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Parties to a dispute can take an arbitration award on review

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While arbitration awards are legally binding, parties to a dispute are at liberty to take the arbitration award on review. The test for review has been established in the leading case of Sidumo v Rustenburg Platinum Mines Ltd and Others [2007] 12 BLLR 1097 (CC) as "...whether the commissioner's decision was one at which a reasonable commissioner would arrive".

The recent Labour Court case of Ellerines Furnishers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others (2015) 36 ILJ 215 (LC) involved an employee who challenged the fairness of his retrenchment. The Commissioner found that the dismissal was substantively fair, but procedurally unfair.

The employee was awarded five months' compensation, which amounted to R125,000. The employer complied with the award and paid the payment of R125,000 to the employee. However, it later transpired that the award for compensation was based on the employee's net remuneration. The compensation was accordingly recalculated based on the employee's gross remuneration.

In a subsequent variation ruling, the compensation payable was increased to R214,028.65. Displeased with the additional amount it had to pay, the employer took the arbitration award, together with the variation ruling, on review. The employee responded with a counter-review, arguing that, in making the compensation payment, the employer was perempted from seeking a review of the entire award.

Striking a balance

The Labour Court was tasked with striking a balance between the statutory right to review and the doctrine of peremption. The doctrine provides that a party who wishes to comply with an award unconditionally and unreservedly is precluded from seeking a review of that award. In other words, the doctrine acts as a barrier to contradictory intentions, preventing a party from fulfilling an arbitration award on one day and reviewing the same award on the next.

The principle of peremption has previously been accepted and applied in Labour Court decisions, namely in NUMSA & Others v Fast Freeze (1992) 13 ILJ 963 (LAC) and Balasana v Motor Bargaining Council & Others (2011) 32 ILJ 297 (LC). In the NUMSA case, the court held that voluntary payment or acceptance of payment in terms of a judgment will usually be sufficient to satisfy a court that the party has acquiesced in the judgment.

Failure to indicate contemplated appeal and acceptance of compensation precludes the party from proceeding with the appeal. Similarly, in the Balasana case, the court noted that "...a finding that the employee's right to review had become peremptied would be justified only if it could be found that the employee, by having elected to accept the payment of compensation in compliance with the award, unequivocally abandoned or waived his right to institute the review proceedings."

Unique to the case at hand was the variation ruling, which had an implication on the original arbitration award. The court agreed that, had there been no variation ruling, the employer would have waived its right to review after having complied with the award.

Separating the variation ruling

The court noted that the right to review means the review of the whole arbitration award. Accordingly, separating the variation ruling from the initial arbitration award would have the potential consequence two applications running at the same time against one award. This could not have been the intention nor the purpose of the Labour Relations Act, No 66 of 1995, insofar as it seeks to resolve labour disputes fairly, justly and equitably.

The court held that "...once it can be said that a right of review exists, such right cannot be circumscribed by the peremption of a portion of that right or that only certain grounds of review may be raised but not others...what this essentially means is that once the variation ruling was issued it became open to Ellerines to challenge the entire arbitration award...on any of the recognised grounds of review, despite an earlier possible peremption of such right of review on the part of the affected party".

Accordingly, the employer was entitled to review the whole arbitration award as a result of the variation ruling and hence the peremption principle was not applicable. The court nevertheless found that the arbitration award, as well as the variation ruling, was one that a reasonable decision maker would have made. The review and counter-review applications were thus dismissed.

Employers should ensure that review applications are brought without any compliance of an arbitration award, failing which they may be precluded from reviewing the award. It is only in exceptional circumstances, such as in the Ellerines case, where, despite the acquiescence of an arbitration award, the principle of peremption will not apply.

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