

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J92/17

In the matter between:

SAMWU obo ALPHEUS MALATSI

Applicant

and

GERT SIBANDE DISTRICT MUNICIPALITY

Respondent

Heard: 17 JULY 2018

Delivered: 28 FEBRUARY 2019

JUDGMENT

PIENAAR, AJ

Introduction

- [1] This is an application in which the Applicant seeks an order for the payment of arrear salaries from 26 August 2013, (the date on which he was reinstated in terms of an arbitration award) up to 17 October 2016 (the date on which he was actually reinstated by the Respondent).

Background

- [2] The relevant facts are canvassed in the papers, and I need not deal with them in any detail here insofar as they are largely a matter of common cause. It is sufficient to record for present purposes that on 1 August 2013, the South African Local Government Bargaining Council handed down an arbitration award in terms of which the Commissioner found that the Applicant's

dismissal was procedurally and substantively unfair and reinstated the Applicant.

[3] In this regard, the Commissioner further, ordered that:

"[37] The Applicant must report for duty on the 26th August 2013.

[38] The respondent must not pay the applicant his arrear wages from the date of dismissal up to the date of reinstatement and same must be treated as a period of unpaid suspension."

[4] It is common cause that the Respondent did not reinstate the Applicant and the aforementioned arbitration award was taken on review by the Respondent. The review application was filed on 26 September 2013. It is significant to note that in the review application, the Respondent (Applicant in the review application) included in its Notice of Motion, a prayer that the arbitration award be stayed pending this Court's decision on the review application.

[5] The Applicant alleged in its papers that he was "*not allowed back to work as the Respondent informed me that they filed a Review Application.*" The review application was dismissed with costs in terms of a court order dated 2 June 2016.

[6] The Applicant submits that he reported for work on 04 July 2016 and was prevented from working (he was refused access and municipal security was called to remove him from the premises).

[7] The Respondent brought an application for leave to appeal against the Judgment of the Labour Court dismissing the review application however, the Respondent withdrew the application for leave to appeal sometime in October 2016¹.

[8] The Applicant instructed his attorney to address correspondence to the Respondent² however same was not attached to the Founding Affidavit and was only subsequently attached to the replying affidavit.

¹ The date of launching and withdrawal of the Application for Leave to Appeal does not appear from the papers.

² Which was referred to as being contained in an Annexure "AM3"

[9] In terms of the said correspondence³, dated 14 October 2016, the Applicant's attorneys set out as follows:

9.1 The Applicant had reported for duty on 4 July 2016 and was prevented from taking up his position,

9.2 The Respondent must comply with the arbitration award,

9.3 The Applicant would return to work; and

9.4 The Respondent must pay his wages from the 26 August 2013 up until Monday, 17 October 2016.

[10] On 13 October 2016, the Respondent addressed correspondence to the Applicant in terms of which, in summary, stated that the Applicant had to report to the office of the Municipal Manager on 17 October 2016 at 07h30 and that it would not pay his arrear salaries from the date of dismissal up to the date of reinstatement (which it deemed to be 17 October 2016) and that same would be treated as a period of unpaid suspension.

[11] The Applicant submits that the date of reinstatement as per the arbitration award is 26th August 2013. As he tendered his services he is entitled to his arrear salaries from 26 August 2013 until 17 October 2016 and not only from 17 October 2016 as the Respondent alleged.

[12] The Applicant therefore claimed an amount of R 813 762-78. In anticipation of the Respondent's stance in the matter, the Applicant pleaded in his founding affidavit that in the event of this Court finding that part of his claim has prescribed for that period, he is prepared to abandon the amount of R 107 074-05.

[13] The Respondent opposed the Applicant's claim and submitted that the date of reinstatement was 17 October 2016 as this was the date upon which the Respondent withdrew its application for leave to appeal against the judgment of the Labour Court dismissing the review application. Therefore, the Respondent submitted that it is only liable to pay the Applicant his arrear salary from 17 October 2016 and not from the date he was ordered to report for duty in terms of the arbitration award.

³ "AM3"

