IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Case No: J1226/08

REPORTABLE

In the matter between:

CHEMICAL, ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS UNION	First Applicant
M MOSES	Second Applicant

and

LE – SEL RESEARCH (PTY) LTD	Respondent

JUDGMENT

MOSHOANA, AJ

INTRODUCTION

[1] The Applicants brought an application for an order in the following terms:-

1. Making the arbitration award issued by the National Bargaining Council for the Chemical Industry on 11 July 2005 under Case Number:GP0444/03 an order of court insofar as it relates to the dismissal of the Second Applicant;
2. Directing the Respondent to pay the Second Applicant R40 800.00 together with interest at the rate of 15.5% per annum from 11 July 2005 to date of full payment;
3. Directing the Respondent to pay the Second Applicant her monthly salary of R1 700.00 for the period from 20 July 2005 to date of judgment together with interest *a tempora morae;*
4. Directing that the costs of this application be paid by the Respondent on the scale as between attorney and own client;
5. Granting further and or alternative relief.

[2] According to Adv Van de Riet SC, appearing for the Applicants, prayer 1 of the Notice of Motion is brought in terms of Section 158(1)(c) of the Labour Relations Act. Prayer 2 and 3 are brought in

terms of the provisions of Section 77 of the Basic Conditions of Employment Act. The application was opposed by the Respondent.

BACKGROUND FACTS

[3] The Respondent dismissed a number of its employees, including the Second Applicant in July 2003. A dispute regarding the fairness of the dismissal was referred to the National Bargaining Council of Chemical Industry. An award was issued on 11 July 2005, wherein the arbitrator found the dismissal of the Second Applicant to be substantively unfair and ordered the Respondent to re-instate the Second Applicant retrospectively from the date of her dismissal. The award specifically stated that the Second Applicant must report for duty on 18 July 2005. The Second Applicant failed to report for duty on that particular day. The Respondent contends that the deponent of the Founding Affidavit had telephoned one, Mr Bosch and indicated to him that the Second Applicant would not be reporting for duty as she feels that she is riding on the back of others. This aspect is disputed by the deponent of the Founding Affidavit. I shall deal with this aspect later when I deal with whether there is a disputed fact or not.

4] The parties then exchanged various correspondences. In the letter of 03 November 2005, the attorneys acting for the Respondent indicated that the Second Applicant had repudiated her contract of employment and as a result she would not be paid in exchange of her tender for services. As a result of that, the Second Applicant assisted by the First Applicant, referred a dispute to the Bargaining Council on 02 November 2005. In that dispute, the Second Applicant was alleging that she has been dismissed again on 03 November 2005. The matter was then referred to arbitration. On 27 November 2006, a ruling was issued to the effect that the Bargaining Council lacks jurisdiction. On 19 March 2007, the Applicants being aggrieved by that ruling launched an application for review in this Court under Case Number: JR640/07. The review application was argued before His Lordship Van Niekerk AJ on 14 June 2007. On 9 January 2007, an order was issued dismissing the review application with costs.

[5] As a result the Applicants then launched this application on 09 July 2008.

ARGUMENT

[6] In court, Adv Boda appearing for the Respondent, submitted that the application should be dismissed on the basis that there has been an unreasonable delay, there are disputed facts and that the Court would lack jurisdiction to order prayers 2 and 3 in particular. He also argued that prayers 2 and 3 could possibly suffer the fate of prescription. On the other hand Adv Van de Riet SC argued that there is no dispute of facts and the argument of unreasonable delay finds no application. He indicated that prayers 1and 2 are brought in terms of Section 77 of the Basic Conditions of Employment Act, accordingly the Court should grant the prayers as contained in the Notice of Motion.

ANALYSIS

[7] In considering this matter, I have to take into account the arguments in particular the legal issues raised therein. I accordingly do that hereunder.

THE ISSUE OF A DISPUTE OF FACT.

