REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case no: CA15/12

In the matter between:

SOUTH AFRICAN POST OFFICE LIMITED **Appellant**

and

CWU obo PERMANENT PART-TIME EMPLOYEES **Respondent**

Heard: **23 May 2013**

Delivered: **28 August 2013**

Summary: Making settlement agreement an order of court in terms of section 158(1)(C) of the LRA- Prescription raised in argument not properly before court- Labour Court making a settlement agreement an order of court and ordering the CCMA to conciliate and arbitrate the issue relating to the interpretation of the settlement agreement- section 158(1)(c) should be read in conjunction with section 158(1A) of the LRA- court should exercise its discretion and satisfy itself whether the settlement agreement meets the criteria in section 158(1A)- court should also consider all relevant facts and exercise its discretion to make a settlement agreement an order of court. Held that the terms of the settlement agreement were disputed- dispute related to the interpretation of the settlement agreement- Labour Court lacks jurisdiction to interpret a collective agreement and could not make such agreement an order of court. Appeal upheld with costs

Coram: Waglay JP, Tlaletsi ADJP and Coppin AJA

JUDGMENT

WAGLAY JP

Introduction

[1] This is an appeal against the judgment of the Labour Court (Steenkamp J), in terms of which the Labour Court made a settlement agreement between the parties an order of Court. The Labour Court further ordered that the dispute between the parties about the interpretation of the said settlement agreement be conciliated by the Commission for Conciliation, Mediation and Arbitration ("the CCMA") and if necessary arbitrated on an expedited basis.

Background

[2] The Respondent referred a dispute in respect of implementing the terms of a collective agreement concluded between them in July 2007 to the CCMA for Arbitration. While the Arbitration was proceeding, the parties settled their dispute. The settlement agreement was concluded on 29 February 2008.

[3] The terms of the settlement agreement are not relevant for present purposes, save to record that a dispute arose about the interpretation of the settlement agreement.

[4] On 4 August 2008, the appellant referred a dispute related to the settlement agreement to the Labour Court. Again the purpose of the referral is not known, nor is it relevant. The order of the Labour Court pursuant to the referral was the following:

'*the settlement agreement between (the parties) on the 29th February 2008 is declared to be of full force and effect and binding on the parties.*'

[5] Both parties submitted that the Labour Court was not asked to, nor did it make the settlement agreement an order of court.

[6] On 24 February 2011, four days before the third anniversary of the conclusion of the said agreement, the respondent instituted action proceedings against the appellant.[1] The dispute it referred to the Labour Court for adjudication was not pre-shadowed by any conciliation process. The order the respondent sought on behalf of its members in the schedule to the papers was:

> *"18.1 that the agreement concluded between the parties on 29 February 2008 be made an Order of this Honourable Court;*
>
> *18.2 that the Respondent be ordered to –*
>
> *18.2.1 permit the Applicant's members listed in the schedule hereto to work the night shift, from the date on which an Order is made, for as long as that shift endures;*
>
> *18.2.2 pay to each of the Applicant's 136 members the amount of R80 749.16, being the shift and transport allowances and pension benefits that they would have earned during the period 01 April 2008 to 31 January 2011, as well as the shift allowances and overtime pay that they would each earn from 01 February 2011 until the date of this Order;*
>
> *18.2.3 to pay interest on all outstanding amounts due and payable by it to the Applicant's 136 members at the prescribed rate; and*
>
> *18.2.4 pay the Applicant's costs of suit."*

[1] The case number used by the respondent was the same case number that was allocated to the earlier matter which I have referred to in paragraph 4 above.

[7] It was common cause that the prayers contained in the above quoted paragraphs related to the interpretation of the agreement which was sought to be made an order of the Labour Court.

[8] The appellant opposed the action. One of the grounds on which it opposed the action was that the Labour Court had no jurisdiction to deal with the dispute relating to the interpretation of the settlement agreement as such a dispute should be referred to the CCMA in terms of section 24(8)[2] of the Labour Relations Act of 1985 as amended ("the LRA"). The appellant also objected to the respondent's prayer that the settlement agreement be made an order of court in terms of section 158(1)(c) of the LRA on the grounds that the respondent had taken an irregular step by utilising an action procedure instead of an application procedure to obtain this order.

[9] After the close of pleadings, a pre-trial conference was held before a judge. At the conference, the respondent sought for the Labour Court to make the settlement agreement an order of court. As the appellant did not agree to such an order, the Labour Court refused to make the agreement an order of the Court at the pre-trial conference.

[10] In the pre-trial minute, the respondent appears to have abandoned its prayers for the Labour Court to interpret the settlement agreement and replaced it with a prayer that the dispute about the interpretation of the settlement agreement be "*transferred to the CCMA to be arbitrated on an expedited basis"*.

