SOUTH AFRICA / JUDGMENT

Kekana v Amalgamated Beverages Industries (ABI), A division of the South African Beverages Ltd and Others (J1009/13) [2017] ZALCJHB 212 (5 June 2017)

[2017] ZALCJHB 212

COURT
Labour Court Johannesburg

BEFORE
Prinsloo

CASE / FILE NUMBER
J1009/13

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THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not Reportable

Case no: J1009/13

In the matter between:

SEOKA DAVID KEKANA

Applicant

and

AMALGAMATED BEVERAGES INDUSTRIES

(ABI), A DIVISION OF THE SOUTH AFRICAN

BEVERAGES LTD

First Respondent

CINDY MULLER

Second and further

(named in annexure “A” hereto)

Respondents

Heard: 02 December 2016

Order: 02 December 2016

Date of Reasons: 05 June 2017

REASONS

FOR ORDER

PRINSLOO J

Introduction

[1] On 2 December 2016 this matter served before Court as a contempt application. The application was opposed.

[2] The following order was made:

1. The application is dismissed with costs.
2. Mr Sebola is not entitled to charge a fee for the heads of argument he drafted and that were filed on 10 October 2016 and any fee charged and received for the heads of argument, is to be refunded to the Applicant within 7 days of date of this order.
3. Mr Sebola has to file an affidavit within 14 days of date of this order to confirm his compliance with this order.

[3] The Applicant subsequently requested reasons for the order issued on 2 December 2016 and I set out the reasons infra.

The background facts

[4] The Applicant was employed by the First Respondent (ABI) as a warehouse operator and after he was dismissed on 19 March 2010, he referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). An arbitration award was issued on 17 August 2010, finding the Applicant's dismissal substantively unfair and reinstating him with effect from 6 September 2010.

[5] ABI filed an application for review on 6 October 2010 and the review application as well as the Rule 7A(6)) and (8) notices were served on the Food and Allied Workers Union (FAWU) that represented the Applicant during the arbitration proceedings. FAWU did not oppose the application for review and at no stage did either the Applicant or FAWU inform ABI that the Applicant was no longer a member of FAWU or that FAWU was no longer representing the Applicant.

[6] The arbitration award was certified in terms of the provisions of section 143 of the Labour Relations Act[1] (the Act) on 3 June 2011.

[7] The said arbitration award was reviewed and set aside by this Court on 21 August 2012.

[8] On 10 January 2013 the Applicant filed an application under case number J 3273/12 in terms of the provisions of section 158(1)(c) of the Act to make the certified arbitration award an order of Court.

[9] The Applicant demanded compliance with the certified award on 22 April 2013, failing which contempt proceedings would be instituted. On 23 April 2013 ABI's attorneys responded and indicated that ABI would not comply with the award as it was reviewed and set aside by this Court on 21 August 2012 under case number JR 2547/10.

[10] On 24 May 2013 the Applicant filed a contempt of Court application under case number J 1009/2013, which ABI opposed on the basis that the award the Applicant seeks to enforce, has been reviewed and set aside.

The relief sought

[11] To provide a proper context to the reasons why the application was dismissed and not to paraphrase the relief sought incorrectly, the relief sought by the Applicant is captured verbatim. I say so as any person with a slight understanding of Court processes might think that the relief sought is captured incorrectly as the relief sought is not only impossible but also contradictory and incompatible. The relief sought is:

"1. Finding the managers i.e. Ms Cindy Muller (HR Manager), Mr. Justice Phetha, (Industrial Relations Manager) and Charlene Wilson (Employment Relations Specialist) of the First Respondent, guilty of being in contempt of Court on account of their wilful or mala fide refusal, failure, omission or delay to comply with the certified arbitration award of the CCMA under case number: GATW6506-10 (marked hereto as "CCMA1");

2. Imposing penalty of 25 days' imprisonment without option of fine;

3. Suspending 25 days' imprisonment without option of fine on condition the Applicant is reinstated within seven (7) days of this order, with full retrospective effect to the date of the First Respondent's receipt of the arbitration award, 26th August 2010, and on the terms and the condition of employment which are not less favourable than the terms and conditions of employment

that applied on the date of his dismissal, 13 March 2010,

4. Directing the Respondents to pay the costs of this contempt of Court application, jointly and severally, the one paying another to be absolved,

5. In the event the Court cannot grant the Contempt of Court application or relief in the light of the CCMA certified award marked as "CCMA1", granting further and/or alternative relief in the following terms:

