

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO D 223/98

DATE 1998/09/16

In the matter between:

R BHAL

and

LA LUCIA SANDS

Applicant

Respondent

BEFORE THE HONOURABLE MR ACTING JUSTICE
MASERUMULE

—

ON BEHALF OF APPLICANT:

MR R HARKOO

ON BEHALF OF RESPONDENT

MR M ALEXANDER

JUDGMENT DELIVERED ON:

1/2614

ON RESUMPTION:

16 September 1998

J U D G M E N T

MASERUMULE AJ:

[1] In this matter the applicant has brought an application to have an arbitration award, dated 27

March 1998, made an Order of Court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995. The application is opposed by the respondent.

[2] The applicant was reinstated in terms of the arbitration award referred to above, with retrospective effect to 21 December 1997, having been dismissed on the 21st of November 1997.

[3] Following the issue of the award, the applicant was not immediately reinstated due to a view held by the respondent at the time that the award was reviewable. However, the applicant was eventually requested to tender his services in terms of the arbitration award, and he did so on the 29th of July 1998.

[4] The applicant alleges in an affidavit filed of record, that when he tendered his services on the 29th of July, his tender was not accepted and he was told to return the following day. He further alleges that when he returned the following day, his tender was once more not accepted and he was told by the respondent's Mr Collins that there was no work for him.

[5] The applicant further alleges that on that same

day, the 30 July , the respondent's Mr Collins enquired from him whether he did not prefer to be retrenched, to which the applicant alleges he said that he preferred to be reinstated.

[6] The applicant further alleges that when he returned to work on the 4 August 1998, being the date on which he was told to once more tender his services, he was told by Mr Collins, in the presence of his co-employees, that he would not be reinstated.

[7] The respondent, on the other hand, takes the view that the applicant was reinstated on the 29th of July 1998, that the respondent has tendered to pay him the arrear wages due to him from the date of the retrospective reinstatement and that, accordingly, the respondent has complied with the arbitration award and the Court should therefore exercise its discretion against making the arbitration award an Order of Court.

[8] The respondent has also filed a supplementary affidavit which deals with some of the allegations made by the applicant in his affidavit. It is instructive to note that the deponent to the respondent's supplementary affidavit, Mr Collins, who is referred to in the applicant's affidavit as the person who refused

to accept the applicant's tender, does not deal with the specific allegations raised by the applicant as to what occurred on the 29th and 30th of July as well as the 4th of August 1998.

[9] Mr Collins, in his affidavit, seems to be content to simply state that the fact that the applicant was reinstated is common cause in the face of a specific denial by the applicant in the affidavit filed prior to the filing of the respondent's supplementary affidavit.

[10] On the uncontested allegations contained in the applicant's affidavit, it appears that the applicant tendered his services on the 29th, which tender was not accepted; that he further tendered on the 30th of July and was told that he had to make a choice between persisting with his tender and retrenchment; and that on the 4th he was told in the presence of his fellow-employees that he would not be reinstated.

[11] I do not know why the respondent has chosen to leave these allegations uncontested but given the fact that it had the opportunity to contest them if it so wished, I am therefore inclined to accept the correctness of the undisputed allegations made by the

applicant as reflecting what occurred on the three days when the applicant tendered his services.

[12] On those facts, I cannot find, and I am unable to find that the respondent accepted the applicant's tender. That reliance ought to be placed on a handwritten note which purports to be a resignation letter by the applicant dated 4th August 1998 is, in my view, misconceived. Unless the respondent had accepted the applicant's tender on the 29 July, the applicant could not factually and legally be said to have resigned on the 4th of August 1998. He had to be reinstated before he could resign.

[13] It is also necessary to note that the events of the 4th of August and the circumstances under which the note was written, are set out in the applicant's affidavit and are not dealt with nor challenged by the respondent in its supplementary affidavit. The applicant alleges that he wrote the note after Mr Collins told him that he would not be reinstated and that he did so on the instructions of Mr Collins. Again, the respondent had the opportunity to put a version to the Court as to precisely what occurred during the exchange to which the applicant refers, to

but has elected not to do so.

[14] The respondent was also required to compensate the applicant in the form of back-pay from the 21st of December 1997. It is common cause that as at the date of the hearing of this application, the applicant has not yet received any of the monies due to him in terms of the arbitration award.

[15] The respondent states in its supplementary affidavit that its attorneys confirmed that the applicant should collect his outstanding money from the respondent. Neither a letter nor any other document, nor an averment by the attorney, under oath has been tendered as evidence that in fact such tender was made. In the circumstances, I am inclined to take the view that as matters stand, there has been no unequivocal tender by the respondent to pay the applicant the back-pay due to him, nor has the respondent, for that matter, actually paid such back-pay.

[16] In the circumstances, the Court is of the view that the discretion which the Court has must be exercised in favour of the applicant as, on the papers filed of record, it cannot be said that the respondent has in

fact complied with the arbitration award.

[17] The Order that I make is accordingly as follows:

O R D E R

1. The arbitration award dated 27 March 1998 is made an Order of Court.
2. The respondent is to pay to applicant's costs.

MASERUMULE AJ