



Runaway mora interest in substituted compensation orders?

by Lee Crisp

In *Malatji v Minister of Home Affairs and Another*, the South African Labour Appeal Court (“LAC”) had to determine when *mora* interest (interest accrued on overdue payment) should begin running, in circumstances where the Labour Court had ordered the substitution of an arbitration award granting retrospective reinstatement with an order for the payment of compensation, but had made no provision for the timing of interest.

In essence, the LAC was required to determine whether *mora* interest should be calculated from the date of the initial arbitration award or from the date on which the arbitration award was reviewed and set aside by the Labour Court.

In this matter, the Department of Home Affairs (the “department”) dismissed Mr Malatji as its chief director: legal services after a disciplinary hearing where he was found guilty on various charges. Mr Malatji subsequently referred an unfair dismissal dispute to the General Public Services Sector Bargaining Council (“GPSSBC”). On 14 August 2006, the GPSSBC issued an arbitration award retrospectively reinstating Mr Malatji and ordering the Minister of Home Affairs (the “minister”) and the department to pay him compensation equivalent to 12-months’ remuneration. The GPSSBC’s award was subsequently varied on 30 August 2006.

The minister and the department launched a review application in respect of the GPSSBC’s award. On 2 April 2013, Snyman AJ reviewed and set aside the GPSSBC’s award, substituting the relief in the award with compensation equivalent to nine months’ salary. Thereafter, the substituted award was made an order of the Labour Court, however, no order was made in relation to the payment of interest.

Thereafter, on 24 April 2013, the department paid the principal compensation amount and interest from 2 April 2013, the date of Snyman AJ’s judgment. However, Mr Malatji insisted that he be paid interest from 1 September 2006, the date on which the GPSSBC award was varied. He contended that the effect of the Labour Court’s order in substituting the award was that he was entitled to the payment of interest from the date of the arbitration award and not the judgment. In support of his argument, Mr Malatji relied on section 143(2) of the of the Labour Relations Act, 1995 (“LRA”), which provides that:

“If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the award provides otherwise.”

Mr Malatji launched an application in the Labour Court for a declaratory order that the minister and the department were liable to pay him interest from date of the variation of the award until 24 April 2013, which was the date on which the department paid interest on the principal amount. Harper AJ dismissed Mr Malatji’s application, reasoning that section 143(2) of the LRA does not address a circumstance where an arbitrator’s award is substituted in its entirety with an order of the Labour Court.

Mr Malatji took the matter on appeal to the LAC. In considering the applicable legal principles, the LAC confirmed that, as set out by the Labour Court in *Top v Top Reizen CC*, section 143(2) of the LRA does not depart from the common law position that interest begins running from the date on which the debtor’s claim is ascertained. In this regard, the LAC noted that the question that needed to be answered in this matter was whether a debtor’s liability for the payment of interest can be said to have arisen where the validity of an arbitration award is subject to challenge through a review process. In this regard, the LAC pointed out that:

- *mora* interest can only be levied and begin to accrue once the amount of compensation is ascertained or easily ascertainable;
- where an award is subject to review, it cannot be said that the quantum is readily ascertainable, nor is the time for performance by the debtor fixed; and
- consequently, there is no obligation on the debtor, in such circumstances, to pay the debt.

With reference to the Constitutional Court judgment in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others*, the LAC noted that:

- while section 145(3) of the LRA empowered the Labour Court to stay enforcement of an award pending a review application, it did not follow automatically that the award was enforceable, because if awards were to be so enforced, applicants in review proceedings would be prejudiced and exposed to irreparable harm in the event that the award is set aside; and
- arbitration awards constitute administrative action and are not claims capable of being enforced. Rather, the last step in the adjudication of unfair dismissal disputes is either a Labour Court judgment, where the court has jurisdiction in respect of such a dispute, or a Labour Court order making an arbitration award an order of court.

To the extent that the GPSSBC award was an order for Mr Malatji’s reinstatement, the LAC held it did not constitute a “debt”, which has been authoritatively defined as being an obligation to pay money or deliver goods or to render service by a judgment debtor. As a result, it held that interest in this instance could not have accrued from the date of the issue of the award and that, in any event, Snyman AJ’s order awarding Mr Malatji compensation equivalent to nine-months’ salary substantially altered the original reinstatement award made by the GPSSBC. Therefore, the LAC held, it could not be said that the minister and the department were in *mora* from the date of issue of the award and/or its subsequent variation, but rather only from the date of Snyman AJ’s judgment.

The LAC held that the consequence of its judgment was that a judgment debtor would only be entitled to the payment of interest *a tempore morae* on an unliquidated claim from the date of an arbitration award, if the award is not challenged through a review process, or from the date of a review judgment pursuant to the court’s determination of the quantum of the claim.

Accordingly, the LAC only partially upheld Mr Malatji’s appeal in that it set aside and substituted Snyman AJ’s order, but only to the extent that interest on the compensation award was to begin running from the date of his judgment, being 2 April 2013, to the date of final payment.

Thoughts on the judgment

The approach of the LAC to the running of *mora* interest, where the award is replaced in its entirety, in the prevailing circumstances of this matter may come as a welcome relief to reviewing litigants. This is because it alleviates what may have possibly been a cumbersome interest burden to bear, even in the event of a successful review application, due to the protracted nature of litigation. It also puts litigants on guard to ensure that orders sought from the court are drafted with sufficient clarity so as to ensure that there cannot be any doubt as to when interest begins to run.

Reviewed by Peter le Roux, an executive consultant in ENSafrica's employment department.



Lee Crisp

employment | associate

cell: +27 71 604 9880



No information provided herein may in any way be construed as legal advice from ENSafrica and/or any of its personnel. Professional advice must be sought from ENSafrica before any action is taken based on the information provided herein, and consent must be obtained from ENSafrica before the information provided herein is reproduced in any way. ENSafrica disclaims any responsibility for positions taken without due consultation and/or information reproduced without due consent, and no person shall have any claim of any nature whatsoever arising out of, or in connection with, the information provided herein against ENSafrica and/or any of its personnel. Any values, such as currency (and their indicators), and/or dates provided herein are indicative and for information purposes only, and ENSafrica does not warrant the correctness, completeness or accuracy of the information provided herein in any way.

info@ENSafrica.com
level 2 BBBEE rating (South Africa)