5.1. declaring that the proceeding under case number JR2547/10 in as far as the non-joinder of Seoka David Kekana as a party and judgment Creditor to arbitration award under case NO: GATW6506-10 is null and void ab initio and of no force and effect and that the order of the Labour Court dated 21 August 2012 granted under case no: JR2547/10 (attached hereto marked “LC1”) is of no force and effect and is to be disregarded without the necessity of formal order setting it aside,

5.2. alternatively, rescinding such case no: JR2547/10 order dated 21 August 2012 in the order having reviewed and set aside the arbitration award issued by Commissioner Khomotjo Daniel Matji under the auspices of Commission for Conciliation, Mediation and Arbitration (CCMA) under case No: GATW6506-10 (attached hereto marked “K1”) for reasons that Seoka David Kekana as a judgment Creditor if the award was not cited or joined as a party in those proceedings, and thus the order was granted in the absence of the Applicant who is affected by the order,

5.3. Consolidating Case No: J3273/12 proceedings with the present case J1009/2013 proceedings,

5.4. making the arbitration award dated 17 August 2010 and issued by Commissioner Khomotjo Daniel Matji under the auspices of Commission for Conciliation, Mediation and Arbitration (CCMA) under case No: GATW6506-10 (attached hereto marked “K1”) an order of Court in terms of section 158 (1) (c) of Act 66 of 1995, as amended,

5.5. directing the First Respondent, Amalgamated Beverages Industries (ABI), a Division of the South African Beverages Ltd:

5.5.1 to reinstate the Applicant within seven (7) days pf this order with full retrospective effect to the date of the First Respondent’s

receipt of the arbitration award, 26th August 2010, and on the terms and the conditions of employment which are not less favourable than the terms and condition of employment that applied on the date of his dismissal, 13 March 2010,

5.5.2. to pay the costs of this application,

5.6. Further and/or alternative relief.”

[12] It is evident from prayers 1 to 4 that the Applicant pursued a contempt application. There are a number of difficulties with that. Firstly, the Practice Manual for the Labour Court[2] provides that a contempt application should be brought on an ex parte basis on a Friday and prescribes the order that should be sought in the notice of motion.

[13] This application was filed after the effective date of the Practice Manual and the Applicant should have followed the prescripts of the Practice Manual.

[14] In Ralo v Transnet Port Terminals and Others[3] the purpose of the provisions of the Practice Manual was stated as follows:

"The practice manual contains a series of directives, which the Judge President is entitled to issue. In essence, the manual sets out what is expected of practitioners so as to meet the imperatives of respect for the court as an institution, and the expeditious resolution of labour disputes [...]. While the manual acknowledges the need for flexibility in its application [...] its provisions are not cast in the form of a guideline, to be adhered to or ignored by parties at their convenience."

[15] The status of the Practice Manual was recently considered by the Labour Appeal Court in Rumba Samuels v Old Mutual Bank[4] where it was held that:

"The consolidated practice manual which came into operation on 2 April 2013 constitutes a series of directives issued by the Judge President over a period of time. Its purpose is, inter alia, to provide access to justice by all those whom the Labour Court serves; promote uniformity and/or consistency in practice and

procedure and set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court. Its objective is to improve the quality of the court's service to the public, and promote the statutory imperative of expeditious dispute

resolution."

[16] The Labour Appeal Court further held that the provisions in the Practice Manual are binding[5].

[17] The Applicant's application for contempt is not compliant with the Practice Manual and stands to be dismissed for that reason alone. However, there are more reason to dismiss the application as the arbitration award the Applicant seeks to compel compliance with, was reviewed and set aside on 21 August

2012. In the absence of a court order or certified arbitration award, contempt of Court is not possible and the Applicant's contempt application has to fail.

[18] It follows that the main relief sought by the Applicant is not competent and cannot be granted.

[19] In his heads of argument Mr Sebola for the Applicant submitted that ABI's only defence in respect of the contempt of Court proceedings is that the arbitration award was reviewed and set aside and that this defence could not succeed as it was 'solely founded upon wrong legal advice.' Mr Sebola submitted that it was insufficient for ABI, who was in breach of a Court order (i.e the certified arbitration award) to rely on legal advice and that they should be found to be in contempt of Court and punished accordingly.

[20] This argument goes to the second main relief Mr Sebola sought and persisted with in his heads of argument namely a declaratory order to the effect that the Labour Court order issued on 21 August 2012 under case number JR 2547/10, wherein the arbitration award was reviewed and set aside, be declared to be of no force and effect and is to be disregarded without the necessity of a formal order setting it aside.

[21] Mr Sebola submitted that "Rabkin-Naiker J has no jurisdiction to review and set aside the certified award deemed to be made an order of the Labour Court" and that insofar as a certified award is deemed to be an order of the Labour Court, the Labour Court is not competent to review and set aside its own orders.

