

IN THE LABOUR COURT OF SOUTH AFRICA

Held in Durban

Case No : D338/98

In the matter between :

M. G. MEYER

Applicant

and

W. C. BUTLER t/a WACK-EM

Respondent

JUDGEMENT

1. Under the case number recorded above Applicant M. G. Meyer sought and was granted an order in terms of s158(1)(c) of the Act making the arbitration award made in her favour an order of this Court. Pursuant to obtaining the order and the Respondent's failure to comply therewith the Applicant issued a warrant of execution against Respondent's property. An attachment was duly made and the Respondent goods removed by the sheriff.

2. The Respondent then brought an application in which he sought to suspend the attachment. This application was opposed and the matter set down for hearing on 30 November 1999. On 30 November Respondent's Counsel indicated that Respondent did not wish to pursue the application and quite rightly so and tendered the Applicant's party and party costs which was accepted by the Applicant. To state that application sought by the Respondent was devoid of any merit would be a gross understatement.

3. Although the application was not being proceeded with, on perusing the file I found that the granting of the order by this Court in terms of s158(1)(c) to be clearly wrong. I then informed the parties that I would be rescinding the order of this Court on my own motion as provide for in s165.

4. Applicant's Counsel requested an opportunity until 1 December 1999 to consider the matter and be allowed to argue why, if at all, I should or could not rescind the order as stated earlier. This opportunity was granted.

5. By way of background it is recorded that on

5.1 On 23 October 1997 the commissioner at the CCMA made an award in favour of the Applicant against the Respondent as follows :

- (1) The dismissal of the Applicant by the Respondent without consultation was unfair ;
- (2) Respondent is ordered to pay Applicant an amount of R 80 500.00 as compensation ;
- (3) Respondent to pay Applicant's costs of the matter.

5.2 The Respondent failed to comply with the order and on 16 April 1999 this Court made the aforesaid award an order of Court at the instance of the Applicant in terms of s158(1)(c). The order was granted on an undefended basis and in the absence of the Respondent. The Court order simply states that "the arbitration award dated 23 October 1997 is made an order of Court."

5.3 Pursuant to the arbitration award being made an order of this Court a warrant of execution against Applicant's property was issued and his assets were attached and removed.

6. The problem I have in this matter is the arbitration award itself. In the paragraph headed "analysis of the evidence" the commissioner records as common cause that the Applicant was dismissed by the Respondent for operational reasons.

7. This being common cause the commissioner fails to state why it is that he arbitrated the

dispute between the parties. In terms of s191(5)(b)(ii) when an employee's dismissal is based on the employer's operational requirements such dispute may not be arbitrated upon by the commissioner but referred to the Labour Court. The only circumstance in which a dispute relating to dismissal by reason of the employer's operational requirement may be arbitrated by the CCMA or Council is when both the parties agree to the matter being arbitrated as provided for in s141(1). There is nothing before this Court nor was there an allegation in the Applicant's papers in its application in terms of s158(1)(c) that such agreement was in fact arrived at.

8. If there was no such agreement then the arbitration award is in fact a nullity. A commissioner cannot clothe himself with jurisdiction which is not specifically provided for in the Act. If on the other hand the parties agreed to the dispute being arbitrated by a commissioner at the CCMA, then the party seeking for the arbitration award to be made an order of Court should have alleged in its application that the arbitration was conducted with the agreement of both parties.
9. Having perused the arbitration award and the application in terms of s158(1)(c) I have not found any evidence that the commissioner was in fact compelled to arbitrate the matter before him. In the absence thereof this Court should not have made the arbitration award an order of the Court.
10. Counsel for the Respondent however submitted that since s141(1) does not prescribe the form of agreement required such agreement may be implied or tacit. Counsel referred to various authorities none of which in my view support the submission that where agreement is specifically required to clothe jurisdiction upon an administrative body such as the CCMA which may not otherwise have jurisdiction same can be implied simply by virtue of the fact that the parties participated in the proceedings. Counsel's further argument was that an agreement should be implied because both parties were legally represented at the arbitration proceedings and the arbitrator was a senior commissioner and therefore all of them must have been aware of such basic requirement

and only proceeded because they all accepted that none had any objection to the arbitration process.

11. I find the above argument untenable. I believe s141(1) of the Act requires the parties to a dispute to expressly agree to the arbitration process in matters where the dispute relates to dismissal based on operational requirements. The requirement that the agreement must be express is inescapable because it is not always that the parties will be represented by legal Counsel and whether represented or not be aware that the dispute which is to be arbitrated is one which, but for an agreement between them, be adjudicated upon by this Court. It is only when the parties are aware of the forum in which the dispute is required normally to be heard can they exercise their right to agree or not to agree to the arbitration proceedings. Merely because the parties proceeded with the arbitration cannot mean that they knew that their dispute was one which should have been referred to this Court and for that matter it cannot be said that they agreed to the dispute being arbitrated because of their participation in the process or because the fact that they were represented by legal Counsel.
12. In the circumstance unless there is express agreement that a dispute relating to a dismissal based on the employer's operational requirement be arbitrated it cannot be arbitrated.
13. Counsel further argument of some merit was that this Court could not rescind the order made by it in the present matter because it was not erroneously granted. This is so, he submits because this Court cannot have any knowledge of whether or not the judge who presided over the application in terms of s158(1)(c) considered the question of agreement or not. This argument can be easily dispensed with. It is not disputed by Counsel that that there was no express agreement between the parties that the dispute should have been arbitrated. In the circumstances to make the arbitration award an order of Court was clearly erroneous and therefore liable to be rescinded.

14. The final issue I need to decide upon is whether or not I am prepared to make the agreement between the parties an order of this Court. As stated earlier the Respondent sought to stay the execution of his assets to liquidate his indebtedness to the Applicant pursuant to the order of this Court. As this Court has now decided that the order should not have been granted in the first instance, should this Court then make an agreement between the parties which has costs implication an order of Court. Ordinarily I would believe not but the application sought by the Respondent was so devoid of merit that had the application not been withdrawn and the order of this Court not interfered with the likelihood of a punitive cost order being granted against the Respondent was almost inevitable.

15. In the result the following orders are made :

15.1 The order of this Court dated 16 April 1999, making the arbitration award made under the auspices of the CCMA under its case number KN 1623 an order of this Court, is rescinded and set aside.

15.2 The agreement between the Applicant (Respondent in the application under the same case number) and Respondent (Applicant in the application) to the effect that the application is withdrawn with Respondent to pay Applicant's party and party costs up to 30 November 1999 is made an order of this Court.

WAGLAY J

LABOUR COURT OF S. A

(Date of Judgement 02 December 1999)