REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA36/12

Reportable

In the matter between:

THE PUBLIC SERVANTS ASOCIATION OF SOUTH AFRICA

ON BEHALF OF ITS MEMBERS **Appellant**

and

T T GWANYA N.O. **First Respondent**

G NKWINTI N.O. **Second Respondent**

Heard: **03 September 2013**

Delivered: **27 November 2014**

Summary: Interpretation and enforcement of settlement agreements made orders of court- Parties entering into a settlement agreement which made an order of court. Employer terminating settlement agreement- appellant seeking declaratory order against employer- A settlement agreement made an order of court remained a contractual agreement and cannot be elevated to the status of a court order. A settlement agreement made an order of court enforceable by way of contempt of court proceedings if it is breached and its terms are clear and unambiguous. Enforcement of settlement agreement made an order of court depending on the nature of the dispute. Evidence showing settlement agreement a collective agreement. Settlement agreement made an order of court a collective agreement and may be terminated on reasonable notice. Dispute about the interpretation and

enforcement of a collective agreement should follow the route provided for by the LRA. Labour Court's judgment upheld. Appeal dismissed.

Coram: Waglay JP, Francis *et* Dlodlo AJJA

JUDGMENT

FRANCIS AJA

Introduction

[1] This is an appeal against the judgment and order of the court *a quo* (Conradie AJ) in term of which it dismissed an application to declare the respondents to be in contempt of a court order. Leave to appeal was granted by the court *a quo.*

Background facts

[2] The appellant is the Public Servants Association (PSA) acting on behalf of its members who are employees in the office of the Registrar of Deeds.

[3] The first respondent who is cited in his official capacity is the Director General of the Department of Rural Development and Land Reform (the Department). The second respondent is cited in his official capacity as the Minister of that Department.

[4] During 2006, the appellant's members, who are employees in the Office of the Registrar of Deeds, gave notice that they wanted to embark on strike action. The Department brought an urgent application to interdict the strike. The matter was resolved between the parties after they had concluded a settlement agreement signed by their authorised representatives. The urgent application was withdrawn in terms of the settlement agreement which was unrelated to the urgent application. Curiously, the settlement agreement was made an Order of Court.

[5] The settlement agreement provides for the payment of a so-called "Piecework and Production Incentive Scheme" (the Scheme) bonus to members of the appellant for the increased or additional workload handled during certain periods set out in the settlement agreement. These periods were essentially when the South African economy was buoyant with the resultant high volumes of property transactions being registered in the Deeds Office. There was no definite or specific period stated in the settlement agreement that the Scheme would endure, but it was generally understood that it was a by-product of the then economic boom.

[6] The first respondent continued to comply with the terms of the settlement agreement until 14 January 2009 when it gave notice of its intention to terminate the aforesaid Scheme with effect from 1 February 2009 due to the fact that the increased or additional workload catered for by the collective agreement no longer existed.

[7] Flowing from the aforesaid notice of termination, the appellant alleged that the first and second respondents are in contempt of the court order, alternatively in breach of the court order.

The proceedings in the court *a quo*

[8] The appellant brought an application to hold the respondents in contempt of court for failing to give effect to the order granted on 13 November 2006 or in the alternative to be in breach of the aforesaid court order. The appellant also sought an order declaring that the first and second respondents are bound to extend to the appellant's members employed in the office of the Registrar of Deeds the benefits emanating from the norms approved by the Director-General of the Department on 11 August 2006, referred to in "FA5" and "FA" to the appellant's founding affidavit. During argument, the appellant abandoned the relief sought against the second respondent.

[9] The court *a quo* said that the fact that a settlement agreement is made an order of court does not mean that all the terms of the settlement agreement automatically become terms of the court order. It stated that it is simply assumed that this is the case, with little if any consideration given to the nature of the settlement agreement. There are inherent difficulties in clothing a settlement agreement in the terms of a

court order. It was, said the court, that when the court made the settlement agreement an order of court, all that it was doing was acknowledging that the matter before it was withdrawn, and that the parties had reached an agreement about how they would address the underlying dispute going forward. In other words, the specific terms of the settlement agreement do not necessarily form part of the court order. The court said that it was noteworthy that clause 4 of the settlement agreement records that the parties would inform the court on the day when the interdict application was to be heard and that the matter is withdrawn on the basis that it has become settled between the parties. The fact that the settlement agreement contains an option to make the agreement an order of court does not mean that the details relating to the incentive Scheme also forms part of the court order. All that is included in the ambit of the order is that the parties have reached an agreement on how to resolve the matter going forward. A court should distinguish clearly between orders of court and their enforcement on the one hand, and deeds of settlement on the other hand. The former is concerned with procedural principles and the protection of the courts' dignity and honour and the latter with the law of contract.