[11] Nothing further transpired in this matter. There was no request for a trial date, nor was a notice of withdrawal of the action proceedings filed.

[12] On 23 February 2012, six days short of the fourth anniversary of the conclusion of the settlement agreement, the respondent brought the application, which is

[2] Section 24(8) provides that: 'If there is a dispute about the interpretation or application of a settlement agreement contemplated in either section 142A or 158(1)(c), a party may refer the dispute to a *council* or the Commission and subsections (3) to (5), with the necessary changes, apply to that dispute.'

now the subject matter of this appeal.[3] The relief sought by the respondent in its application proceedings is the same as that sought by it in its action proceedings, save that while in its action it sought for the Labour Court to transfer the dispute about the interpretation of the agreement to the CCMA to be arbitrated on an expedited basis, it now asked in the application for the dispute to be '*transferred to the CCMA to be conciliated and if necessary, to be arbitrated on an expedited basis.'* In essence, the respondent was seeking, by way of application proceedings, exactly the same relief it sought in its action proceedings.

[13] The reading of the founding affidavit in support of the relief leaves one totally aghast! The founding affidavit is deposed to by the attorney acting for the respondent and, effectively, proffers as respondent's reasons for bringing the application, the following:

i. the failure by the appellant to agree to the orders that it seeks in its Notice of Motion;

ii. the appellant's "opportunistic" behaviour in raising the defence of lack of jurisdiction of the Labour Court;

iii. that, *"it is a necessary first step to have the settlement agreement made an order of court to avoid it prescribing before a dispute about its interpretation is considered"*.

The Labour Court

[14] The Labour Court, in deciding the matter found that the appellant wanted to "avoid" the merits of the dispute and that the only reason it opposed the application was to ensure that prescription is not interrupted. It thus held that the appellant's opposition was "cynical". The Labour Court also went on to say that the appellant's opposition to the application "smacked of opportunism" and on this, the sum total of its reasoning, went on to grant the relief sought by the

[3] This matter also carried the same case number as the previous matters.

respondent. Not only did the Labour Court make the settlement agreement an order of court, it went on and ordered the CCMA to conciliate the dispute about the interpretation of the settlement agreement [now the court order] and, if necessary, to arbitrate the dispute on an expedited basis. It also ordered the appellant to pay the costs of the application. The Labour Court had nothing to say on the issue of prescription.

The Appeal

[15] On appeal both parties contended that the first issue to be determined was whether, by the time the respondent launched the application now on appeal, the settlement agreement had prescribed. In this respect, the respondent made the submission that once it had instituted the action proceedings against the appellant, prescription was interrupted in terms of the Prescription Act[4] and since the action proceedings was instituted a few days before the third anniversary of the agreement, the agreement had not prescribed. The appellant, on the other hand, argued that once the respondent instituted the application proceedings it lost the protection afforded by the Prescription Act. The effect of the application proceedings, so the appellant argued, was that the respondent had abandoned its action proceedings, and since the action instituted by the respondent was not brought to finality the respondent could not use the action proceedings to claim that the prescription period was interrupted by it.[5] The appellant thus argued that the settlement agreement had in fact prescribed. One of the arguments made by counsel for the appellant was that the court could not breathe life into that which was already dead. Respondent, on the other hand, argued that the action against the appellant was still pending and the application proceedings was merely an

[4] Act no 68 of 1969 as amended which provided in s15(1) as follows: 'The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.'

[5] Section 15(2) of the Prescription Act provides that: 'Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.'

interlocutory application, adding that this was evidenced by the fact that the case numbers in both matters were the same.

[16] It was disingenuous for Mr Williams to argue, on behalf of the respondent, that the application was interlocutory. The application was clearly not interlocutory. Once granted it made the action instituted by the respondent irrelevant. The relief claimed in the application proceedings, as I have said earlier, was exactly the same as the relief claimed in the action proceedings. As regards the case number, in his affidavit, Mr Williams states, *inter alia*, that he was using the same case number in the action proceedings as the previous matter, because the Registrar of the Labour Court had insisted that matters relating to a similar dispute should utilise the same case number, but that the utilisation of the same case number should not be taken to mean that the action proceedings was the same matter as the previous matter, i.e. which was first assigned the case number. In light of that, I find Mr Williams' argument as to why I should find the application to be interlocutory, to be less than candid.

[17] In the circumstances, appellant is quite correct to argue that once the respondent brought the application it signalled an intention of an abandonment or withdrawal of its action and could therefore not rely on the action proceedings to seek protection against prescription.

