

SOUTH AFRICA / JUDGMENT

Goliath and Others v African Meter Reading (PTY) Ltd (J 90/2021) [2022]

ZALCJHB 330 (17 November 2022)

[2022] ZALCJHB 330

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J 90/2021

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: J 90/2021

In

the matter between:

KARABO

GOLIATH AND 8 OTHERS

Applicant

And

AFRICAN

METER READING (PTY) LTD

Respondent

Heard:

2 November 2022

Delivered:

17 November 2022

This

judgment was handed down electronically by consent of the parties' representatives by circulation to them by email. The date for

hand-down is deemed to be 17 November 2022.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicants approached this Court in terms of the provisions of section 77(3) of the Basic Conditions of Employment Act^[1] (BCEA) for payment of their remuneration, for the period 19 September 2016 until 3 January 2021.
- [2] The Applicants were employed on different dates by the Respondent as meter readers and they were dismissed in May 2016. The National Metalworkers Union of South Africa, acting on behalf of the Applicants, subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [3] A default arbitration award was issued on 5 September 2016 under case number GAJB11839-16 and the Applicants' dismissal was found to be substantively and procedurally unfair. The Respondent had to reinstate the individual applicants, on the same terms and conditions of employment, which governed their employment relationship prior to their dismissal and to pay specified amounts to them. The reinstatement was with effect from 12 May 2016 and the Respondent was ordered to pay the Applicants their basic monthly earnings from the date of dismissal until their return to work. The Applicants were ordered to report for duty on 19 September 2016.
- [4] On 20 June 2018, the Respondent filed an application to rescind the default arbitration award, with an application for condonation. On 26 November 2018, a ruling was issued wherein the Respondent's application for condonation was refused.
- [5] On 16 December 2018, the Respondent filed an application to review the condonation ruling and the default arbitration award.
- [6] The Applicants initiated contempt proceedings against the Respondent for non-compliance with the arbitration award and on 27 November 2020, the Court found that the Respondent was in contempt of court for failing to comply with the certified arbitration award issued under case number GAJB11839-16. The Respondent was fined R 100 000, wholly suspended for 24 months, provided that it did not commit similar conduct during this period and that it complied with the said arbitration award within two weeks of being served with the order.

- [7] The Respondent's managing director, Mr Mphahlele, was also ordered to take the necessary steps to ensure that the Respondent complies with the certified arbitration award issued under case number GAJB11839-16. On 17 December 2020, the Respondent sent an email to the reception of Goldberg Attorneys, the Applicant's attorney of record, wherein it was stated that "[w]e hereby confirm that the employees can report for duty" on 4 January 2021 at the Respondent's offices in Johannesburg.
- [8] The Respondent submitted that the Applicants did not report for duty on 4 January 2021. The Applicants filed a replying affidavit wherein they stated that the email of 17 December 2020 did not come to the attention of the correct person at Goldberg Attorneys and that the said firm was closed from 18 December 2020 until 4 January 2021.
- [9] The Respondent's application to review the condonation ruling and the default arbitration award was set down for hearing on 14 January 2021, but the Respondent indicated its willingness to comply with the arbitration award and the application was withdrawn on 22 January 2021.
- [10] The Respondent's version is that the Applicants did not report for duty on 4 January 2021 and it instructed its attorneys to instruct the Applicants to again report for duty on 20 January 2021 at the Respondent's offices, which they failed to do. Although the Applicants filed a replying affidavit, this averment is not dealt with in the replying affidavit.
- [11] The Respondent subsequently made payment of the amounts set out in the arbitration award, but did not pay the Applicants remuneration in respect of the period 19 September 2016 to January 2021, which they claim is due to them and which triggered this application.
- [12] In the papers and arguments before Court, much was made of the fact that the Applicants were in fact employed on fixed term contracts and that they are therefore not entitled to relief. The Applicants argued that notwithstanding the fact that their contracts appear to be fixed term contracts, they were in fact employed on a permanent basis. In my view, the question of whether the Applicants were employed on fixed term contracts or on a permanent basis is not relevant to the issues this Court has to decide for purposes of this application.

Applicable principles and analysis

- [13] The crisp question in casu is whether the Applicants' contracts of employment were restored pursuant to an arbitration award ordering their reinstatement. If the employment contracts were restored, the Applicants would be entitled to outstanding remuneration from 19 September 2016 to 3 January 2021 and if not, there is no claim against the Respondent.

