

SOUTH AFRICA / JUDGMENT

Ithala SOC Ltd v Ntombela and Others

(DA 1/2024) [2024] ZALAC 71; [2025] 4
BLLR 425 (LAC) (24 December 2024)
[2024] ZALAC 71

COURT
Labour Appeal Court

BEFORE
Molahlehi, Nkutha-Nkontwana, Mooki

CASE / FILE NUMBER
DA 1/2024

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THE
LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG
Not
Reportable
Case
no: DA 1/ 2024
In

the matter between:

ITHALA
SOC LTD
Appellant
and
FAITH
NOZIZIWE NTOMBELA
First Respondent
KHOLISILE
DLAMINI
Second
Respondent
JABULANI
NGWANE N.O .
Third Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Fourth Respondent

Heard: 27 November 2024

Delivered: 24 December 2024

Coram: Molahlehi AJP, Nkutha-Nkontwana JA et Mooki AJA

JUDGMENT

MOOKI, AJA

Introduction

[1] The matter came before Court as an appeal of the dismissal of the appellant's review application. The Labour Court (per Govender AJ), in dismissing the review application, upheld the award by the third respondent, who found the dismissal of the first and second respondents (employees) to be substantively unfair. The award directed their reinstatement and that they be paid backpay.

Appeal

[2] Counsel for the employees submitted, during the hearing, that the appeal had been perempted because the appellant had reinstated the employees following the dismissal of the review application.

[3] The Court directed the appellant's counsel to address it on the issue of the appeal being said to be perempted. Mr Boda SC, counsel for the appellant, informed the Court that he had no instruction on whether the employees had been reinstated or not.

[4] The Court, after the parties addressed it on the merits, directed that the parties inform the Court as to the status of the employees. The parties were given a period of about a week to revert to the Court. Judgment was then reserved.

[5] The employees filed an affidavit setting out their views on their status. The employees referenced the appellant's supplementary submissions in support of its application for leave to appeal. In its supplementary submissions, the appellant recorded the following, among others:

5.1 The employees were to be reinstated and be required to report for work on 1 September 2023;

5.2 The appellant would bring an application for leave to appeal the judgement of the Labour Court;

5.3 The appellant would not pay the employees the awarded backpay pending the final determination of its application for leave to appeal; and

5.4 The appellant took the employees back into its employ to prevent any potential increase in the backpay which, at the time of the letter, stood at 76 months.

- [6] The recordal in the preceding paragraph was set out in a letter by the appellant to the employees. This was before the appellant launched its appeal process.
- [7] The employees, in their affidavit, mentioned that they had been in Ithala's employ since August 2023; that they received bonuses in 2023 and 2024, and that Ithala conferred a Long Service Award for 25 years of service on the second respondent.
- [8] The appellant filed an affidavit disputing that it acquiesced to the dismissal of its review application. That was because, according to the appellant, the employees were taken back for the appellant to limit the appellant's exposure to the payment of the backpay due to the employees.

Evaluation

- [9] This Court has said the following in relation to peremption:

'a party to a judgment acquiesces therein, either expressly, or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be perempted, ie he cannot thereafter change his mind and note an appeal. Peremption is an example of the well-known principle that one may not approbate and reprobate, or, to use colloquial expressions, blow hot or cold, or have one's cake and eat it.'[1]

- [10] We accept that the employees were reinstated. The reinstatement was effected before the start of the appeal process. The appellant's statement that it did not acquiesce to the dismissal of its review application but that it took the employees back to minimise the appellant's potential liability of the payment of backpay would turn courts into a gambling den – with a litigant bringing a matter before court not so much to vindicate an entitlement, but to hedge against exposure. Such a stratagem is odious to the law.
- [11] The appellant perempted the appeal by reinstating the employees. The appeal therefore must fail.

- [12] In the premises, the following order is made:

Order

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

O. Mooki AJA

Molahlehi AJP and Nkutha-Nkontwana JA concur.

APPEARANCES:

For the Appellant: F Boda SC, Instructed by Norton Rose Fulbright South Africa Inc. For the first and Second Respondents: B Hlela (attorney), Instructed by Hlela Attorneys

[1] National Union of Metalworkers of SA and others v Fast Freeze

(1992) 13 ILJ 963 (LC) 969I – J.

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