[8] The Respondent contends in its Heads of Argument that there is a dispute of facts and on that basis alone, the Court must dismiss the

application. In paragraph 20 of the Heads of Argument for the Respondent, it is submitted that there is a dispute of fact as to whether or not the Second Applicant tendered her services persuant to the award. The Respondent says that she did not. This dispute must be resolved in favour of the Respondent, so the argument went. The dispute of fact was clearly foreseeable. It is in fact anticipated in the founding papers. For that reason the application must be dismissed with costs. Reference was made to various authorities in that regard. Of course the disadvantage that this Court had in preparation of hearing the matter was that it did not know where in the affidavits the dispute of fact occurs. It would have been prudent for the Respondent in the heads of argument to point the paragraphs in the affidavits where the dispute of facts occurs.

9] Nonetheless, Adv Boda pointed to the Court that such appears in paragraph 4.6 of the Founding Affidavit, which for the purposes of this judgment I shall quote. The deponent stated the following:-

"*On 10th August 2005 our attorneys received a letter dated 1st August 2005 from the company's attorneys. In this letter, it was denied that the company had advised Miss Moses not to report for duty. It was alleged that I had said that Miss Moses would not be reporting for*

work as she feels that she is riding on the back of the others. This was not true. I had told Mr Bosch that Miss Moses felt guilty about the fact that she was the only one of the group of the dismissed union members who had been reinstated but I did not say that Miss Moses would not be reporting for work as a result. I said that she may be willing to consider a monetary settlement. A copy of the company's letter dated 1st August 2005 is attached to this affidavit marked "TB3"".

[10] In response to the above quoted paragraph, the Respondent stated the following at paragraph 27.5:-

'*The Second Applicant did not report for duty. In fact the Applicant's union official Mr Themba Buthelezi informed the Respondent that the Second Applicant would not be reporting for work as she feels that she is riding on the back of the others".*

[11] In reply, the following was stated:-

"*I admit that Miss Moses did not report for duty on 18th July 2005. Miss Bosch stated that she should not do so. On 20th July 2005 our attorneys addressed a letter to the company recording that Miss Moses tendered her services".*

[12] The Respondent's Opposing Affidavit was deposed to by one Amelia Phillip, who stated that she is the Respondent's Human Resources Director. There was no confirmatory affidavit from Mr Bosch as to the allegation that the union official informed him of the reasons why the Second Applicant would not report for duty. It ought to be taken into account that the union official at the commencement of these proceedings, in the Founding Affidavit, had already pointed out that that allegation is not true. It was therefore opportune for the Respondent in opposing the matter to obtain a confirmatory affidavit form Mr Bosch to confirm that indeed this is what he was told.

[13 There is no dispute between the parties that on 18 July 2005 there was no reporting for duty. The dispute relates to whether the Second Applicant tendered her services. The approach that the courts must take with regard to disputed facts had been developed in the matter of **Stellenboch Farmers Winery (Ltd) v Stelenvale Winery (Pty) Ltd 1957 (4) SA 234 (C)** at 235**.** Where there is a dispute as to the facts a final interdict should only be granted in Notice of Motion proceedings if the facts as stated by the Respondent together with the admitted facts in the Applicant's affidavit justify such an order. Where it is clear

that facts, though not formally admitted cannot be denied, they must be regarded as admitted.

[14] In the matter of **Plascon Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (AD)** the Appellate Division as it then was sought to perfect the approach and said the following"-

"*It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, wherein in proceedings of Notice of Motion disputes of fact have arisen on the affidavits, a final order whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavit which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order. The power of the court to give such final relief on the papers before it, is however, not confined to such a situation. In certain instances the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real genuine or bona fide dispute of fact…if in such a case the Respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under Rule 6 (5) (g) of the uniform rules of court and the court is satisfied as to the*

inherent credibility of the Applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the Applicant is entitled to the relief which he seeks….moreover there may be exceptions to this general rule as, for example, where the allegations or denials of the Respondents are so far fetched or clearly untenable that the court is justified in rejecting merely on the papers."

