

SOUTH AFRICA / JUDGMENT

Govender v Gauteng Provincial Government: Department of Roads and Transport (J677/23; J952/23) [2023] ZALCJHB 325; [2024] 3 BLLR 298 (LC) (24 November 2023) [2023] ZALCJHB 325

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J677/23; J952/23

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case

no: J 677/23

J952/23

In

the matter between:

PERUMAL
GOVINDASAMI GOVENDER
Applicant
and
GAUTENGPROVINCIAL
GOVERNMENT:DEPARTMENT
OF ROADS AND TRANSPORT
Respondent

Decided:

In chambers

Delivered:

24 November 2023

This

judgment was handed down electronically by circulation to the parties' representatives via email. The date for hand-down is deemed to be 24 November 2023.

JUDGMENT**PRINSLOO J****Introduction**

- [1] The Applicant filed an application to make an arbitration award an order of Court. There was a material dispute about the Respondent's obligation to reinstate the Applicant. The Applicant was of the view that paragraph 69 of the arbitration award is to be interpreted to the effect that he is reinstated permanently, on the same terms and conditions that he enjoyed prior to his dismissal. The Respondent on the other hand submitted that paragraph 69 is not capable of implementation and that the award was indeed complied with when the Applicant was employed on a 12-month fixed-term contract, which was "on the same terms and conditions that applied prior to the termination" of the Applicant's contract.
- [2] It was evident that the parties interpreted the obligation which the arbitration award imposed on the Respondent differently and that the wording of paragraph 69 of the award created scope for different interpretations and fertile ground for confusion, uncertainty and ambiguity.
- [3] This Court found that the Applicant did not cross the hurdle to show that the arbitration award is 'sufficiently clear' to be made an order of Court and as a result, his application was dismissed in a judgment that was handed down on 18 September 2023.
- [4] On 3 October 2023, the Applicant filed an application for variation in terms of section 165(b) of the Labour Relations Act[1] (LRA) and Rule 16A(1)(a)(ii) of the Rules of this Court[2] (Rules) because of an obvious and/or patent error in the judgment and or order.

The variation application

- [5] The Applicant seeks to vary the judgment and/or order handed down on 18 September 2023 in accordance with section 165(b) of the LRA and Rule 16A(1)(a)(ii) of the Rules on the basis that there is an obvious and/or patent error in the judgment and or order
- [6] The Applicant seeks a variation of the judgment and/or order to include relief to the effect that the matter is referred to the GPSSBC to be dealt with in terms of section 144 of the LRA, with specified timeframes and that I retain the Court file to be case managed until the matter is finally resolved.
- [7] The application is opposed and the parties were requested to indicate whether they wanted the application to be argued in open Court or whether they would consent to the application being decided on paper. The parties agreed that the application be decided on paper and they submitted heads of argument on 17 November 2023.

The applicable legal principles

[8] The variation of a court's decision, judgment or order is provided for section 165 of the LRA and Rule 16A(1)(a) of the Rules.

[9] Section 165 provides as follows:

'The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order –

- (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;
- (c) granted as a result of a mistake common to the parties to the proceedings.'

[10] The wording of Rule 16A(1)(a)(i) – (iii) is identical to section 165 of the LRA and there is no need to set out both.

[11] In *Construction and Allied Workers Union and another v Federale Stene (1991) (Pty) Ltd*[3] (*Federale Stene*), it was held that section 165 of the LRA is similar in its terms to Rule 42 of the Uniform Rules.

[12] In *Minister for Correctional Services and Another; In re Van Vuuren v Minister for Correctional Services and Others*[4], the Constitutional Court considered Rule 42 of the Uniform Rules and held that:

'[7] Rule 42(1) of the Uniform Rules of Court empowers a court to rescind or vary an order or judgment erroneously sought or granted, in which there is an ambiguity or a patent error or omission, or in which there is a common mistake by the parties. The jurisdictional facts in subrule

(1) must, however, be established by the party seeking variation before a court may exercise its discretion to set aside the order or to amend it.

[8] A court may clarify its order or judgment to give effect to its true intention which is to be ascertained from the language used without altering the sense and substance of the judgment if, on its proper interpretation, the meaning remains unclear. But once a court has pronounced a final judgment or order, it has, itself, no authority to correct, alter or supplement it. The rationale for this principle is delineated by Ngcobo J in *Zondi v MEC, Traditional and Local Government Affairs* that:

"In the first place a Judge who has given a final order is functus officio. Once a Judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of Court has been made, it is final and they can arrange their affairs in accordance with that order." (Footnotes omitted.)

