

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG
J1250/02

CASE NO:

In the matter between:

SOUTH AFRICAN CHEMICAL WORKERS UNION
Applicant

First

WILLIAM MAHLANGU
Applicant

Second

and

AFROX LIMITED
Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to make an arbitration award and order of Court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 (“the Act”).
2. The respondent is opposing the application on the basis that the second applicant had failed to report to the respondent for reinstatement within fourteen days from the date when the award was served on the first applicant.

The background facts

3. The dispute arose out of the dismissal of the second applicant together with two

other employees by the respondent following their alleged participation in an assault of a temporary employee during a lawful strike at the respondent's premises.

4. The dispute was arbitrated on 24 May 2001 and commissioner Vincent Surics ordered that the second applicant and another employee be reinstated and that they should report at the premises of the respondent within 14 days of receipt of the award. The relevant portion of the award reads as follows:

“Applicants 2 & 3 are to report at the premises of the respondent within 14 days of receipt of this award failing which the obligations of the respondent in giving effect to this award will fall away.”

5. The first applicant received the award on 25 May 2001 and consulted with the second applicant on 28 May 2001 about the award.
6. On 31 May 2001, the first applicant wrote a letter to the respondent informing it that the second applicant and the other employee were going to report on 11 June 2001.
7. In a letter dated 8 June 2001, the respondent notified the first applicant that the period within which the second applicant had to tender his services had expired on 6 June 2001. Further that the other employee had tendered his services. The

letter stated further that in terms of the specific provisions of the award, the respondent incurred no liability towards the second applicant and that any tender after 6 June 2001 would not oblige the respondent to accept such tender. It stated that it was no longer bound by the arbitration award in respect of the second applicant.

The parties contentions

8. The first applicant contended that the date of receipt of the award was 28 May 2001 which is the date on which the arbitration award was brought to the second applicant's attention. The second applicant tendered his services on 11 June 2001 which tender was rejected by the respondent. At the time when the tender was made, the 14-day period had not expired from the date of receipt of the arbitration award. The 14-day period only expired on 12 June 2001. There was no basis that the respondent could refuse to accept the second applicant's tender of his services in terms of the arbitration award.
9. The first applicant contended further that the computation of "days" with regard to the period determined by the commissioner for compliance with the award is in terms of the Rules of the CCMA which exclude Saturdays, Sundays and Public holidays and the period between 16 December and 7 January, and not in terms of *dies* as defined in the Interpretation Act 33 of 1957. The 14-day period expired on 15 June 2001. It was contended that the allegation by the respondent that the

second applicant failed to meet the condition of his reinstatement is devoid of any foundation.

10. The respondent contended that the reinstatement of the second applicant was subject to the condition that the second applicant was required to present his services to the respondent within 14 days calculated from the date upon which the applicants nominated representative received the arbitration award. The second applicant did not present himself to commence duty within the time period stipulated in the arbitration award. Since the second applicant had failed to meet the condition set forth in the arbitration award, the respondent was no longer obliged to reinstate the second applicant in terms of the arbitration award.

The issue to be determined

11. There are two issues that need to be determined in this application:
 - 11.1 From what date did the fourteen-day period commence running? and
 - 11.2 How is the fourteen-day period to be computed?

Analysis of the facts and arguments raised

12. It is common cause that the first applicant referred a dispute to the CCMA for conciliation on behalf of the second applicant and two other employees. They were represented at the arbitration proceedings by J Lebea, the applicants'

attorney of record. The fax number given to where the arbitration award could be faxed to is that of the first applicant.

13. It is further common cause that the arbitration award was transmitted to the first applicant on 25 May 2001. The said award was brought to the attention of the second applicant on 28 May 2001.
14. If the date of receipt of the award is considered to be 25 May 2001 and ordinary calendar days are used, the 14-day period would have expired on 8 June 2001. The applicants tender for reinstatement would have been late. If court days are used, the tender would have been within the requisite period. If the date of receipt of the award is considered to be 28 May 2001 and if the ordinary calendar days are used, the 14-day period would have expired on 11 June 2001. The tender would have been within the requisite period.
16. Mr Lengane, who appeared for the applicants, did not persist with the argument that was raised in his heads of argument that the word “days” referred to in the award are to be construed to be court days. It therefore becomes unnecessary for me to determine how the word “day” is to be construed.
17. Mr Lengane contended further that the commissioner did not comply with the provisions of section 138(7) of the Act, in that he did not serve the award on the

second respondent. It was contended further that even if an applicant is represented by a union or a representative, the Act requires that the award be served on that applicant. I do not agree with the applicants' contention. In terms of section 138(7) of the Act, an award may be served on either the applicant or his representative. One can imagine what would happen where there are a number of applicants who had chosen a representative. A commissioner would be required to serve the award on each of the applicants. This can only be so if the applicants are not represented by a representative.

18. In terms of the award, the second applicant was required to present himself to the respondent for reinstatement within 14 days of receipt of the award which was on 25 May 2001. The 14-day period therefore commenced running from 26 May 2001. The last day on which the first applicant had to report for reinstatement was 8 June 2001. It will be noted that the commissioner chose to use the word "receipt of the award" and not the date of "service" of the award. There is no difference between the meaning of service and receipt. The second applicant had chosen to be represented by a representative. No facts were placed before me why the award was only brought to the attention of the second applicant on 28 May 2001. I am also left in the dark about why the other employee was able to present himself for reinstatement timeously whereas the second applicant did not.
19. It is quite clear from the facts that the second applicant's representative was

labouring under a misapprehension when it believed that the 14 days commenced running from 28 May 2001. However, a tender was made on 31 May 2001 which was well within the 14-day period. The respondent received the letter on the same day but only responded to it on 8 June 2001. I find the respondent's conduct morally reprehensible to say the least. It is clear that the second applicant wanted to comply with the award. This is reinforced by virtue of the fact that it transmitted the letter on 31 May 2001. There was a genuine effort on the part of the second applicant to comply with the award.

20. This Court is also a court of equity. I am of the view that there was a moral duty on the respondent to have responded to the first applicant's letter much earlier than it did. Its failure to do so timeously is indicative of the fact that the respondent was not desirous or serious to comply with its obligations in terms of the award. I would have expected a party that genuinely wants to comply with its obligations and which is aware of the fact that the other party labours under a genuine misapprehension to have brought it to the attention of that party. No explanation was tendered by the respondent why it did not respond earlier than 8 June 2001. The second applicant's dismissal was found to be substantively unfair. That finding still stands. The effect of such a finding would become meaningless if this Court does not come to the assistance of the second applicant. In terms of section 158(1)(a)(iii) of the Act, this Court has a discretion to grant an order directing the performance of any particular act which order, when implemented,

will remedy a wrong and give effect to the primary objects of the Act. This Court will not sit idly and not come to the assistance of such a party especially where it is clear that the other party wants to benefit out of a genuine mistake committed. This is one such a case where the Court must interfere and correct the wrong.

21. The application stands to be granted.
22. There is no reason why costs should not follow the result.

In the circumstances the followed order is made:

1. The arbitration award dated 24 May 2001 made by commissioner Vincent Surics of the CCMA under case number MP1032 is made an order of court in terms of section 158(1)(c) of the Act.
2. The respondent to pay the applicants costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS : K LENGANE INSTRUCTED BY LEBEA &
ASSOCIATES

FOR THE RESPONDENT : A E FRANKLIN SC INSTRUCTED BY WEBBER
WENTZEL BOWENS

DATE OF HEARING: 24 OCTOBER 2002

DATE OF JUDGMENT : 31 OCTOBER 2002