[15] This approach has since been followed in various judgments of this Court, particularly in motion proceedings. In **Mahala v Nkombombini and Another 2006 (5) SA 524 (SECLD)** Erasmus J, followed the approach, however he said the following in respect of the matter that was before him:-

"*That approach is possibly not entirely satisfactory for a matter such as the present. As was pointed out in* ***Trollip v Du Plessis and Another 2002 (2) SA 242 (W)*** *at 245 E – F, a more robust approach is sometimes required, and the court should then grant the order if it is satisfied that there is sufficient clarity regarding the issues to be resolved for the court to make the order prayed for.*

[16] The Respondent submitted that the Court must follow the *Plascon Evans* approach. As I have pointed out, the only dispute is about whether the Second Applicant had tendered her services. That allegation in the papers took the following format:-

In the founding affidavit, the deponent stated, in paragraph 4.5, the following:-

"*On 20th July 2005 our attorneys addressed a letter to the company recording that Miss Moses tendered her services. A copy of that letter is attached to this affidavit marked "TB2"".*

[17] In answer to the allegation, the Respondent chose to give the background to the matter and in paragraph 27.6 stated the following:-

"On 20th July 2005 the Applicant's attorneys addressed a letter to the Respondent wherein it was stated that the individual applicant was told not to report for duty. A copy of this letter is annexed thereto "LR5."

[18] The said annexure "LR5' happens to be the letter in which the Second Applicant's services were tendered. The said letter reads in parts as follows:

"We are instructed as follows:-

1. *In the arbitration award delivered in the above matter Lee Cell Research (Pty) Ltd was ordered to reinstate one of CEPAWU's member Maria Moses with effect from the date of her dismissal;*
2. *The company informed Miss Moses that she should not report for duty;*
3. *Miss Moses tendered her service."*

[19] In response the Applicants, in paragraph 17 of the Replying Affidavit, stated the following:-

"I admit the contents of this paragraph. I fail to understand why the Respondent attaches this and other letters to its affidavit, when they already appear twice elsewhere in the papers".

[20] It is apparent to the Court that in the first instance there is no dispute in respect of the aspect that the Second Applicant tendered her services on 20 July 2005. Therefore it is incorrect to submit that there is a dispute of fact in respect of the tender of services. However, an allegation which seems to be related to the alleged dispute of fact is that which was allegedly mentioned by the union official to Mr Bosch.

In applying the *Plascon Evans* test I have to resolve the dispute on the papers, particularly because the union official, under oath, disputed the statement allegedly made to Mr Bosch. With the opportunity to have Mr Bosch confirm that statement, the Respondent chose to repeat as it were, the contents of its letter of o1 August 2005. Therefore the Court is left with nothing but undisputed evidence by the union official that he did not utter the statement. The union official, under oath, furnishes the reasons why the Second Applicant could not report for duty on 18 July 2005. Again this is not in dispute. I am bound to accept those reasons.

[21] Therefore, I find that there is no real and genuine dispute of fact, which will necessitate that the order should be refused. Adv Boda argued that if the Court finds that there is a dispute of fact, it is therefore appropriate to have the matter referred to oral evidence. As the Applicants is the one who commenced the proceedings by way of motion, it should have anticipated this dispute of fact. As the result the Respondent was forced into motion proceedings despite this dispute of fact. I reject this argument. As I have pointed out, there is no dispute of fact which is genuine and real for this Court to even contemplate referring the matter for oral evidence.

THE ISSUE OF UNREASONABLE DELAY

[22] The contention of the Respondent is that the Applicants should fail since there was a delay for which no condonation was sought. As pointed out, Adv Van der Riet SC contended that the principle of unreasonable delay finds no application. In court, Adv Boda conceded that an arbitration award is a debt as contemplated in the Prescription Act. He was however steadfast that the Court should find that even in Section 158(1)(c) applications to make awards orders of this Court, such should be refused on the basis of unreasonable delay principle. Much as I found the argument attractive and fanciful to say the least, I cannot agree. This argument fanciful as it maybe has already attracted the attention of the Labour Appeal Court in the matter of **Solidarity and Others v Eskom Holdings Ltd 2008 (29) ILJ 1450 (LAC)**. It is instructive to note what the Labour Appeal Court said at page 456 paragraph 15, which was the following:-