[10] The court *a quo* stated that the fact that a settlement agreement is made an order of court does not mean that it is enforceable as such. The purpose of a court order should not, except in certain circumstances, be to record contractual terms between the parties, as the court is not a registry of obligations. Rather, the purpose of the court order should be to bring a dispute to closure. This cannot be achieved where the settlement agreement is not capable or ready for enforcement by execution. The court *a quo* said that the settlement agreement in question was in its view not capable of ready execution. A host of disputes could arise relating to the interpretation and application of the settlement agreement, which would make enforcement of it on the strength of a court order undesirable.

[11] The court *a quo* stated further that the settlement agreement in this matter, in fact and in law, is a collective agreement as contemplated in the Labour Relations Act 66 of 1995 (the LRA). The normal principle applicable to a collective agreement which is concluded for an indefinite period, such as the one in question, is that it may be terminated on reasonable notice. In this regard, section 23(4) of the LRA

provides that unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.

[12] The court *a quo* stated that in this case, to the extent that there is a conflict between the duty to observe a court order and the right to terminate the collective agreement, it was of the view that the collective agreement must prevail.

[13] The court *a quo* said that the conclusion of collective agreements through the process of collective bargaining is what underpins our labour relations system. It added that if the appellant's argument was accepted, then the Department would never be in a position to alter or terminate the incentive Scheme without approaching that court for an order that the underlying agreement be varied or terminated. The court would be called upon to resolve through litigation that which must be resolved through collective bargaining. Such an approach would be inconsistent with the LRA. This would mean that if the parties agree to vary, add to, delete or cancel the agreement as provided for in clause 6, this would be of no force and effect unless sanctioned by the court. This, the court said, cannot be correct.

[14] The court *a quo* said that it did not agree that the appellant's members' contracts were varied to include the incentive bonus and as such they should continue to be entitled to the bonus even though the agreement is cancelled. Given the nature of the right, they only enjoyed it for as long as the collective agreement was in force. Based on these reasons, the court did not believe that there was a breach of the court order and that the respondents could not be held to be in contempt of court. The application was thus dismissed with costs.

On appeal

[15] On appeal, the appellant's counsel abandoned the first ground of appeal which relates to the contempt of court charge on the grounds that one of the requirements for contempt of court namely that the respondents had wilfully disobeyed a court order was not met. They persisted however with the alternative relief that was sought: for a declaratory order. The appellant seeks the enforcement of the settlement agreement.

[16] The appellant contended that the respondents do not have a right to terminate the settlement agreement. Once the settlement agreement has been made a court order, its terms become an order of court. It was further contended by the appellant that the court *a quo* had found that the settlement agreement, being a collective agreement is capable of termination on reasonable notice. The respondents never made it their case that they terminated the settlement agreement on reasonable notice. Secondly, the collective agreement had the effect of varying the individual's employees' contracts of employment and so the termination of the settlement agreement would leave the rights of the individual employees intact. There is no universal right to terminate a contract by virtue of one party's perception of changed circumstances.

[17] It was further contended that in terms of section 23(3) of the LRA, the terms of the settlement agreement varied the contracts of employment of the individual employees. Thus, even if the settlement agreement could be cancelled, it would not affect the rights of the individual employees. The relief that was sought in prayer 3 of the notice of motion sought to enforce the rights of the individual employees.

Analysis of the facts and arguments raised

[18] Section 158(1)(c) of the LRA states that the Labour Court may make any arbitration award or settlement agreement an order of court. Section 158(1A) states that for the purposes of subsection (1)(c), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is only entitled to refer to arbitration in terms of section 22(4), 74(4) or 75(7). Section 22(4) deals with the procedure to be followed in disputes about organisational rights. Section 74(4) deals with disputes in essential services and 75(7) with disputes in maintenance services.

[19] It is common cause that the parties concluded a settlement agreement after members of the appellant went on strike. They agreed that the settlement agreement could be made an order of court in terms of the provisions of the LRA. In their settlement agreement, they had agreed that the collective agreement signed on 11 February 2004 would no longer regulate the relations between them. They agreed that the norms that applied on 30 June 2002 would continue to be utilised

until 31 December 2006. The tariffs that applied since 30 June 2002 would be adjusted upwards on an annual basis at the same rate as the annual salary increments that applied to the affected staff, with effect from 1 July 2002; that the Department would recalculate the amounts payable to employees in terms of the abovementioned clauses and then any outstanding amounts payable to such employees would be paid to them in monthly batches with final payment to be made by not later than 31 March 2007. The attached norms approved by the Director General on 11 August 2006 would apply with effect from 1 January 2007. The aforesaid tariffs would continue to be adjusted on an annual basis in the same way indicated in "'clause 3". "Clause 5.1" of the agreement provides that no agreement varying, adding to, deleting from or cancelling this agreement shall be effective unless recorded in writing and signed by or on behalf of the parties.