- [13] The application in casu is premised on the provisions of section 165(b) of the LRA and Rule 16A1(a)(ii), which effectively provide for the correction of an ambiguity, obvious error or omission in a decision, judgment or order.
- [14] It is trite that once a judgment has been granted, the judge becomes functus officio, subject to only specific exceptions, such as section 165(b) and Rule 16A1(a)(ii). The purpose of section 165(b) and Rule 16A1(a)(ii) is to expeditiously correct an obvious error, ambiguity or omission and they find application only in specific and limited circumstances. A variation of an order or judgment should be allowed only in exceptional circumstances as “the guiding principle of the common law is the certainty of judgments”.^[5]
- [15] A court may correct, alter or supplement a judgment or order to clarify it and to give effect to its true intention, without altering the sense and substance of the judgment or order.^[6]

Analysis

- [16] This application is premised on the fact that this Court expressed a prima facie view that the relief sought cannot be granted, due to the ambiguity in the award, and the Court’s intention to refer the matter to the GPSSBC to be dealt with, within specified time frames and to retain the court file to case manage it until the matter is resolved. This is also reflected in paragraph 74 of the judgment:

[74] I communicated my willingness to the parties to retain the court file and to case manage the matter until it is finally resolved. I conveyed my intention to refer the matter to the GPSSBC to be dealt with in terms of section 144 of the LRA, with specified time frames. However, the Applicant opted to argue the merits of the matter rather than to have it case managed until it was finalised.’

- [17] The Applicant made a portion of the transcript of the proceedings in Court available, from which it is evident that the Respondent’s counsel took instructions and that the Respondent was willing to

approach the GPSSBC to have the relief in the arbitration award clarified or varied and that it was of the view that it was the

proper approach to resolve the dispute. The transcript shows that the Court said:

‘Court: ...If there is a proposal from the Respondent’s side, let us just consider that, because what I am prepared to do is to provide clear timelines and I will keep this file with me and to case manage the file...’

- [18] In response, Mr Redding for the Applicant, expressed his appreciation for the Court’s approach but submitted that he would like to persuade the Court that the relief sought should be granted, that there is no ambiguity at all and that there is no necessity to refer the matter to the GPSSBC. As a result of the attitude adopted by the Applicant, both parties presented full arguments on the point in limine, the merits of the section 158(1)(c) application and the declaratory relief sought and judgment was reserved.

- [19] In his application for variation, the Applicant submitted that considering what transpired, as set out supra, there is an obvious error in the judgment and or order as there appears to be a bona fide misunderstanding between his counsel and this Court regarding the submissions advanced on the Applicant's behalf, which resulted in an obvious and/or patent error. According to the Applicant, this Court misunderstood that the Applicant elected to ventilate the merits of the dispute to the exclusion of the Court's intended approach.
- [20] In my view, there is no merit in the application for variation.
- [21] This Court's intention was to to refer the matter to the GPSSBC to be dealt with in terms of section 144 of the LRA, within specified time frames, and if, after the arbitration award was varied or clarified, it was necessary to proceed with the section 158(1)(c) application, for the parties to return to Court and for this Court specifically to deal with the matter until it was finalised. This was obviously a possibility only if the parties agreed to it as it would effectively stay the adjudication of the section 158(1)(c) application.
- [22] The Applicant however was of the view that he should be afforded an opportunity to convince the Court that the relief sought should be granted, that there was no ambiguity at all and that there was no necessity to refer the matter to the GPSSBC.
- [23] After hearing arguments, judgment was reserved. The only logical next step, after the merits of the application were argued by both parties and judgment was reserved, was for this Court to consider the point

in limine, the merits of the section 158(1)(c) application and the declaratory relief sought and hand down a judgment. Judgment, dealing with all the aforesaid aspects was handed down on 18 September 2023 and the Applicant's case was dismissed.

- [24] In his application for variation, the Applicant submitted that considering what transpired, as set out supra, there is an obvious error in the judgment and or order as there appears to be a bona fide misunderstanding between his counsel and this Court regarding the submissions advanced on the Applicant's behalf, which resulted in an obvious and/or patent error. According to the Applicant, this Court misunderstood that the Applicant elected to ventilate the merits of the dispute to the exclusion of the Court's intended approach.
- [25] The Applicant submitted that:
- ‘[H]ad the court correctly understood my counsel's submissions, the court would have granted the order it intended to make as conveyed to the parties in court and as correctly recorded in paragraph 74 of the judgment and or order. As a consequence of the obvious and/or patent error, the judgment and /or order does not reflect the real intention of Her Ladyship Judge Prinsloo.’
- [26] There is no error in the judgment or order handed down by this Court and it indeed reflects the true intention of this Court. The intention was to refer the matter for clarification or variation as the award was ambiguous, as such referral was the most pragmatic way to deal with it. The referral to the GPSSBC for clarification had to

be done before hearing arguments on the merits of the application and before handing down judgment, as I was of the view that the

interpretation issue could and should be resolved at the level of the GPSSBC. The intention was to keep the file for case management if there was still a need for the application to proceed after the award was clarified or varied by the GPSSBC. The approach proposed by this Court, and supported by the Respondent, was declined and the Applicant elected to argue the full scope of the issues, including

the merits of the application.

