

SOUTH AFRICA / JUDGMENT

Matjipa v PGL Mining (Pty) Ltd (J79/21)

[2024] ZALCJHB 325 (21 August 2024)

[2024] ZALCJHB 325**COURT**

Labour Court Johannesburg

BEFORE

S Sethene

CASE / FILE NUMBER

J79/21

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Source record**FLYNOTES:****LABOUR**

– Arbitration award – Order
of court –
Reinstatement
– Reported for duty and was denied access – Failed to
prove allegations of bribery – Contends
it is impossible to
comply with award regarding reinstatement due to non-renewal of
contract – Failure to institute
review proceedings –
Obliged in law to comply with award – Arbitration award is
unambiguous and unequivocal –
Raising supervening
impossibility as defence for non-compliance is not permitted –
Application granted.
THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Not Reportable
Case
No: J
79/21
In

the matter between:

MABAKANE
PHILLIP MATJIPA
Applicant
and
PGL
MINING (PTY) LTD
Respondent

Heard: 23 May 2023

Delivered: 21 August 2024

Summary: Application to make arbitration award an order of court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995, as amended – Arbitration award is unambiguous and unequivocal and raising supervening impossibility as defence for non-compliance is not permitted. Held: (1) Arbitration award made an order of court. (2) Respondent ordered to pay the applicant's costs.

JUDGMENT

SETHENE, AJ

Introduction

‘The purpose of making a settlement agreement or an arbitration award an order of court is to enforce compliance with the agreement or the award. The agreement or the award must therefore be unambiguous and unequivocal and not open to any dispute...’[1]

- [1] I have considered it apt to cite the judgment of the Labour Appeal Court (LAC) in the introduction of this judgment to clearly highlight that Mr Mabakane Phillip Matjipa (applicant) is entitled to succeed in this application to make an arbitration award an order of this Court as contemplated in section 158(1)(c) of the Labour Relations Act[2] (LRA).
- [2] However, PGL Mining (Pty) Ltd (respondent) urges this Court not to make the arbitration award obtained in favour of the applicant an order of this Court as there is a supervening impossibility that makes compliance with the arbitration award impossible.
- [3] Is the doctrine of supervening impossibility applicable in this instance? Not at all.

Salient background facts

- [4] The applicant was employed as a Training Manager effective from 27 January 2020 until he was dismissed on 8 May 2020, for allegations of bribing the security guard by offering him two cans of Dragon drink.
- [5] On 28 April 2020, the respondent held a formal disciplinary hearing against the applicant and on 8 May 2020, the chairperson of the disciplinary hearing issued a sanction summarily dismissing the applicant with immediate effect.
- [6] Aggrieved by the decision to dismiss him, the applicant approached the Commission for Conciliation Mediation and Arbitration (CCMA) to refer an unfair dismissal dispute.

[7] On 1 July 2020, the CCMA held the arbitration proceedings and on 8 July 2020, issued the arbitration award which found that the dismissal of the applicant by the respondent was procedurally fair but substantively unfair, and ordered the applicant's

reinstatement effective from 1 August 2020 and remuneration of two months' salary.

[8] On 1 August 2020, the applicant reported for duty and was denied access to the respondent's premises to render his services.

[9] In terms of the reasoning of Commissioner Jeffrey Nkuna, the respondent failed to prove the allegations of bribery against the applicant and the witnesses that ought to have been called to substantiate the respondent's case were not called for inexplicable reasons, albeit being available. In my view, Commissioner Nkuna was correct. In *East Rand Gold and Uranium Co Ltd v National Union of Mineworkers*[3], the LAC held as follows with respect to the failure to call witnesses who are available:

'Failure to call witnesses who are available and able to elucidate the facts leads to the inference that the litigant in question fears that such evidence will expose facts unfavourable to him. See *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A). There can be no doubt that members of the union's negotiating team were available to the union as witnesses. They have personal first-hand knowledge of the state of their minds as representatives of the union and this evidence would have elucidated the facts on this point. They were not called. Ergo obviously could not call them.'