Reinstatement

[14] In *Kubeka and others v Ni-Da Transport (Pty) Ltd*[2] (*Kubeka*), the Labour Appeal Court (LAC) considered a claim for arrear wages or backpay, consequent upon an order for reinstatement. The LAC held that the key issue to be decided 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*.

[15] The LAC restated the reasoning of the Constitutional Court in *National Union of Metalworkers of SA on behalf of Fohlisa and others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd*[3] (*Hendor*) about the governing principle that the contracts of employment of unfairly dismissed employees are terminated by a dismissal and revive only when they tender their services pursuant to a reinstatement order and the tender is accepted by the employer. The reinstatement

order does not in and of itself reinstate the contract of employment, it is rather directing the employees to tender their services and for the employer to accept those services. In *Hendor*, it was confirmed that if an employee presents her- or himself for work, but the employer refuses to accept him or her back, the remedy is not contractual, but it is to bring the employer before court for contempt of court.

[16] 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 backpay flowing from the reinstatement order can only arise once the contract is restored. Prior to the employer agreeing to restore the contract pursuant to an order to do so, there is no contract in existence and thus no juridical basis for a claim for arrear wages.

[17] In *Kubeka*, the LAC held 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.'

[18] The LAC further held that[5]:

‘A requirement that back pay is only due and payable on reinstatement is in keeping with the remedial scheme and purpose of s 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 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 ss 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.’

[19] Prior to the actual reinstatement of an employee, no contract of employment exists and thus also no contractual obligation, as the only obligation at that point is to reinstate. An employee is not entitled to the payment of remuneration in terms of a contract of employment that is yet to be resuscitated. An order to reinstate does not restore the contract of employment and reinstate an employee, it merely orders an employer to do so.

[20] It is clear from the aforesaid authorities that arrear wages or backpay are only due and payable on reinstatement.

[21] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[6] (*Equity Aviation*), the Constitutional Court specifically dealt with the meaning of ‘reinstatement’ awarded in terms of section 193 of the LRA and held that:[7]

‘The ordinary meaning of the word ‘reinstatement’ is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions... It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers’ employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of s 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word ‘reinstatement’ means that the reinstatement will not run from a date after the arbitration award. Ordinarily then, if a commissioner of the CCMA orders the reinstatement of an employee that reinstatement will operate from the date of the award of

the CCMA, unless the commissioner decides to render the reinstatement retrospective...'

[22] The ratio in *Equity Aviation* is clear. Reinstatement means the restoration of the status quo ante. It is as if the employee was never dismissed. Where reinstatement is awarded, an employer will be in compliance with such an award if the employer, on (or as from) the date of the award having been made, takes the employee back into its service on the same terms and conditions of employment of the employee as it existed at the time of the dismissal of the employee. Also, and as a necessary consequence, the original starting date of employment of the employee will remain the same and applicable, if such reinstatement is awarded.

[23] The obvious question in *casu* is whether the Applicants were indeed reinstated, as reinstatement is a fact that must be established to succeed with their claim for the payment of outstanding remuneration as from September 2016 until January 2021.

[24] In *Kubeka*, it was made clear that 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 by tendering prospective services, it would

convert a reinstatement remedy, which requires a tender of services, into a compensation award, which it is not.

[25] It was held in *Hendor* and *Kubeka* that a reinstatement order is an order directing the employees to tender their services and the employer to accept that tender. If an employee fails to tender his or her services or the employer refuses to accept the tender, there is no restoration of the employment contract and the order for reinstatement is to be enforced through contempt proceedings.

[26] In my view, the critical question is whether the Applicants tendered their services for the act of reinstatement to be completed.

[27] The Applicants have to show that they indeed tendered their services on 19 September 2016, in accordance with the arbitration award in terms of which they were reinstated and ordered to report for duty.

[28] In the founding affidavit, the Applicants stated that the Respondent failed to comply with the arbitration award and persisted to do so. The Applicants stated that they did not earn any income and were not alternatively employed during the claim period and that "[a]ll the applicants further and as from 19 September 2016 for the full currency of the claim period tendered our services to the

respondent".

[29] The Respondent on the other hand explained that after the Court issued an order in November 2020, finding it in contempt and affording the Respondent two weeks to take steps to comply with the arbitration award, the Applicants were called upon to report for duty on 4 January 2021 and when that did not happen, they were informed once again to report for duty on 20 January 2021. The Respondent's

version is that the Applicants never reported for duty and not much is put in reply to rebut this version.

