IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 61/21

In the matter between:

FIDELITY FUND SECURITY SERVICES **Appellant**

and

PATIENCE SIZIWE NGQOLA **Respondent**

Heard: **17 March 2022**

Delivered: **07 April 2022**

Coram: **Coppin JA, Savage et Tokota AJJA**

JUDGMENT

TOKOTA AJA

Introduction

[1] The respondent approached the Labour Court in terms of section 77(1) and 77(3) of the Basic Conditions of Employment Act No. 75 of 1997 (the Act) seeking an order directing the appellant to pay her arrear salary from the date of her dismissal to the date of her reinstatement, as ordered by the arbitrator at the Commission for Conciliation, Mediation and Arbitration (CCMA). She was successful in her application. With leave of the Court *a quo* (Snyman AJ) the appellant is appealing against the whole of the judgment and order of the Labour Court.

Factual background

[2] The respondent was employed by the appellant as a security officer since 2 February 2011. Not long after the respondent was appointed, the appellant was not happy with her work performance. During July 2011, the respondent was reprimanded for poor work performance. On 15 August 2011, a letter was addressed to her informing her that since there was no change in her poor work performance, it was decided that she be transferred to Robertsville, Guarding Division and was offered a lower salary than that which she was earning. She was advised that should she decline the offer her contract of employment would be terminated and her last date of working shift would be 31 August 2011.

[3] The respondent did not report at the new station and she was then dismissed effective from 31 August 2011. She then referred a dispute of unfair dismissal to the CCMA for conciliation on 14 September 2011. When the conciliation failed, the matter was referred to arbitration which was set down for 9 March 2012. The arbitrator found that the dismissal was both procedurally and substantively unfair. He ordered the appellant to reinstate the respondent. The appellant was further ordered to pay the respondent an amount of R31 470.11 being the arrear salary calculated from the date of dismissal to date of her reinstatement (which would have been 26 March 2012 in accordance with the award). The award was made on 18 March 2012 and the respondent was directed to report for duty on 26 March 2012

[4] In April 2012, the respondent reported for duty at her place of employment where she met the HR Manager, one Mr Martin Keevy, who informed her that she was not allowed to resume work because they were taking the award on review. He offered her a settlement of R20 000, but she rejected the offer.

[5] On 12 June 2012, the respondent brought an application in the Labour Court seeking an order to make the award an order of Court in terms of section 158(1)(c) of the Labour Relations Act, No 66 of 1995 (the LRA). Although the appellant filed a notice to oppose that application, no answering affidavit was filed and the matter proceeded on an unopposed basis. The arbitration award was duly made an order of Court on 17 October 2012.

[6] On 19 September 2013, after a period of about 12 months since the arbitration award was made an order of Court, the appellant filed an application to review and set it aside.

[7] On 17 September 2013, on the strength of the award that had been made an order of Court, the respondent had obtained a writ of execution against the appellant which was served by the Sheriff on the appellant on 30 September 2013. Consequently, the appellant paid the arrear salary specified by the arbitrator in the award, namely, R31 470.11.

[8] On 23 July 2014, the respondent brought an application in the Labour Court seeking an order dismissing the application for review in terms of Rule 11 of the Rules of the Labour Court, but that application was not pursued any further.

[9] With regard to the review application - there was an issue of an incomplete record. The parties met and finalised the reconstruction of the record in January 2015. Despite the finalisation of the reconstruction, the appellant remained supine and did nothing further to prosecute the review application. On 2 September 2015, the respondent brought a second application to dismiss the review, but this application was also not pursued any further.

[10] On 15 December 2016, that is, after a period of over four years after the order making the award an order of Court was granted, the appellant brought an application for the rescission of the order of the Labour Court dated 17 October 2012.[1]

[11] On 20 January 2017, both, the application for the review of the arbitration award and for the rescission of the Labour Court order dated 17 October 2012, were dismissed.

[12] On 15 February 2017, the appellant addressed a letter to the respondent requesting her to report for duty. Further according to the request, she was to see one, Mr Wickus Payne, at the appellant's Head Office in Roodepoort. On

[1] Rule 16A(2)(b) of the Rules of the Labour court provides that and application for rescission must be brought within 15 days of the party becoming aware of the order.

16 February 2017, the respondent duly reported for duty as requested. On her arrival she was required to sign a new contract with less favourable conditions and in a lower position than the position she had previously occupied before her dismissal. On the same date (16 February 2017), the respondent's attorneys addressed a letter to appellant contending, *inter alia*, in essence that the requirement that the appellant sign a new contract amounted to a re-employment, instead of reinstatement as ordered by the arbitrator, and also took issue with the appellant's rank which had been reduced from grade A to grade C.

[13] On the 17February 2017, the respondent did not go to work. Her attorneys addressed a letter to the appellant informing it that the respondent had no money to travel to work and was forced to tender her resignation. The decision to resign came about as a result of the downgrading of her rank and the request that she signs a new contract.

[14] The order of the Labour Court against which this appeal is directed effectively gave effect to the arbitration award of the arbitrator (which was subsequently made an order of Court), with necessary adjustments in respect of the payment of arrear salary. The Labour Court ordered the appellant to pay a sum of R209 085.64, being the respondent's arrear salary from 30 April 2012 to October 2012 and for the period 12 September 2013 to 16 February 2017, calculated at the rate of R4 495.73 per month with interest thereon amounting to R91 440 within 10 days of the date of the order.

[15] The Labour Court held that the respondent was not entitled to payment after 17 October 2012 to 12 September 2013 as she did not tender her services, notwithstanding the fact that the arbitration award had been made an order of Court. It reasoned that from that period until 13 September 2013 when the review application was launched nothing stopped the respondent from reporting for work. It held further that from 13 September 2013, the pending review application stood on the way of the respondent tendering her services. No cross-appeal has been filed in this regard and therefore nothing further needs to be said in respect thereof.