[10] In respect of the other directives of the arbitration award, the respondent complied only with the payment of salary. The respondent contends that the reason for not reinstating the applicant is that it has no work for the applicant to perform as the contract it had with Redpath Mining has not been renewed.

[11] In sum, the respondent states that it is impossible to comply with the arbitration award with respect to the reinstatement of the applicant. The Court is urged to consider the non-renewal of the contract between the respondent and Redpath as grounds for supervening impossibility, resulting in its inability to comply with the arbitration award reinstating the applicant.

Law and analysis

[12] Section 158(1)(c) of the LRA confers discretionary powers to this Court to make any arbitration award or settlement agreement an order of the Court. This section cannot be read in isolation from other relevant sections of the LRA applicable to the issuance of arbitration awards. For instance, section 143(1) of the LRA states:

'An arbitration award issued by a commissioner is final and binding and it may be enforced as it were an order of the Labour Court, unless it is an advisory arbitration award.'

- [13] Section 143(1) of the LRA must be interpreted to mean that in an instance the arbitration award is not subject to review as contemplated in section 145 of the LRA, it is final and binding and may be enforced as if it an order of this Court.
- [14] In this case, the arbitration award was issued on 8 July 2020, to the parties (employee and employer/applicant and respondent) and to date, the respondent has not instituted any review proceedings as provided for in section 145(1) of the LRA. The respondent's failure to institute review proceedings in terms of section 145(1) of the LRA only means that the respondent sees no defects in the arbitration award. If there is no defect identified by the respondent in the arbitration award, the final and binding nature of the arbitration award takes effect as if the arbitration award itself is an order of this Court. In the circumstances, the respondent is obliged in law to comply with the arbitration award.
- [15] Should the Court consider or give credence to the respondent's contention that it is impossible to reinstate the applicant as there is no work to give the applicant or there is supervening impossibility occasioned by the non-renewal of the agreement between the respondent and Redpath?
- [16] I have difficulty with the respondent's defence as it is untenable, to say the least. The respondent, if for whatever reason, reasonably believes that it would be impossible to comply with the arbitration award, or part of it, it is obliged to apply to the CCMA in terms of section 144 of the LRA for the variation of the award premised on ambiguity or omission. There is no evidence of the application contemplated in terms of section 144 of the LRA ever made by the respondent to the CCMA to warrant the consideration of its defence.
- [17] In respect of the non-renewability of the agreement between the respondent and Redpath, the defence of supervening impossibility is persisted with by the respondent and reliance is placed on the judgment of the Supreme Court of Appeal (SCA) in *Kudu Granite Operations (Pty) Ltd v Caterna (Pty) Ltd*[4] (Kudu). The respondent's reliance on Kudu illustrates the brazen misunderstanding between commercial and employment contracts. Supervening impossibility or vis major relates, amongst others, to acts of God or government-enforced restrictions making it impossible for a party to discharge its contractual obligations. The supervening impossibility must not be attributable to the parties to the contract. The impossibility of discharging contractual obligations could arise either before the commencement of the contract or after its conclusion. In Kudu, the parties to a contract found themselves in a situation where the performance of their contractual obligations was impossible as they made the fate of their contract dependent upon the contract of the third party who was unable or unwilling to perform.
- [18] In this case, the respondent invites this Court to see its defence from the prism of Kudu and accordingly refuse to make the arbitration award an order of this Court. Having regard to the law I cannot accede to the respondent's invitation. The SCA in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund*[5], held that every contract must be

given its commercial sensible meaning. There is no evidence tendered in this Court to find that the meaning that should be attached to the contract of employment between the applicant and the respondent accords with the doctrine of supervening impossibility. Further, in *Kooij and Others v Middleground Trading 251 (CC)* and *Another*[6], the SCA restated the issue of vis major when it held that:

‘It is trite that where performance of an obligation by a party to an agreement becomes impossible after the conclusion of the agreement,

that party is discharged from liability if it was prevented from performing its obligation by vis major, but not if the impossibility was due to its own fault.’