[30] Applying the Plascon-Evans rule[8], I cannot accept the Applicants' version that they "as from 19 September 2016 for the full currency of the claim period tendered our services to the respondent". This is so for the following reasons: firstly, the Applicants provided no details as to when and how they tendered their services for the full currency of the claim period (19 September 2016 until January 2021) and why or how their tender was consistently refused. It is difficult to accept that the Applicants could tender their services for the 'full currency' of a period of four years and four months. If they indeed tendered their services as alleged, they have not placed those facts before this Court.

[31] Secondly, on the Respondent's version, contempt proceedings were instituted in November 2020 to compel compliance with the arbitration award. It is not clear why the Applicants waited from September 2016 until November 2020, a period in excess of three years to institute contempt proceedings to compel the reinstatement they were entitled to since September 2016, when such ought to be instituted as soon as there was a refusal or unwillingness to reinstate. This is even more so where the Applicants' version is that they throughout the entire period, tendered their services.

[32] It is trite that when an order for reinstatement is not complied with, the reinstated employees have to compel compliance by way of contempt proceedings. It is improbable that the Applicants would wait for a period in excess of three years to institute contempt proceedings to compel the reinstatement they were entitled to, if they indeed throughout the entire period, tendered their services. This version is so improbable that it cannot be accepted by this Court.

[33] Thirdly, it is evident from the averments made in the answering affidavit and admitted in the replying affidavit that a number of the individual applicants had obtained alternative employment since the arbitration award ordered their reinstatement. It goes without saying that when an employee takes up alternative employment with a different employer, it is impossible to, at the same time, tender services to his or her former employer.

[34] After contempt proceedings were instituted, the Respondent attempted to comply with the reinstatement order and instructed the Applicants to report for duty on two occasions. I accept the Respondent's version that the Applicants did not report for duty on the dates they were to report for duty, as they did not put up a convincing answer in their replying affidavit to rebut the Respondent's version.

- [35] Reinstatement, meaning the restoration of a contract of employment, happens when, pursuant to a reinstatement order, the employees return to work, tender their services and the employer accepts the tender. There is an obligation on a reinstated employee to tender prospective services in order to claim arrear wages.
- [36] I accept that it is evident from the facts placed before this Court that the Applicants did not tender their services in accordance with the order for reinstatement and as a result, that they were never reinstated in accordance with the order for reinstatement. If a case was made out that the Applicants indeed tendered their services on 4 or 20 January 2020 and that such a tender was accepted by the Respondent, the outcome of this application could have been different.
- [37] The authorities are clear: an employee must tender his or her services, failing which he or she cannot claim arrear wages and if an employer refuses to reinstate the employee, the contract of employment does not revive. 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.

Conclusion

- [38] In casu, the reinstatement order per se did not reinstate the Applicants, it ordered the Respondent to do so. It obliged and required the Applicants to present themselves for resumption of duties, and it obliged the Respondent to accept their tender for services. The facts presented by the Applicants fail to show that a tender to return to work and render services was indeed made and as a result, reinstatement never took place, no contract of employment existed and there was no contractual obligation to remunerate the Applicants.
- [39] 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.
- [40] Considering the facts of this matter, there is no merit in the application and it has to fail. The Applicants are not entitled to the payment of remuneration in terms of an employment contract that was never resuscitated.

Costs

- [41] The last issue to be decided is the issue of costs.
- [42] In so far as costs are concerned, this Court has a broad discretion to make orders for costs.
- [43] Mr Radebe for the Respondent submitted that there should be an order for costs in favour of the Respondent as the Applicants never reported for duty.
- [44] Having considered the facts of this matter and the history of litigation, I am of the view that the interests of justice will be best served by making no order as to costs.

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

Order

1. The application is dismissed;
2. There is no order as to cost.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr A Goldberg from Goldberg Attorneys

For the Respondent: Advocate S B Radebe

Instructed by:

Lawtons Africa Attorneys

[1] Act 75 of 1997, as amended.

[2]

(2021) 42 ILJ 499 (LAC).

[3]

(2017) 38 ILJ 1560 (CC).

[4] Kubeka supra at para 35.

[5] Ibid at para 38.

[6]

(2008) 29 ILJ 2507 (CC).

[7] Id at para 36.

[8]

[1984] ZASCA 51; 1984 (3) SA 623 (A).

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