- [14] The Respondent in addition, relied upon additional reasons for refusing to pay the Applicant's arrear salaries prior to 17 October 2016 as it maintained that the Applicant "*never tendered his service to the Respondent and was not bound to devote his whole time and attention to Council's service as he had been dismissed the Respondent is not obliged to remunerate the Applicant retrospectively.*"
- [15] The Respondent in its Heads of Argument, submitted that the claim for arrear salaries is a contractual claim and since no contractual claim has been instituted by the Applicant he is not entitled to payment of same.
- [16] It is significant that the Respondent did not plea prescription in its answering affidavit. However, it is the Applicant who raises prescription in his founding affidavit and Heads of Argument.
- [17] Both sides relied on the judgment of the Labour Appeal Court (LAC) in *Coca Cola Sabco (Pty) Limited v Van Wyk*⁴ but for different reasons.
- [18] The judgment in *Coca Cola Sabco* supra is authority for the proposition that if an employee, after the reinstatement order and during the time that the employer exercises its review and appeal remedies to exhaustion, tenders their labour they do so in terms of the employment contract. The employee is therefore entitled to payment in terms of the contract of employment. The claim is therefore a contractual one, wherein the employee would have to set out sufficient facts to justify the right or entitlement to judicial redress. The employee would *inter alia*; have to prove that the contract of employment is extant; that they tendered their labour in terms thereof and that the employer refuses or is unwilling to pay them in terms of that contract. The employer on the other hand would have all the contractual defences at their disposal.
- [19] In the LAC decision of *South African Football Association v Mangope*⁵, the employee sued SAFA in the Labour Court by way of application proceedings for damages and an order declaring the appellant's decision to terminate his contract of employment unlawful and in breach of contract. The LAC found that application proceedings to bring such claims were permissible provided

⁴ (2015) 36 ILJ 2013 (LAC).

⁵ (2013) 34 ILJ 311 (LAC).

that there were no disputes of fact which had to be resolved through oral evidence.

[20] I am satisfied that there are no material factual disputes between the parties that require the leading of oral evidence and that the Applicant is permitted to bring his claim for arrear salaries (which is indeed a contractual claim) via motion proceedings.

[21] If an arbitration award of reinstatement is made, but reinstatement is delayed, the employee will still be entitled to his salary if he tendered his services in the period of delay.

[22] In this regard, the Applicant firstly alleges in his Founding Affidavit⁶ that despite the arbitration award ordering him to report for duty on 26 August 2013, he was not allowed back to work as the Respondent informed him that it filed a review application. In its opposing affidavit the Respondent admits this.⁷

[23] In any event, as I have mentioned above, the Respondent's Notice of Motion in the review application specifically included a prayer that enforcement of the award be stayed pending the determination of the review application.

[24] The Respondent subsequently in its affidavit maintained that the Applicant, during this period, did not tender his services as he *"was not bound to devote his whole time and attention to Council's service as he had been dismissed the Respondent is not obliged to remunerate him retrospectively."* I find this assertion by the Respondent to be wrong in law.

[25] In any event, the Respondent's representative conceded in argument that Applicant's conduct amounted to a tender of services.

[26] In *Sampson v South African Post Office SOC Ltd*⁸, the Honourable Whitcher J found that the failure to tender services after being reinstated or after an order of specific performance, can have very serious legal consequences for an employee. However, the employer in that matter demonstrated an attitude towards the arbitration award that was plain. It disputed the award and

⁶ Paragraph 4.3 on pg 6 of the Indexed Pleadings.

⁷ Paragraph 6 on pg 35 of the Indexed Pleadings.

⁸ (2017) 38 ILJ 2368 (LC).

sought to review same. The employer therefore, regarded the legal position to be that the employee was still dismissed and consequently would not have accepted a tender of services.

- [27] The aforementioned judgment is apposite to the facts of this matter where the Respondent, by its conduct in taking the arbitration award on review (and including a prayer in its Notice of Motion that the arbitration award be stayed) regarded the Applicant as dismissed and in fact, the basis upon which it seeks to resist the claim for arrear salaries is that it regarded the Applicant status during the period of the review application as being a dismissed employee.
- [28] As the Applicant did tender his services as required by law he is entitled to his salary for the period between 26 August 2013 and 17th October 2016.
- [29] Regarding prescription of all or a part of the Applicant's claim, the parity of votes in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* (Myathaza) led to none of the judgments securing a majority. But, on either approach, that of Jafta J and Zondo J, or that of Froneman J, the Applicant's arbitration award ordering his reinstatement, has on the facts before me not prescribed.
- [30] According to this judgment, in dealing with claims for arrear salaries, prescription on such claims begins to run from the date on which the review application was dismissed, as the dismissal of the review application meant that the arbitration award was upheld.
- [31] In the present matter prescription started running from 2 June 2016, i.e. the date on which the review application was dismissed. As this application was lodged on 27 January 2017, it meant that only a part of the claim has prescribed, as was correctly submitted by the Applicant.
- [32] It is common cause that the Applicant earned an amount of R21 414-81 per month gross salary at the time of his dismissal.
- [33] I accordingly make the following order:

Order

1. The Respondent is ordered to pay the arrear salary to the Applicant in the amount of R 706 688-73 plus interest within 14 days of this order, which amount is calculated as follows:
 - 1.1 R813 762-78 i.e. 38 months (August 2013-October 2016) x R 21 414-81 (monthly salary) minus R107 074-05 (the prescribed amount).
2. The Respondent to pay the costs.

H. Pienaar

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate TM Malatji

Instructed by: Maenetja Attorneys

For the First Respondent: Advocate E Sithole

Instructed by: TMN Kgomo & Associates Incorporated