MANAKA & OTHERS v AIR CHEFS (PTY) LTD (1999) 20 ILJ 388 (LC)
LABOUR COURT (J53/98) C
JOHANNESBURG D
August 14, 1998
Before BRASSEY AJ E
Flynote : Sleutelwoorde
Arbitration - Arbitration Act 42 of 1965 - Award - Order of court - Labour Court has jurisdiction to make award order of court in terms of s 157(3) of LRA 1995.
Labour Court - Jurisdiction - Arbitration in terms of Arbitration Act 42 of 1965 - Award F - Order of court - Labour Court has jurisdiction to make award order of court in terms of s 157(3) of LRA 1995.
Practice and procedure-Postponement - Labour Court proceedings - Postponement of making arbitration award an order of court pending review of arbitration by High G Court - Postponement refused where respondent failed at outset to raise all defences.
Headnote : Kopnota
The applicant applied in terms of s 157(3) of the LRA 1995 to have an award handed down in arbitration proceedings conducted by IMSSA in terms of the Arbitration Act 42 of 1965 made an order of the Labour Court. The respondent resisted the application on the basis that H the court had no jurisdiction to make a private arbitration award an order of court.
The crisp question for decision by the court was whether it is necessary for a dispute to remain cognizable under the LRA throughout its currency or whether it is enough for the purposes of s 157(3) that it be a dispute that at least at the outset is cognizable under the statute. The court I found that the latter interpretation is the appropriate one. Section 157(3) simply states that the dispute must be one that may be referred to arbitration in terms of the LRA. It must, therefore, be a dispute that permissibly or legally can be referred to arbitration in that manner. It is such a dispute at its outset and that is sufficient to bring in within the ambit of s 157(3). Furthermore, it J appeared that what was intended by the legislature was that private

arbitration awards constituting labour disputes such as might otherwise be resolved by the LRA, should themselves be susceptible to the processes of enforcement in terms of the LRA.
The court accordingly had jurisdiction to make the award an order of the court.
The court refused the respondent's alternative prayer that the court postpone making the A award an order of court pending the hearing of review proceedings in the High Court on the grounds that the respondent had failed at the outset to raise all defences, whether preliminary or on the merits.
The court accordingly made the arbitration award an order of court and ordered the respondent to pay the costs of the application.
Case Information
Application to have award handed down in an arbitration conducted under the Arbitration Act B 42 of 1965 made an order of court. The facts appear from the reasons for judgment.
Applicants represented by a trade union official.
Adv L Nowosenetz for the respondent.
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Judgment

BRASSEY AJ: In this matter the applicant applies to make an award handed down in the proceedings between him and the respondent dated 13 November 1997 an order of this court. The proceedings were conducted under the auspices of the Independent Mediation D Service of SA in consequence of a submission to arbitration upon the standard terms for arbitration for which that service provides.

The application is brought under s 157(3) which reads as follows:

'Any reference to the court in the Arbitration Act, 1965 (Act 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration conducted under that Act in respect of any dispute E that may be referred to arbitration in terms of this Act.'

The respondent resists the application on the basis that this court has no jurisdiction to make such a private arbitration award an order of this court. The respondent's counsel, Mr F Nowosenetz , argued by reference to the language of s 157(3) that private arbitration awards, being awards that are given upon a dispute submitted to arbitration, are not such awards as might be produced by an application of the procedures contemplated by the statute.

G The essence of his submission is that the dispute in question must be one that is capable of being referred to arbitration in terms of this Act, that is the Labour Relations Act, throughout the currency of its existence. He submits that once it is agreed between the parties that the dispute should be determined by private arbitration, the parties, in effect, oust the jurisdiction H of the Commission for Conciliation, Mediation & Arbitration and the Labour Court and thus the dispute is no longer a dispute such as may be referred to arbitration in terms of this Act. In short, he says that the submission to arbitration transforms the dispute from one that might be referred to arbitration in terms of the Act into one that cannot be referred and thus takes the dispute out of the ambit of s 157(3).

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The crisp question, therefore, is whether it is necessary for the dispute to remain cognizable under the Act throughout its currency or whether it is enough for the purposes of s 157(3) that it be a dispute that at least at the outset is cognizable under the statute. In my view, the latter J interpretation is the appropriate one. The section simply states that the dispute must be

one that may be referred to arbitration in terms of this Act. It must, therefore, be a dispute that permissibly or legally can be referred to arbitration in that manner. It is such a dispute at its outset and that, in my opinion, is sufficient to bring it within the ambit of s 157(3).