[27] It was not this Court's intention to hear arguments from both parties, write a judgment dealing with all aspects of the application, hand down judgment and thereafter retain the file for case management.

[28] The Applicant's case is that he did not make an election to the exclusion of the Court's intended approach. Instead, his counsel attempted to persuade the Court that there was no ambiguity and that the Court could grant the relief sought, but should counsel be unable to persuade the Court, then the Court's intended approach would be accepted. The Applicant submitted that there was a misunderstanding that he did not accept the Court's proposal to

refer the matter to the GPSSBC, within specified timeframes and that the case be managed until it is finalised

[29] The Applicant's submissions are problematic. It may be so that he did not make an express election to the exclusion of this Court's intended approach or did not communicate that he disagreed with the Court's intention, however, the fact that the Applicant elected to persuade the Court that the relief sought should be granted, that there is no ambiguity at all and that there is no necessity to refer the matter to the GPSSBC, was by implication an election to decline the Court's proposal and an election to proceed with the application. The Applicant could not have it both ways. The full scope of the issues before this Court, including the merits of the case, could not be argued and decided and at the same time, be retained for case management.

[30] Not only was that not the intention, but it would also create an impossible scenario. Once the merits are argued and judgment is handed down, this Court is functus officio and the matter is finalised. On the Applicant's own version, he does not take issue with the Court's decision on the merits and does not seek to undo the dismissal of the application on the merits. It is clear that there is no application pending, as the application was dismissed.

[31] The Applicant's request that I retain the court file to case manage it until the matter is 'finally resolved', is bad in law as the merits were argued, judgment was handed down and at the

level of this Court, the matter is finalised. There is no longer a pending or live matter, let alone one that could be case-managed.

[32] A variation application cannot be brought where an applicant is offered an opportunity to deal with a dispute in a particular way and elects otherwise, to seek to revert to the offer, which was not accepted at the relevant time, because such an applicant failed to convince the court on the merits of the case. It cannot be used to revert to a position previously relinquished.

[33] There is no ambiguity, obvious error or omission in the judgment that was handed down on 18 September 2023 and therefore it is not to be varied in the terms the Applicant seeks.

Costs

[34] Insofar 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 law and fairness.

[35] Mr Redding for the Applicant submitted that the Respondent should pay the Applicant's costs, including the cost of two counsel because the Respondent's opposition was ill-conceived and misguided. The argument is that the variation application ought never to have been opposed and the opposition begs the question as to why the Department would oppose the application if both parties would benefit from the outcome, namely that this matter is dealt with expeditiously.

[36] Mr Ramaepadi for the Respondent submitted that this application for variation is an abuse of process because the Applicant seeks to reverse the effects of an election he made because he did not succeed on the merits and instead of dealing with the consequences of the dismissal of his application, he seeks to revert to a position previously relinquished. The judgment handed down dealt with all the matters raised by the parties and the Applicant is abusing the variation application to relitigate the matter in order to obtain alternative relief.

[37] Mr Ramaepadi submitted that a cost order should be granted in favour of the Respondent because the jurisdictional requirements for variation have not been satisfied and the application is an abuse of process and an attempt to relitigate in circumstances where the court is *functus officio*.

[38] The Applicant's argument that the variation application ought never to have been opposed because both parties would benefit from the outcome, namely that this matter is dealt with expeditiously, is surprising. The expeditious resolution of this matter was the intention when this Court proposed a pragmatic way to deal with the

matter, but instead, the Applicant elected to argue the merits, which necessitated a judgment from this Court when the objective was to avoid that and to resolve the matter instead.

[39] Counsel for both parties argued for a cost order. In my view, this is a case where a cost order would be appropriate as the variation application was ill-conceived.

[40] However, considering the unfortunate litigation history as well as the fact that the Applicant is an unemployed individual, I am of the view that the interests of justice will be best served by making no

order as to costs.

[41] In the premises, therefore, I make the following order:

Order

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

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances: For the Applicant: Advocate A Redding SC with Advocate P Moll Instructed by: Solomon Holmes Attorneys For the Respondent: Advocate M Ramaepadi SC with Advocate T Pooe Instructed by: Seanego Attorneys

[1] Act 66 of 1995, as amended.

[2] GN 1665 of 1996: Rules for the conduct of proceedings of the Labour Court.

[3] [1998] ZALC 132; (1998) 19 ILJ 642 (LC) at para 4.

[4] 2011

(10) BCLR 1051 (CC) at paras 7 - 8.

[5] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) [2003] ZASCA 36; 2003 (6) SA 1 (SCA).

[6] Firestone South Africa (Pty) Ltd v Genticuro AG 1977

(4) SA 298 (A).

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