Discussion

[16] It is now more than 11 years since the appellant was ordered to reinstate and compensate the respondent. For a period of over 14 months, the appellant did nothing about the award except denying the respondent the right to resume her duties as directed by the arbitrator.[2] It was only in September 2013 that it brought a review application in the Labour Court. By that time the award had already been made an order of Court. The appellant was aware of this award but simply ignored it and more than 10 months thereafter simply brought a review of the arbitration award. It was only on 15 December 2016, i.e. more than three years later, that the appellant brought an application for rescission of the Court order of 17 October 2012. The Labour Court's decision to make the award an order of Court operated automatically from the date of the Commissioner's award. The rescission and review applications were correctly dismissed on 20 January 2017. The appellant never appealed against that dismissal and yet still never complied with the Court order embracing the award.

[17] Primarily, the appellant argues that the respondent was never reinstated. It is contended that Court merely ordered the employer to reinstate her. The contract of employment which may give rise to payment of salary, so the argument went, can only come about once the employee has tendered her services and the employer accepted the tender by allowing her to resume duties. It contends that in *casu,* the respondent was never reinstated and therefore is not entitled to any arrear payments. Accordingly, so it was argued, the Labour Court erred in making the order directing the appellant to pay arrear salary to the respondent. I cannot agree.

[18] The argument advanced by the appellant overlooks, firstly, the fact that the respondent reported for duty in April 2012 and tendered her services. Mr Keevy, on behalf of the appellant, did not allow her to resume duties stating that the matter would be taken on review and therefore is not yet finalised. He even offered her R20 000.00 as settlement which the respondent rejected.

[2] Section 145 of the LRA provides for the time limit of six weeks within which the review application must be brought.

This evidence was never challenged. Secondly, until the order to reinstate the respondent was set aside or otherwise suspended in terms of the law, it remained binding on the employer, and the appellant was to give effect to it. In any event, save where there is a statutory provision to that effect or an order of Court, a review does not suspend the operation of the order of Court.[3] Section 145(7) of the LRA read with sub-section (8) is in line with this principle save where the applicant has furnished a security to the satisfaction of the Court in accordance with sub-section 8. Thirdly, on 17 February 2017, the appellant's attorneys addressed a letter to the respondent's attorneys and informed them that the respondent would be placed at Head Office in the control room until a position of her previous placement became available. Lastly on this topic, the appellant's attorneys further stated that the respondent would be earning the same salary she earned before her dismissal. Nothing can be clearer than this as reinstatement.

[19] In light of the above, the appellant cannot now deny that the respondent was ever reinstated. On 15 February 2017, the appellant requested the appellant to report for work, and she did. The fact that the appellant requested her to sign a new contract does not negate its stated intention at the time of requesting her to report for duty, namely to reinstate her in compliance with the Court order. In the circumstances, I conclude that the respondent was indeed reinstated and her contract of employment ensued until she resigned on 16 February 2016. Consequently, the Labour Court cannot be faulted when it calculated her arrear salary to the date on which she resigned. The appeal has no merit and must fail.

Costs

[20] The appellant's wilful refusal to comply with the Court's order that it reinstates the respondent and its deliberate and apparent delaying tactics are deplorable and merit sanction.

[3] *Snyders v De Jager* 2017 (3) SA 545 (CC) ; (2017 (5) BCLR 614; [2016] ZACC 55) para.37;

[22] The general rule in civil matters is that costs will follow the result. This Court in *Wentworth Dorkin*[4] per Zondo JP (as he then was), held that "[t]he relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness.[5] In matters involving employment relationship usually no order as to costs is made. The rationale behind the principle is to keep the relationship between the parties intact. That is not applicable in the present matter. Here the appellant was obviously hell-bent on unfairly exhausting, draining and frustrating the respondent emotionally and otherwise, resulting in her resignation in the end. Further, nothing can be so traumatic than to wait for the finalisation of one's case for almost 12 years. For the respondent to be saddled with the burden of costs as a result of the appellant's flagrant disregard of the Court's order, would bring about an inequitable result. This, unfortunately, is one of those rare cases in labour law where costs should follow the result.[6] The law and fairness demand it.

Order

The appeal is dismissed with costs.

B R Tokota

Acting Judge of the Labour Appeal Court

[4] *MEC for Finance, Kwazulu-Natal, and another v Dorkin NO and Another* (2008) 29 ILJ 1707 (LAC) para 19. *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC) (2018 (6) BCLR 686; [2018] ZACC 1): at paras 24-26; *Union for Police Security and Corrections Organisation v S A Custodial Management (Pty) Ltd and Others* (2021) 42 ILJ 2371 (CC) at para 39.

[5] Section 162 and 179 of the LRA provide that the Labour Court and the Labour Appeal Court respectively may make an order of costs having regard to the conduct of a party in proceeding or defending the matter.

[6] *NUMSA on behalf of Fohlisa and others v Hendor Mining Supplies (A Division of Marschalkbeleggings (Pty) (Ltd* (2017) 38 ILJ 1560 (CC) para.57*; Equity Aviation Services (Pty) Ltd v CCMA* 2009 (1) SA 390 (CC) ((2008) 29 ILJ 2507; 2009 (2) BCLR 111; [2008] ZACC 16) para 58.

Coppin JA and Savage AJ concurred in the judgment.

APPEARANCES

FOR THE APPELLANT	G L van der Westhuizen
	Instructed by Crafford Attorneys
FOR THE RESPONDENT:	Mr A Goldberg
	From Goldberg Attorneys