REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Of interest to Other Judges

Case no: C 540/08

In the matter between:

FAWU	**First applicant**
VERONICA CLAASEN	**Second applicant**
BERONICE SETHLOW	**Third applicant**
APATHEA PHATLANYANE	**Fourth applicant**
ROSY TSHENYEGO	**Fifth applicant**

and

CAPE HOSPITALITY SERVICES T/A	
SAVOY HOTEL	**Respondent**

Heard: **30 January 2014**

Delivered: **24 February 2014**

Summary: LRA s 158(1)(c) – arbitration award made order of court. Part of award relating to writ of execution settled but employer did not reinstate employees.

JUDGMENT

STEENKAMP J

Introduction

[1] The respondent, Savoy Hotel, was ordered to reinstate the applicants (represented by the Food and Allied Workers Union) in an arbitration award. It has not done so. The applicants (FAWU and its members) seek to have the arbitration award made an order of court in terms of s 158(1)(c) of the Labour Relations Act.[1] The respondent says the claim has been settled.

Background facts

[2] A CCMA commissioner made an award reinstating the applicants as long ago as May 2008. The applicants initially brought this application in September 2009. In 2011, their previous attorney, Mr Adrian Horwitz of Kimberley, engaged in correspondence with the Hotel's attorney, Mr Johannes Spamer of Spamer Triebel in Bellville (who still represents the hotel). Mr Spamer says a compromise ensued; Mr Ponoane denies it.

[3] Nevertheless, this Court made the arbitration award an order of court on an unopposed basis on 31 May 2013. That order was rescinded on 28 August 2013 because the Hotel did not receive the notice of set-down.

[4] The question of whether or not the dispute was settled, rests on the events of July 2011.

[5] It is common cause that a writ of execution in the amount of R 31 491, 60 was issued out of this Court on 27 October 2010. That amount comprised the backpay owing to the applicants from their date of dismissal, 9 February 2008, to the date of reinstatement, 9 June 2008. It is also common cause that they were not reinstated.

[1] Act 66 of 1995 (the LRA).

[6] The sheriff only attended at the premises of the Hotel on 6 July 2011. Mr Spamer sent a letter to the applicants' then attorney, Mr Horwitz, on 20 July 2011. Although it was marked "without prejudice", he disclosed it to the Court. Mr Spamer made the following offer "in full and final settlement":

> 'Our client will pay half of the amount of R31 491, 60 to yourselves [*sic*] on or before the end of July 2011;
>
> Our client will pay the remaining half of the amount of R31 491, 60 by the end of August 2011.'

[7] Mr Horwitz responded in these terms on 25 July 2011:[2]

> 'Our clients are in principle prepared to accept your client's offer of settlement in two monthly instalments, one at the end of July 2011 and one at the end of August 2011.
>
> However, our clients require the payment of the interest due in terms of the writ which is 15,5% on R 31 491, 60 from 19 May 2008 (1167 days) together with the costs of execution which we estimate at R 1000 plus VAT.
>
> The full amount outstanding is therefore R48 212, 06 made up as follows:
>
> ...
>
> <u>The original award also provided for reinstatement of all the applicants on the same terms and conditions that existed at the time of their dismissal.</u>
>
> Should your clients pay the above amount, we will <u>recommend</u> to our clients to drop the <u>legitimate claim</u> they have in this regard and for the payment of backpay from the date of the award to the present time.'

[8] The Hotel subsequently paid the amount of R 48 212, 06 in three instalments. Nothing more was said about reinstatement until the applicants obtained the order of 31 May 2013 on an unopposed basis. As I have noted, that order was rescinded in August 2013 and re-enrolled for hearing on an opposed basis on 30 January 2014, after the respondent

[2] My underlining.

had delivered its opposing papers. The applicants replied and included an affidavit by Mr Horwitz. The respondent did not replicate.

Evaluation/Analysis

[9] It is so that an offer of compromise "in full and final settlement" of a debt constitutes a compromise and precludes the creditor from claiming the balance of the amount owing, if that offer is accepted.[3] But, as Malan AJA remarked in *Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd*.[4]

> 'The essential issue is whether an agreement of compromise was concluded: one is concerned simply with the principles of offer and acceptance.… In other words, 'the proposal, *objectively* construed, must be intended to create binding legal relations and must have so appeared to the offeree.'

[10] In this case, it is quite clear from Mr Horwitz's response that he only accepted the offer in full and final settlement in respect of the writ of execution for the amount owing from 8 February 2008 to 9 June 2008, together with interest and the Sheriff's fees. He reminded Mr Spamer in very specific terms of the fact that it did not include his clients' "legitimate claim" to reinstatement in terms of the award. He did no more than undertake that he would "recommend" to his clients to drop that claim and the further claim for backpay from 9 June 2008.