[20] It was further common cause that the first respondent had on 13 January 2009 taken a decision to terminate the Scheme with effect from 1 February 2009. That decision was explained in a letter dated 18 November 2009. It stated that its interpretation of the court order was different to that of the appellant's. It said that the implication of the court order is that as long as the Scheme was in place, the norms as agreed to in the settlement agreement which was made an order of court would apply. The settlement agreement does not provide that the Scheme would be in place *ad infinitum* and that was never the intention of the Department. It said that the termination of the Scheme did not violate the court order and that, whilst the Scheme was in place, it did not change the norms.

[21] It is clear from the aforesaid that the parties have different interpretations about the actual meaning of the settlement agreement that was made an order of court. In other words, there is a dispute about what the settlement agreement means. Section 24 of the LRA deals with disputes about collective agreements. It sets out a procedure that must be followed when such a dispute arises. It provides for example for a dispute first to be referred to the Council or the Commission for conciliation and thereafter to arbitration. Importantly, section 24(8) of the LRA provides as follows:

> 'If there is a dispute about the interpretation of application of a settlement agreement contemplated in either section 142A or 158(1)(c), a party mat refer the

dispute to the council or the Commission and subsections (3) to (5), with the necessary changes, apply to that dispute.'

[22] The appellant should have referred the dispute either to the Council or the Commission first for conciliation and if it remained unresolved to the Council or Commission for arbitration.

[23] The appellant did not follow section 24(8) of the LRA but approached the Labour Court for a contempt of court order alternatively breach of court and declaratory relief. On appeal, the appellant no longer seeks a contempt of court order but an order for breach of the settlement agreement and declaratory relief.

[24] The only issues that arise in this matter are whether the respondents were in breach of the settlement agreement that was made an order of court and whether this Court should issue the declaratory order sought by the appellant. Deciding whether the respondents have breached the settlement agreement, involves interpretation of the agreement that was made an order of court.

[25] It is common cause that the parties had drafted a settlement agreement which was by agreement between them made an Order of Court. Once the settlement agreement becomes an order of court, an aggrieved party may approach the Labour Court to enforce the order by way of contempt proceedings should all the requirements of contempt of court be met. It follows and logic dictates that once the agreement has been made an order of court, it becomes an order of court and may be enforced by way of contempt of court proceedings if it is breached. However the court should still consider what the nature of the settlement is all about that was made an order of court. If it is one that involves a collective agreement or the interpretation of such a collective agreement, an aggrieved party cannot approach this Court for an order for contempt of court or breach of a court order but should rather utilise the provisions of the LRA that deals with such disputes.

[26] In the matter of *South African post office Ltd v Communication Workers Union obo Permanent Part-time Employees* (SAPO),[1] the court warned against simply making an agreement an order of court precisely because agreements all too often contain

[1] [2013] 12 BLLR 1203 (LAC).

conditions that must be fulfilled for the happening or not happening of an event or the agreement contains ambiguity or uncertainty requiring extraneous evidence to ascertain the agreed terms and give effect to the terms of the agreement. In *SAPO,* the court dealt with the situation where parties sought to make an agreement an order of court for purpose extrinsic to the execution of the terms of a settlement. The parties were through the back door seeking to validate a failure to comply with certain processes without following the prescribed route. In that judgment, the court also only dealt with making orders of those agreements that can effectively be implemented without the need to debate any of its terms. In other words, only making such agreements an order of court that can be executable by the sheriff because it is clear and certain and can leave no doubt as to its import and failure to comply with the order would then amount to contempt of court.

[27] Other than those agreements referred to above there are those agreements which are basically contracts that are concluded between the litigants. This matter is an example of a contract between the parties.

[28] Where the court is approached to make a contract between the parties an order of court, it must not readily do so even if the parties desire that the agreement be made an order of court because the court should not be, as stated above, in the judgment, a recorder of contractual terms or a registry of duties and obligations agreed to by the parties involved in litigation.

[29] The present matter illustrates the dangers of simply making an agreement an order of court. The agreement deals with how the parties would address a dispute that exists between them. It is a contract between the parties. Making that an order of court does not give the contract the status of a court order all it does is sets out or should have set out the basis upon which legal proceedings were terminated.

[30] The agreement then remains an agreement between the parties and the natural rules relating to agreements will apply.

[31] The court *a quo* correctly found that the settlement agreement constituted a collective agreement. The court said that the court order merely recorded the settlement agreement between the parties without an element of the court requiring

obedience with its terms as a court order. The application was thus correctly dismissed.

[32] The appeal in the circumstances stands to be dismissed.

[33] I have taken into account that the parties do have an on-going relationship and do not believe that costs should follow the result. An appropriate order is that each party is to pay its own costs.

[34] In the circumstances, I make the following order:

34.1 The appeal is dismissed;

34.2 Each party is to pay its own costs.

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Francis AJA

Waglay JP and Dlodlo AJA concur in the judgment of Francis AJA

APPEARANCES:

FOR APPELLANT:	H A Van Der Merwe
	Instructed by Martin Weir-Smith Attorneys
FOR RESPONDENTS:	W R Mokari SC with A Olua
	Instructed by State Attorneys