[19] The respondent states that it had a secondment agreement with Redpath and its employment of the applicant was dependent on the existence of the commercial contract between it and Redpath. However, the respondent failed to attach the employment contract it concluded with the applicant to prove that the secondment agreement was an essential term of the employment contract it concluded with the applicant. In the absence of the employment contract between the applicant and respondent indicating that their employment relationship was dependent on the commercial contract between the respondent and Redpath, this Court is obliged to respect the contractual autonomy of the applicant and respondent as per *Brisley v Drotsky*. [7]

[20] The respondent’s reliance on the doctrine of supervening impossibility is impermissible for an arbitration award issued in terms of the LRA. If an arbitration award is not subject to review by any litigant, it is final and binding as if it were an order of this Court. That being the case, it follows that the arbitration award must be respected and duly be complied with expeditiously to avoid the accrual of interest as contemplated in section 143 (2) of the LRA. Therefore it must be emphasised that, once the arbitration award becomes an order of this Court, section 165(5)[8] of the Constitution of the Republic, 1996 becomes applicable. Therefore, non-compliance with the Court order constitutes a brazen assault on the rule of law and sullies the authority of the courts.

Costs

[21] Section 162 of the LRA confers discretionary powers on this Court to make an order for costs according to the requirements of the law and fairness. I appreciate that this is a labour case and the costs should not follow the results. However, the conduct of the respondent warrants some censure. The respondent ought to have approached the CCMA in terms of section 144 of the LRA for variation and it failed to do so. Further, the respondent disregarded, without valid reason, the failure to reinstate the applicant as set out in the arbitration award. This Court sent a clear message[9] that failure to comply with arbitration awards without resorting to requisite legal remedies would attract cost orders from this Court. I see no reason why the applicant, who has been without a salary for almost four years should be out of pocket for a glaring

misinterpretation of the law by the respondent.

Conclusion

[22] Arbitration awards, if not reviewed by aggrieved litigants must be complied with without any delay to accord with the rule of law. It is not open to an aggrieved litigant to ascertain which part of the arbitration award to comply with or disregard. The LRA provides remedies for any aggrieved litigant and such legal remedies must be expeditiously exploited to enforce employment rights. The issuance of arbitration awards is not the province of the litigants.

[23] In the result, the following order is made:

Order

1. The application is granted.
2. The arbitration award under case number LP3942-20 issued by Commissioner Jeffrey Nkuna under the auspices of the CCMA on 8 July 2020, is made an order of this Court.
3. The respondent is ordered to pay the costs.

S Sethene

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. D Matlatle Instructed by: Kwena Mahlakoane Attorneys Inc
For the Respondent: Mr FM Maluleka from FM Maluleka Attorneys

[1] SA Post Office Ltd v Communication Workers Union on behalf of Permanent Part-Time Employees [2013] ZALAC 20; (2014) 35 ILJ 455 (LAC) at para 21.

[2] Act 66 of 1995, as amended.

[3]

(1989) 10 ILJ 683 (LAC) at 694H-695A.

[4]

[2003] ZASCA 64; 2003

(3) All SA 1 (SCA).

[5]

[2009] ZASCA 154; 2010

(2) SA 498 (SCA) at para 13

[6] (1249/18)

[2020] ZASCA 45 (23 April 2020) at para 33.

[7] [2002] ZASCA 35; [2002]

(12) BLCR 1229 (SCA).

[8] Section 165(5) provides as follows: ‘An order or decision issued by a court binds all persons to whom and organs of state to which it applies.’

[8] Section 165(5) provides as follows:

‘An order or decision issued by a court binds all persons to whom and organs of state to which it applies.’

[9] ECCAWUSA obo Moyo v Super Spar, Polofields and Another (J547/22) [2023] ZALCJHB 330; (2024) 45 ILJ 543 (LC)

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