification or limitation. The enforcement of any arbitration award issued in terms of the Act may be stayed by the Labour Court. Therefore, the enforcement of a certified award which is deemed to be an order of the Labour Court in respect of which a writ was issued may be stayed by the Labour Court pending its decision. The Labour Court may therefore stay the enforcement of an award pending its decision in the review application. It follows that the court a quo's conclusion in relation to the Labour Court's lack of jurisdiction to stay CCMA

certified awards is incorrect.

[42] In case number J1807/15, the applicant requested a rule nisi calling upon the respondent to show cause why the enforcement award should not be stayed pending the outcome of the review application. In J1706/15, the applicant sought final relief to stay the enforcement award pending the outcome of the review application. Much water has flown under the bridge since the court a quo's judgment. It is also not clear what happened to the review applications in the interim. In my judgment, these matters should be remitted to the court a quo so that the issues can be properly ventilated if the applicants are still desirous to move for the relief which they sought.

[41] I therefore make the following order:

- a) The appeal is upheld with no order as to costs.
- b) The court a quo's order is altered to the extent set out below;
- c) Paragraphs 1 - 3.1 of the court a quo's order are set aside.
- (c) Both cases (case no: J1807/15 and case no: J 1706/15) are remitted to the court a quo so that they may be dealt with in terms of this judgment.
- d) Paragraph 3.2 and 3.3 of the court a quo's order are not interfered with.
- e) The registrar is directed to send a copy of this judgment to all the applicants and respondents in the two applications.

C. J. Musi JA

Davis JA and Murphy AJA agreed with C J Musi JA.

APPEARANCES

FOR THE APPELLANT: Adv. Maenetje SC

Instructed by Cheadle Thompson & Haysom Inc

FOR THE RESPONDENT: No appearance

[1] See Section 163 of the Act.

[2] Footnotes omitted. Rule 40 of the CCMA Rules reads as follows: 40. Certification and enforcement of arbitration awards

(1) An application to have an arbitration award certified must be made on or contain the information in

(a) LRA Form 7.18 in respect of an award by a commissioner;

- (b) LRA Form 7.18A in respect of an award in arbitration conducted under the auspices of a bargaining council.
 - (2) Any arbitration award that has been certified in terms of section 143 of Act that orders the payment of an amount of money, may be executed:
 - (a) by using the warrant of execution in the LRA Form 7.18 or LRA Form 7.18A; or (b) the warrant of execution prescribed in the Rules for the Conduct of Proceedings in the High Court.
 - (3) For the purposes of subrule (2), an arbitration award includes an award of costs in terms of section 138(10), a taxed bill of costs in respect of an award of costs and an arbitration fee charged in terms of section 140(2).
- [2] Footnotes omitted. Rule 40 of the CCMA Rules reads as follows:
40. Certification and enforcement of arbitration awards
- (1) An application to have an arbitration award certified must be made on or contain the information in
 - (a) LRA Form 7.18 in respect of an award by a commissioner;
 - (b) LRA Form 7.18A in respect of an award in arbitration conducted under the auspices of a bargaining council.
 - (2) Any arbitration award that has been certified in terms of section 143 of Act that orders the payment of an amount of money, may be executed:
 - (a) by using the warrant of execution in the LRA Form 7.18 or LRA Form 7.18A; or (b) the warrant of execution prescribed in the Rules for the Conduct of Proceedings in the High Court.
 - (3) For the purposes of subrule (2), an arbitration award includes an award of costs in terms of section 138(10), a taxed bill of costs in respect of an award of costs and an arbitration fee charged in terms of section 140(2).
- [3] *Novartis SA (Pty) Ltd v Maphill Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para 29; *KPMG Chartered Accountants SA V Security Ltd and Another* 2009 (4) SA 399 (SCA) at para 39; 2012 (4) SA 593 (SCA) at para 18.
- [4][4] 1949 (1) SA 842 (A).
- [5] At page 852 and 853.
- [6] See *Olley v Maasdorp and Another* 1948 (4) SA 657 (AD) at 666; *Hleka v Johannesburg City Council* 1949 (1) SA 842 (AD) at 852 to 853.
- [7] *Shorter Oxford Dictionary Sixth Ed* Oxford University Press at page 127.

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