"*Furthermore, the view that the unreasonable delay rule applies to a case where the Prescription Act applies will render the relevant provisions of the Prescription Act redundant. In terms of the Prescription Act, if A assaults B, B has three (3) years within which to institute court proceedings for the payment of damages arising from*

the assault. The effect is that B can sit at home and not do anything about his claim until the last minute before the expiry of the prescription period of three years. There is, in my view, no rule of law to the effect that, despite the availability to him of a period of three within which to institute court proceedings B must, nevertheless, institute court proceedings within a reasonable time prior to the expiry of that period of three years, because if he fails to do so, he will be barred for doing so even though the prescription period of three years prescribed by the Prescription Act has not expired. The reason why there is no such rule is because, when the legislature prescribed three years it regarded three years as a reasonable period within which B should be required to institute his claim for damages. There can, therefore, not be a rule that effectively nullifies the prescription period provided for in the Prescription Act. That is rule that says B must institute court proceedings within a reasonable time before the expiry of the three years period prescribed by the Prescription Act and says that if he fails to do so he will suffer the same consequences that the Prescription Act say he will suffer if fails to institute court proceedings within a longer period, namely, three years. Such a rule would create a prescription period within a prescription period".

[23] What is clear from the above stated is that where Prescription Act applies there is no room for the rule of unreasonable delay. Over and above the fact that I am bound by this decision, I agree that as a matter of logic, it would be inappropriate to refuse to enforce an award which is subjected to a Prescription Act. I suppose that in respect of prayers 2 and 3 it is as clear as daylight that Prescription Act would apply to such claims. Accordingly the argument of unreasonable delay would not succeed in respect of them too.

[24] Accordingly it is my finding that the principle of unreasonable delay finds no application.

THE ISSUE OF WAIVER AND OR PEREMPTION.

[25] Adv Boda argued that there is peremption, although in its opposing papers, the Respondent submitted that the Applicant's conducted amounts to a waiver of right to bring the application. In reply to this argument Adv Van De Riet SC argued that peremption does not find application and it has not been pleaded. In his submission peremption, simply entails blowing hot and cold. He submitted that there was no blowing hot and cold in this matter. The Applicants did

not have an adverse award and accordingly the principle of peremption would not apply. I agree with the submission. Even if I were to consider the plea of waiver, it appears that such a plea was badly pleaded, because the deponent only states that there was a waiver of a right to bring the application not a waiver to the claim. The waiver contemplated in paragraph 15 seems to be referring to the unreasonable delay principle, which I have already found, finds no application. In my judgment, I find that waiver in any event was not pleaded. Accordingly I find no basis upon which it can be said that there has been waiver and or peremption.

THE ISSUE WHETHER PRAYERS 2 AND 3 SHOULD BE GRANTED

[26] In court, as I was somewhat dissatisfied that this Court would have jurisdiction to order prayers 2 and 3, I enquired from Adv Van de Riet SC as to the basis for the jurisdiction of the Court. He submitted that in terms of Section 77 of the Basic Conditions of Employment Act, the Court has jurisdiction. Section 77(3) provides as follows:-

"*The Labour Court has concurrent jurisdiction with the Civil Courts to hear and determine any matter concerning a contract of employment,*

irrespective of whether any basic condition of employment constitute a term of that contract".

[27] His argument was that the payments arise out of a contract of employment, which had been restored by the award made on 11 July 2005. It is not in dispute that since July 2005, the Applicant was not paid any salary. My misgivings with regard to prayers 2 and 3 were brought to light by the fact that there is re-instatement and its effect, in my view, is that it covers prayers 2 and 3. In the **Republican Press (Pty) Ltd v CEPPAWU and Gumede and Others 2007 (11) BLLR 1001 (SCA)** at paragraph 19 Nugent JA said the following:-

"*I do not think that the backpay to which a worker ordinarily becomes entitled when an order for reinstatement is made is to be equated with compensation (thus allowing for limitation contained in Section 194 to be applied in relation to the backpay). As pointed out by Davies AJA in Kroukram (and I respectfully agree) an order of reinstatement restores the former contract and any amount that was payable to the worker under that contract necessarily becomes due to the worker on that ground alone".*

[28] Therefore, it is my view that making an order in respect of 2 and 3 would necessarily become superfluous, since the Court is inclined to make prayer 1, an order of court. Prayer 1 is in respect of an award that contains a re-instatement order.