[22] This argument shows a shocking lack of understanding of the status of a certified arbitration award and indicates an inability to interpret judgments on this issue. In casu Mr Sebola, as a practitioner in this Court, displayed nothing but a gross lack of understanding of Court process and the heads of argument filed and arguments advanced in this matter, highlighted his lack of understanding and insight.

[23] In the alternative the Applicant seeks the rescission of the Court order of 21 August 2012 on the ground that it was served on FAWU and not the individual personally. The Applicant's referral to the CCMA was made by FAWU on the Applicant's behalf, at the arbitration the Applicant was represented by a FAWU official and on the arbitration award the contact details of the Applicant are those of FAWU. ABI's review application was served on FAWU and there is no evidence that the Applicant communicated to ABI at any stage that he is no longer a member of FAWU or that he was no longer represented by FAWU.

[24] The Applicant's case that the Court order of 21 August 2012 should be rescinded because it was served on FAWU and not upon him personally, is without merit.

[25] The alternative relief sought by the Applicant also shows the lack of understanding of Court processes and without dealing with the remainder of the relief sought in detail, I will illustrate this point with reference to the relief sought in paragraph 5.3 of the notice of motion wherein the Applicant seeks for the arbitration award issued on 17 August 2010 to be made an order of Court. This is the same arbitration award that was reviewed and set aside on 21 August 2012 and the same award Mr Sebola has argued could

not be reviewed as it was already an order of this Court.

[26] I made an order that Mr Sebola is not entitled to charge a fee for the heads of argument he filed.

[27] In Early Bird Farm (Pty) Ltd v Food and Allied Workers Union and others[6] the Labour Appeal Court held that:

"Before concluding this judgment, there is one further matter that we wish to deal with. In this appeal the respondents' attorney was required to file heads of argument succinctly setting out the points to be argued at the hearing of the appeal. A document purporting to be heads of argument was timeously filed on behalf of the respondents. However, it was of such poor quality that it can hardly be described as heads of argument. This court could not derive any assistance from that document nor was the attorney helpful to the court at the hearing of the appeal. Properly prepared heads of argument play an important role in the adjudication of a matter - especially in an appeal court. Useful heads of argument cannot be prepared unless the person preparing them has taken the trouble to study the record and has done such research on the legal issues raised by the matter or appeal as may be necessary. Where heads

of argument are drawn without the necessary understanding of the facts or the evidence in the record and/or without doing the necessary research on the legal issues that arise in the appeal, such heads - and it is very easy to recognize this in heads of argument - are bound to be of no assistance to the court hearing the appeal. That kind of conduct on the part of a practitioner is unacceptable. A practitioner should not accept instructions or a brief in a matter if he does not have the time to do justice to a client's case. It is inexcusable for a practitioner to file heads of argument the contents of which bear no relation to the issues raised.

In this case the document purporting to be heads of argument filed by the respondents' attorney was totally unacceptable. The fault lies solely with the practitioner concerned and not with the respondents.

Accordingly, as a mark of its disapproval for this type of conduct, this court will make an order precluding the respondents' attorney from charging fees in connection with the heads of argument as well as for his appearance in this court."

[28] In Minister of Safety and Security v Mashego and others[7] it was held that

"It is not acceptable that practitioners should merely send up heads which are not helpful, which do not cite authorities and which

suggest hurriedness of preparation. Counsel draw heads for the purpose of assisting the court. Whilst, in the end, the court does

its own research, and seeks to satisfy itself that the authorities referred to actually say what counsel say they say, it goes without saying that in a case where counsel have worked hard and produced material that shows that they have researched the topic of contestation, the courts become hugely indebted to the practitioners when they have to give their reasoned judgments."

[29] In casu the heads of argument prepared by Mr Sebola indicated that he has no understanding of the issues and has not researched the topics he addressed properly. The heads of argument were of no assistance to this Court and therefore Mr Sebola is not entitled to charge a fee for that.

[30] It is for these reasons that I issued the order as I did on 2 December 2016.

Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant : Advocate Sebola

Instructed by : Nchupetng Attorneys

For the Respondent : Advocate Z.M Navsa

Instructed by : Bowman Gilfillan Attorneys

[1] Act 66 of 1995 as amended.

[2] Came into effect from 2 April 2013

[3] [2015] ZAECPEHC 68 (17 June 2015)

[4] Case no DA30/15 handed down on 25 January 2017.

[5] Rumba Samuels at para 15

[6] (2004) 25 ILJ 2135 (LAC) par 50

[7] (2003) 24 ILJ 1690 (LC)

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