

SOUTH AFRICA / JUDGMENT

NEHAWU obo Matshexana and Others v Department of Higher Education and Others (P09/20) [2021] ZALCPE 14 (8 December 2021) [2021] ZALCPE 14

COURT

Labour Court Port Elizabeth

BEFORE

Z Lallie

CASE / FILE NUMBER

P09/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not

Reportable

CASE

NO: P09/20

In

the matter between:

NEHAWU
obo MATSHEXANA & 3 OTHERS Applicant
and
DEPARTMENT
OF HIGHER EDUCATION &
TRAINING First
Respondent
EASTERN
CAPE MIDLANDS Second
Respondent
TVET
COLLEG'B EDUCATION LABOUR
RELATIONS
COUNCIL Third
Respondent
ARBITRATOR
PUMEZA NDABAMBI Fourth
Respondent

Heard:

22 July 2021

Delivered: This judgment was down electronically by circulation to the Applicants' and the Second Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing- down is deemed to be 12h00 on 8 December 2021.

JUDGMENT

LALLIE J

- [1] The applicants launched this application seeking an order making an arbitration award issued by the fourth respondent on 19 November 2019 made an order of court. The application is opposed by the second respondent (the respondent). In the award, the fourth respondent found that the suspension of the individual applicants (the applicants) constituted an unfair labour practice and ordered the second respondent to uplift it with effect from 25 November 2019.
- [2] The applicants submitted that before the arbitration award which forms the subject of this application was issued, the second respondent changed the nature of the applicants' suspension by placing them in different business sites thus rendering them excess to establishment in those sites. They further submitted that they are still on suspension although under very strict conditions. They expressed the view that as lecturers they are denied the right to work as well as access to students. The second respondent opposed the applicants' suspension was uplifted even before the award was issued. The second respondent further alleges that it complied with the award and that this application is based on new facts which were not presented at arbitration and might constitute the basis of a different dispute.
- [3] Elaborating on the point in limine that this matter is moot the second respondent submitted that after the arbitration proceedings had commenced but before the award was issued, the second respondent uplifted the applicants' suspension and ordered them to report at its head office in Brickfields Campus. A number of conditions were attached to their return to work. In determining whether the second respondent's point is valid care should be taken not to allow employers to circumvent arbitration awards by taking steps which may undermine awards and attempt to oust this court from performing its supervisory role. The right of the Labour Court to determine whether an award should be made an order of court for purposes of enforcing it should not be hindered. Notwithstanding the steps the second respondent took before the award was issued, the right of this court to determine this application on its merits remains intact as a different conclusion will expose employees to the risk of having their rights in terms of arbitration awards diminished or thwarted. The point in limine can therefore not succeed.

- [4] Factors which have to be taken into account in deciding the application at hand are expressed as follows in *SA Post Office Ltd v CWU obo Permanent Part Time Employees*[1]:
- [21] ... What all this means is that before the Labour Court will grant an order sought in terms of section 158(1)(c) of the LA it must be satisfied that, at the very least:
- (i) the agreement, is one which meets the criteria set in s 158(1)c read with section 158(1A) of the LA, and if it is an award, that it satisfied the criteria set in section 142A of the LRA:
 - (ii) that the agreement or award is sufficiently clear to have enabled the defaulting party to know exactly what it is required to do in order to comply with the agreement or award; and
 - (iii) there has not been compliance by the defaulting party with the terms of the agreement or the award
- [22] Once the Labour Court is satisfied with all the above then it must, nevertheless, exercise its discretion whether to grant or refuse the order. In exercising the discretion, the Court must take relevant facts and circumstances into account, such as are necessary to satisfy the demands of the law and fairness. Necessarily, each case must be decided on its own facts and circumstances. There is, otherwise, no closed list of factors to be taken into account. A relevant factor is the time it took the party seeking the relief to launch the application to make the settlement or award an order of court. The Labour Court may, for example, be more reluctant to make an award for reinstatement of employees an order of court where the employees unreasonably delayed in seeking the enforcement of the award, yet a delay in years in seeking to make an award for payment of a sum of money may not be grounds for refusing to make the award an order of Court. Finally and most crucially, it must be remembered that the purpose of making an agreement or award an order of the Labour Court is to compel its enforcement, or enable its execution and not for some other purpose.
- [5] The validity and clarity of the award are not challenged. The only issue in dispute is whether the second respondent has complied with the award. The applicants alleged that there is non-compliance with the award which is denied by the second respondent. Suspension is the employer's unilateral conduct of refusing to receive an employee into service and allow that employee to enter and remain in service. It is common cause that the second respondent suspended the applicants. While the third respondent was in the process of arbitrating the dispute concerning whether the suspension constituted an unfair labour practice, the second respondent informed the applicant in letters dated 8 November 2019 that their precautionary suspension pending the outcome of the disciplinary hearing had been reviewed and formally lifted with effect from 11 November 2019. The lifting of the suspension was accompanied by a number of conditions which included that the applicants report at the second respondent's head office Brickfield Campus. The applicants reported for duty at the second respondent's head office on 13 November 2019 at 08h00.

- [6] The applicants' basis for alleging that the second respondent has failed to comply with the award is that they are refused the right to work as envisaged in section 23 of the Constitution of the Republic of South Africa, Act 108 of 1996. They also complain of being denied access to students which as lecturers they are entitled to.
- [7] On the date the award was issued the second respondent's conduct of refusing to receive the applicants into service had ceased. The applicants had entered the second respondent's service. The applicants have therefore not proved non-compliance with the arbitration award. The other complaints that the applicants have against the second respondent based on its conduct after the upliftment of their suspension fall outside the realm of section 158 (1)(c) of the LRA. Absent non-compliance with the arbitration award, the application cannot succeed because an order making an arbitration award an order of court is intended to assist applicants enforce arbitration awards. The applicants' suspension has already been lifted there is therefore no need for the enforcement of an award which requires the second respondent to uplift the applicants' suspension.
- [8] The second respondent sought a costs order against the applicants. On grounds of fairness the order may not be granted because the applicants did not act unreasonably in bringing this application.
- [9] In the premises, the following order is made:

Order:

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

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr

P. Matu of Nehawu

For the Respondent: Advocate

L. Voultsov

Instructed by: Joubert

Galpin Searle

- [1] 2013 12 BLLR 1203 (LAC) at para 21.

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