[29] In my view, Section 77(3), should be read with other provisions of the Basic Conditions of Employment Act, in particular the provisions of Section 32, which provides that an employer must pay to an employee any remuneration that is paid in money. Any refusal to pay remuneration is in contravention of Section 32.

[30] In terms of Section 64(1), a Labour Inspector in promoting, monitoring and enforcing compliance with an Employment Law would endeavour to secure compliance with the Employment Law by securing undertakings or issue compliance orders. The Employment Law, referred to, includes, as defined, the Basic Conditions of Employment Act. In terms of Section 69(1), the Labour Inspector may issue a compliance order if an employer has not complied with the provisions of the Act. In terms of Section 73, the compliance order may be made an order of this Court. With that statutory framework, it is my view that issues relating to non-payment of salary cannot be brought under

Section 77(3). Section 77(3) contemplates, in my view, other claims and or benefits that may arise out of a contract of employment, not the remuneration aspect, as same is covered by Section 32. Prior to the coming into operation of the Basic Conditions of Employment Act 75 of 1997, its predecessor made provision that the Civil Courts could be approached on condition that there is a *noli prosequi*. In the old Act, there was no provision of Labour Inspectors securing compliance and making those an order of court. In my view, Act 75 of 1997 introduced an uncomplicated and simple procedure wherein a salary had not been paid. If that is so, it would be a duplication of efforts, if Section 77(3) could be used, when a compliance order could be obtained which could be made an order of this Court.

[31] In opposing prayers 2 and 3, Adv Boda referred me to the decision of this Court in **Char Technology (Pty) Ltd v Mnisi and Others 2000 (7) BLLR 778 (LC).** In that judgment Her Ladyship Pillay AJ as she then was had the following to say:-

"I mention in passing that the commissioner failed to quantify the award. If this matter had come before this Court for an order in terms of Section 158(1)(c) of the Act, it would have been have referred back to the CCMA for quantification".

[32] As it is clear, the statement was made in passing, same does not form part of the *ratio decidendi* of the Court. Accordingly I do not think that same is authority to the proposition that when an application is brought in terms of Section 77(3), as it was argued by Adv Van de Riet SC, such cannot be entertained simply because the arbitrator had not quantified. In any event in terms of the *Republican Press* decision the employee's pay is included in the reinstatement order.

[33] My other misgiving with regard to prayers 2 and 3 is that the Applicants is seeking interest at 15.5% from July 2005 in respect of prayer 2 and interest *a tempore morae* in respect of paragraph 3. If I accept that prayers 2 and 3 can be brought in terms of Section 77(3), interest would only accrue to that once the Court makes an order to that effect. Since there is no order, the interest would not accrue. In any event I am not inclined to grant prayers 2 and 3, since prayer 1 is sufficient for their purpose.

THE ISSUE OF COSTS

[34] Both counsel argued that costs should follow the results. Given the approach I have taken that prayer 1 is inclusive of prayers 2 and 3, it follows that the Applicants was successful in all respects. That being the case I see no reason why the Applicants should not be entitled to their costs.

CONCLUSION

[35] I have, in the course of this judgment, rejected all the arguments presented on behalf of the Respondent. Since the Respondent had not brought a review application for the award, I find no reason why the award should not be made an order of this Court since the Respondent is refusing to comply with the award. In the result I make the following order:-

1. The arbitration award issued by the National Bargaining Council for the Chemical Industry on 11 July 2005 under Case Number: GP0444/03 is hereby made an order of this Court.

2. The Respondent to pay the Applicant's costs

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G.N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 04 December 2008

Date of Judgment: 06 January 2009

APPEARANCES

For the Applicants:	Adv J G van der Riet SC
Instructed by	Cheadle Thompson & Hayson
For the Respondent:	Adv F Boda
Instructed by	Yusuf Nagdee Attorney