

SOUTH AFRICA / JUDGMENT

Samuels v Aspen Pharmacare Ltd (P556/17) [2017] ZALCPE 27 (20 December 2017)

[2017] ZALCPE 27

COURT

Labour Court Port Elizabeth

BEFORE

Potgieter

CASE / FILE NUMBER

P556/17

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IN

THE LABOUR COURT OF SOUTH AFRICA

HELD

AT PORT ELIZABETH

NOT

REPORTABLE

Case

Number P556/17

In

the matter between:

VERONIQUE
SAMUELS
Applicant
and
ASPEN
PHARMACARE LTD
Respondent

Heard:

19 December 2017

Delivered:

20 December 2017

JUDGMENT

POTGIETER, AJ

- [1] This is an application brought in terms of Section 158(1)(c) of the Labour Relations Act No 66 of 1995 (LRA) for an order –
- (i) “The Arbitration Award handed down under the auspices of the National Bargaining Council under case number ECICHEM -13/14 and handed down on 15 February 2016 be made an order of Court.
 - (ii) The Respondent pay the Applicant R53 606.84
 - (iii) The respondent to re-instate the Applicant on terms and conditions of employment applicable to the applicant immediately prior to her dismissal on 11 July 2014
 - (iv) The respondent to pay the Applicant interest on the amount of R53 606.84 at the legal rate from 15 February 2016 to date of final payment, both days inclusive.
 - (v) Costs of the application on an Attorney and Client scale
 - (vi) Further and / or alternative relief
- [2] The matter was placed on the unopposed roll.
- [3] The respondent filed an explanatory service affidavit on 19 December and filing notice with answering affidavit that was filed under case number PR30/16 (on 6 December 2017)

BACKGROUND

- [4] The applicant was dismissed on 11 July 2017 and obtained an award in her favour which the respondent took on review.
- [5] The respondent did not file the record as required within 60 days. The review application is thus deemed to have lapsed in terms of the provisions of item 11.2.3 of the Labour Court Directive
- [6] Mr. Thys, on behalf of the applicant argued that the matter should proceed as unopposed as the respondent did not give notice of intention to oppose but filed an answering affidavit under the review application case number.
- [7] Mr. Brandt on behalf of the respondent argued that the matter should be postponed to the opposed roll and tendered costs I was inclined to postpone the matter to the opposed roll but after consideration proceeded to hear the parties.
- [8] Mr Thys convinced me that I should deal with the matter on the unopposed roll

EVALUATION

- [9] Rule 7 is peremptory in nature the respondent was required to deliver a notice of opposition and answering affidavit within ten days. The respondent filed only an answering affidavit (albeit under the wrong case number)
- [10] The answering affidavit was on own admission not served on the applicant, it cannot thus be said that opposing papers were delivered as required by the rules.
- [11] Section 145(7) of the LRA is explicit to state that a review does not automatically suspend the operation of an award. It will only be suspended if security is furnished as provided for in subsection 8.
- [12] There is nothing before me suggesting that the respondent had sought an extension from the respondent or applied for an extension of time to prevent item 11.2.3. of the Practice Manual kicking in. The factual situation is thus that the review is withdrawn. There is thus no lis pending between the parties[1]
- [13] The respondent chose not to furnish security when it brought the review nor after the review was withdrawn (by not complying with the 60 day period)
- [14] The applicant established in her papers that she tendered her services as she was obliged to do in terms of the award and demanded

payment, both were refused.

- [15] I am convinced that the applicant is entitled to the primary relief sought in her papers.

COSTS

- [15] The applicant did not place anything before me in her founding affidavit to warrant attorney and client costs to be awarded. I am, however, convinced that costs should follow the result.
- [16] In the event the following order is made:

Order:

1. The arbitration award made by the NBCCI arbitrator on 15 February under the auspices of the NBCCI under case number ECCEM506-13/14 is made an order of the Court.
2. The respondent must discharge all of its obligations in terms of the Arbitration award.
3. The respondent pay interest on the amount of R53 606-84 at the rate of 10,25% from 15 February 2016
4. The respondent pay the costs of this application

POTGIETER, A J

Appearances

For the Applicant: Advocate M.Thys

Instructed by Butler Attorneys.

For the Respondent: Mr. Denver Brandt.

Kirchmanns Inc.

[1] See *Ralo v Transnet Port Terminals & Others* (2015) 36 ILJ 2653 (LC) at paragraph[10] “To the extent that the applicant contends that the meaning of the word 'deemed' is such that the dispute between the parties remains

unresolved and that the application has not been withdrawn, the meaning of 'deemed' in a context similar to the present has been

the subject of an instructive judgment by the Labour Court of Namibia. While *Municipal Council of the Municipality of Windhoek v Esau* 2010

(2) NR 414 (LC) (LCA 25/2009 12 March 2010) concerned the lapsing of appeals, the wording of the rule under consideration in that instance is not dissimilar. Rule 17(25) of the Rules of the Labour J Court of Namibia provide that an 'appeal to which this Rule applies must be prosecuted within 90 days after the noting of such appeal, and unless so prosecuted it is deemed to have lapsed'. The word 'deemed' in this instance was clearly considered to have conclusive effect — in the absence of the prosecution of the appeal within the prescribed period the appeal was held to have lapsed. (See also *Pereira v Group Five (Pty) Ltd & others* [1996] 4 All SA 686 (SE) at 698, where the court referred with approval to *Steel v Shanta Construction (Pty) Ltd & others* 1 973

(2) SA 537 (T), in which Coetzee J stated that the word 'deemed' means 'considered' or 'regarded' and is used to denote that 'something is a fact regardless of the objective truth of the matter'.) The plain and unambiguous wording of the Practice Manual is to the effect that the applicant must be regarded as having withdrawn the review application.

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