[18] In any event, the issue of prescription is not a matter for determination, because a court cannot pronounce upon the issue of prescription unless it is properly raised in the pleadings. In this matter, the appellant raised the issue of prescription in argument, but prescription was not pleaded as a defence to respondent's claim.[6] Appellant's argument was that the respondent had raised the issue of prescription in the founding papers and it was therefore entitled to argue the issue. I believe not. Respondent had merely said that it wanted the

[6] See *Technikon Pretoria (now Tshwana University of Technology v Commissioner EP Nel No and Others* case number JA15/2012 heard on 14 May 2013 where the point *in limine* raised by the appellant that prescription by way of point of law was not properly before the court *a quo* was dismissed. On appeal, the agreement between the parties, that the application based on point of law be struck from the roll was made an order of court.

Labour Court to make the agreement an order of court to prevent the appellant from raising prescription as a defence against its claim. The appellant cannot rely on that statement to found a basis to argue that the claim had prescribed. In the absence of prescription being properly raised in the pleadings and in the absence of agreement that it may nevertheless be raised before us, it cannot be determined.

[19] The next issue for determination is whether the Labour Court was entitled to make the settlement agreement an order of court. Section 158(1)(c) of the LRA provides:

> *"(1) The Labour Court may –*
>
> *(a)…*
>
> *(b)…*
>
> *(c) make any arbitration award or any settlement agreement an order of the Court".*

[20] This section must be read with section 158(1A) which defines the settlement agreement.

[21] Section 158(1)(c) of the LRA provides that the Labour Court has the jurisdiction to make any settlement agreement, concluded in respect of a matter arising within the scope of the LRA, an order of court. This does not mean that the order is there for the taking. The Labour Court has a discretion to make it an order of court even if it otherwise meets the criteria provided in section 158(1A), read with section 158(1)(c) of the LRA.[7] Hence, where a settlement agreement provides for an employer to pay an employee R5000,00 by a particular date and the employer pays this amount on or before the due date the employee would be foolhardy to approach the Labour Court to make the settlement agreement an order of court, as no purpose would be served by doing so and the Court would refuse to make

[7] See; *Maryka Greef v Consol Glass (Pty)* Ltd (Unreported decision of the LAC) Case No. CA02/12 delivered on 21 May 2013.

it an order of court. By the same token, where the settlement agreement provides that the employer '*will re-employ a dismissed employee if he feels like doing so*', and the employer does not re-employ the employee, the employee would be ill advised to approach the Labour Court and seek to make that agreement an order of court, because no purpose can be served by making such an agreement an order of court. It is an agreement that leaves the discretion to employ entirely within the discretion of the employer and he may employ 'if he feels like doing so'. He cannot be forced by a court's order to be in the mood to employ and there is no enforceable obligation to employ. The purpose of making a settlement agreement or an arbitration award, an order of court is to enforce compliance with the agreement, or the award. The agreement or the award must therefore be unambiguous and unequivocal and not open to any dispute. This does not mean that an award or agreement that provides payment of salary or wages of a certain period is not clear and precise. The parties would know or easily ascertain by having regard to documentation like pay slips or an independent accounting exercise what the amount is [although ideally the amount should be clearly set out to avoid unnecessary delays and expensive exercise to ascertain the exact amount due]. What all this means is that before the Labour Court will grant an order sought in terms of Section 158(1)(c) of the LRA it must be satisfied that, at the very least :

i. the agreement, is one which meets the criteria set in s 158 (1)(c) read with section 158(1A) of the LRA, and if it is an award, that it satisfies the criteria set in section142A of the LRA;[8]

ii. that the agreement or award is sufficiently clear to have enabled the defaulting party to know exactly what it is required to do in order to comply with the agreement or award; and,

iii. There has not been compliance by the defaulting party with the terms of the agreement or the award.

[8] See the *Maryka Greef* case (supra).

[22] Once the Labour Court is satisfied with all of the above then it must, nevertheless, exercise its discretion whether to grant or refuse the order. In exercising the discretion, the Court must take relevant facts and circumstances into account, such as are necessary to satisfy the demands of the law and fairness. Necessarily, each case must be decided on its own facts and circumstances. There is, otherwise, no closed list of factors to be taken into account. A relevant factor is the time it took the party seeking the relief to launch the application to make the settlement or award an order of court. The Labour Court may, for example, be more reluctant to make an award for reinstatement of employees an order of court where the employees unreasonably delayed in seeking the enforcement of the award, yet a delay in years in seeking to make an award for payment a sum of money may not be grounds for refusing to make the award an order of Court. Finally and most crucially it must be remembered that the purpose of making an agreement or award an order of the Labour Court is to compel its enforcement, or enable its execution and not for some other purpose.