A If I was in any doubt about the matter, my doubts would be resolved by asking what purpose the section is intended to serve. When I put that question to Mr Nowosenetz he ingeniously replied by saying that the section contemplated a situation in which the parties, in submitting to arbitration, specifically make the Arbitration Act applicable and thus when they B submit to arbitration they are in effect submitting to arbitration that is conducted under that Act within the meaning of s 157(3).

That Mr Nowosenetz candidly conceded would be a somewhat arcane situation and I cannot, for my part, believe that it is what the drafters contemplated when they included subsection (3) in s 157. It seems to me that what was intended was that private arbitration awards C constituting labour disputes such as might otherwise be resolved by the Labour Relations Act, should themselves be susceptible to the processes of enforcement in terms of this statute. Accordingly, on the question of

whether this court has jurisdiction to make the award an order D of this court, I find in favour of the applicant.
The next question is whether this application should be postponed in order to allow the respondent to file an application for review such as would entitle him to review and set aside the award of the arbitrator. The application was prefigured in the papers in the following terms:
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'I accordingly humbly pray that this honourable court should in the alternative postpone this application in order for the respondent to have an opportunity to file the review proceedings within a reasonable time.'
The basis of the review proceedings is set out in elliptical terms in para 7.1 of the answering affidavit as follows:
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'The contents of this paragraph involve the findings of the arbitration award which the respondent seeks to set aside on review. The applicant also does not confide in this honourable court that at the arbitration Mr Casey, the chairman of the disciplinary hearing, gave evidence that the applicant G threatened and intimidated him in order to influence the outcome of the hearing. This evidence is not even mentioned in the arbitration award as relied upon by the respondent as a ground of review to show that the arbitrator failed to apply his mind to the merits properly. It is respectfully submitted that pending the review this court is not in a position to make any findings at all regarding the merits of the arbitration award.'
H The meaning that is sought to be conveyed by that paragraph is not altogether certain and becomes clear only when regard is had to the application for review that was filed in the Transvaal Provincial Division shortly before the hearing of this matter before me. In that I application it is made clear that evidence was sought to be placed before the arbitrator to the effect that the applicant had threatened and intimidated the chair of the disciplinary proceedings. The purpose of that evidence, so it emerges from the papers, is to demonstrate that if the dismissal should be found to be unfair it would nonetheless be wrong to grant the J employee reinstatement or indeed any relief whatever. That contention, for which there is

ample potential justification in the authorities, rests on the proposition that the grant of relief in the course of equitable proceedings depends on an exercise of discretion and that in the consideration of that discretion it is permissible to take into account facts that occurred subsequent to the offence for which the employee is charged. Thus if it is so that the arbitrator A declined to hear such evidence, it may be that the arbitrator failed to take into account considerations he should have taken into account and in so doing committed a reviewable irregularity. It is unnecessary for present purposes to consider that question.
B What I do have to consider is whether this matter should be allowed to stand over so as to entitle the applicant, now that it has had in effect a declarator as to the legal position, to file papers in this court that would justify the bringing of a review on that basis or any other basis it considers appropriate. This question has caused me much concern. I have examined the papers before me once again with a view to deciding what would be appropriate in the C circumstances and I consider that the application for a postponement should be refused.
I take that view on the grounds that it has consistently been the standpoint of the applicant that this court has jurisdiction and that should the jurisdictional point be

determined against the D company, the applicant will move for final relief. It was from the outset incumbent on the company to file its papers in the review application on the supposition that it might be unsuccessful in the technical point that it argued. It was a condition for the grant of the alternative relief that the review application should have been filed and it could indeed have been filed as it was in the High Court. The effect of allowing the matter to stand down is to E permit the company in effect to have two chances to argue this matter, one so far as the jurisdictional point is concerned; a second, so far as the merits of review are concerned. It is trite that in application proceedings, as indeed in trial cases, a basis should be laid at the outset F for any defences that are raised, whether they be defences in limine or on the merits. It is undesirable, it seems to me, that that principle, which I take not to be inflexible but nonetheless important, should not be watered down in circumstances where the company has tended to be, to put it mildly, lackadaisical in its approach to the litigation.

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In the circumstances I reject the application for the postponement of this matter and grant the following order:

1 That the arbitration award of Mr Tucker in the proceedings between the applicant, H Matthews Malaka, and the respondent, Air Chefs, be made an order of this court.

2 That the respondent, Air Chefs, pay the applicant's costs.

Respondent's Attorneys: Bloch Gross & Associates I