[23] In this matter it is evident that the parties disagree about the meaning of the contents of the settlement agreement. The respondent states that the agreement needs to be interpreted. In such circumstances, because the parties themselves disagree as to what was intended by the agreement, so much so that both parties agree that third party intervention is necessary to give a proper interpretation as to what were the terms of the agreement, the application does not even 'get off the starting blocks'. The Labour Court cannot in such circumstances make the agreement an order of court, because there is a dispute about what was agreed, and it would serve no purpose, other than exacerbate the interpretational issue, if such an agreement were to be made an order of court. An order that is unclear and ambiguous is open to dispute and that defeats the very purpose for making it a court order in the first place. Such an order would not be enforceable or executable.

[24] This then brings me to the issue of the referral of the settlement agreement to the CCMA for interpretation. Section 24(8) of the LRA provides that a dispute about

the interpretation of a settlement agreement must be referred to a bargaining council or the CCMA for resolution. The settlement agreement must however be one that is capable of being made an arbitration award in terms of Section 142A, or an order of court in terms of Section 158(1)(c) of the LRA. The order sought by the respondent in this matter and the one granted by the Labour Court was totally misconceived and erroneous. The Labour Court made the settlement agreement an order of court (which it should not have done) and having done so, ordered that the dispute between the parties, about the interpretation of what it made into a court order, to be "transferred" to the CCMA for conciliation '*and if necessary to be arbitrated on an expedited basis.*' The Labour Court's orders cannot be referred to a bargaining council or the CCMA for interpretation. It is not competent for a quasi-judicial body to interpret an order of a court. There is also no indication that the Labour Court relied on the unreported judgment of *Fidelity Security Services (Pty) Ltd v P J Benneker*,[9] (*Fidelity* judgment) which was a judgment that was relied upon by the respondent. This judgment purportedly held that a settlement agreement once made an order of Court may be referred in terms of section 24(8) of the LRA to be interpreted by a bargaining Council or the CCMA. In so far as that judgment purports to say that, it is clearly wrong. In any event, s 24(8) of the LRA only deals with awards and settlement agreements, not Court Orders.

[25] The respondent in its founding affidavit admitted that the Labour Court '*lacked the jurisdiction to interpret a dispute concerning that agreement'* referring to the settlement agreement. Having regard to that, I fail to see the basis upon which the Labour Court ordered a "transfer" of the dispute to the CCMA! It was a spurious prayer, alternatively sought wrongfully, to limit the CCMA's right to consider the matter without following its usual processes. The appellant properly submits that there was no basis whatsoever for the Labour Court to grant that order, nor was it a matter that the Labour Court should have considered, having regard to the pleadings in this matter.

[9] Case number: C 933/2008 dated 18 August 2011(Unreported).

[26] In the circumstances, the appeal must succeed.

[27] With regard to the issue of costs, I am satisfied that this is a matter in which consideration of law and equity demand that costs should follow the result. I say this for the following reasons. The respondent's attorneys appear to wrongly interpret appellant's agreement that the respondent has a right to seek an order in terms of s158(1)(c) of the LRA to mean that the appellant is consenting to the order. The respondent's attorney also wrongly interpreted the appellant's agreement with the respondent about the interpretation of the *Fidelity* judgment to mean that the appellant was agreeing to the judgment being correct. There is no explanation why the respondent's attorney did not enrol the action proceedings instead of launching the application specially, in circumstances where there is nothing to indicate that the action could not have been dealt within a month or two of the pre-trial minute having been finalised. And, finally, when the issue of the need for this application was raised, the attorney for the respondent submitted that the application was an interlocutory application, whereas it was not. I have already stated earlier what I thought of this argument.

[28] The application was without any merit. The argument presented were not only misconceived but cannot be said to be based independently on the instruction of the client without any input from the attorney, and in my view the attorney failed to provide competent advise. The facts and allegation contained in the affidavit which formed the basis of the application were sworn to by the attorney and only he could form the opinions he did which then formed the basis of the application. In the circumstances, I was leaning towards taking the view that a *de bonis propriis* costs order might be appropriate, but having regard to the fact that the matter has taken so long to get where it was, blame cannot be placed on the attorneys alone.

[29] In the result, I make the following order:

The appeal is upheld with costs and the order of the Labour Court is substituted with the following order:

"The application is dismissed with costs"

_____

Waglay JP

I agree

_____

Tlaletsi ADJP

I agree

_____

Coppin AJA

APPEARANCES:

FOR THE APPELLANT:	Adv. F Boda Instructed by Z Ngwenya of Cliffe Decker Hofmeyer Inc.
FOR THE RESPONDENT:	Mr Glyn Williams of Chennells Albertyn Attorneys