[11] In these proceedings, Mr Horwitz went further. He stated under oath:

> 'I may add as well, that only assisted the second to fourth applicants to pursue their rights under the warrant of execution issued pursuant to the CCMA award granted under case number NC 465 – 08. Insofar as the award directed that they should get back pay and did not assist them with regard to the direction by the Commissioner that the applicants be reinstated.

[3] Cf *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (A) at 529 B-C; *Kei Brick and Tile Co (Pty) Ltd v A M Construction* 1996 (1) SA 150 (E) at 159 A-C.
[4] 2008 (3) SA 327 (A) para 10 (footnotes omitted).

> I deny that there was ever any deed of settlement entered into between the parties to settle the issue pertaining to their reinstatement as per the CCMA arbitration award.
>
> I humbly submit that, had they been a settlement of the reinstatement claim, the deed of settlement would have been drawn and executed. I deny therefore, that there was a settlement agreement reached by the parties in relation to the reinstatement claim. The only proposal of the respondent that I accepted was for the payment of the monies due in terms of the warrant of execution issued out of the above honourable court in instalments in accordance with the respondent's ability to pay.'

[12] Mr Spamer – who represented the respondent throughout and still does – did not respond to these statements under oath. Should he have wished to replicate, he could have done so.[5]

[13] On the evidence before me, I must accept the clear evidence of Mr Horwitz – an officer of the court – under oath that he only accepted the offer of compromise with regard to the amount that formed the subject of the writ of execution, i.e. the backpay due to his clients from 8February to 9 June 2008. He did not relinquish their right to reinstatement. That much is also borne out by the contemporaneous correspondence.

[14] That leaves the question of the appropriate relief. Mr Ponoane simply asked that the arbitration award be made an order of court. That entails the retrospective reinstatement of his clients to 9 June 2008, more than five years ago. That also implies their right to backpay, apart from the period of 8 February to 9 June 2008.

[15] I have great sympathy for the position of the respondent. It may well be that, after he had made the payments on behalf of his clients in 2011, Mr Spamer was under the impression that the applicants had relinquished their claim for reinstatement. There is no evidence before me that they tendered their services at that time. It is not clear to me why this

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[5] *MISA/SAMWU obo Members v Madikor Drie (Pty) Ltd* [2006] 1 BLLR 12 (LC).

application was only set down – initially on the unopposed roll, after Mr Ponoane had come on record – in May 2013. The applicants had launched the application in September 2009.

[16] Mr Spamer urged me, should I find in favour of the applicants, not to order retrospective reinstatement, in the light of the delays occasioned by the applicants. He relied on the authority of the Labour Appeal Court in *NUMSA v Fibre Flair CC t/a Kango Canopies*[6] where Wallis JA agreed with the court *a quo* having exercised its discretion not to order retrospective reinstatement in a case of dismissal for participating in an unprotected strike. But I have no such discretion. That case was decided with reference to section 193(1)(a) of the LRA. This is not a case where the court has original jurisdiction. It is an application to make an existing arbitration award an order of court in terms of section 158(1)(c). The only discretion I have is to make it an order of court or not.[7]

[17] I am not persuaded that I should exercise the discretion not to make the award an order of court. The award was handed down in May 2008. The applicants had to report for duty on 9 June 2008. They say they did; the respondent denies it. But in September 2009, the applicants brought this application on the basis that they had reported for duty and that the respondent's general Manager, Richard Ndlovu, refused their tender on the basis that the Hotel was reviewing the award. It is common cause that it did not. The award stands. The applicants then brought this application in September 2009. The writ of execution was issued a year later. The respondent says it only came to its attention on 6 July 2011 when the sheriff attended at its premises. The settlement discussions ensued. The applicants did not withdraw the application that they filed in September 2009. It is not clear why the application was not set down for hearing until May 2013. It may be that the applicants should have done more to pursue it; but they never abandoned their claim. Had I had the discretion, I would have limited the amount of backpay due to them; but I

[6] (JA56/99) [2000] ZALAC 3 (17 March 2000).
[7] *S A Post Office Ltd v CWU* [2013] 12 BLLR 1203 (LAC) para [21] – [22]; *BPSA v Maruping* (J 841/09, 26 January 2010, unreported) para [10].

do not have such a discretion, and it would not be in the interests of justice to bar them from exercising their right to reinstatement.

[18] It is also true, as Mr Spamer argued, that there is no evidence before the Court that the applicants remain unemployed. I intend to address that by specifying in the order that they must report for duty by a certain date, failing which they will forfeit the right to reinstatement. The respondent has the right to finality in these proceedings.

[19] With regard to costs, I take into account the delays occasioned by the applicants and the fact that, pursuant to the applicants' reinstatement, the parties will have to renew their relationship. An adverse costs order will have a chilling effect on that relationship. In law and fairness each party should bear its own costs.

Order

[20] I therefore make the following order:

20.1 The arbitration award under case number NV 458-08 is made an order of court.

20.2 The individual applicants – Ms Claasen, Ms Sethlow, Ms Phatlanyane and Ms Tshenyego – must report for duty on or before 1 April 2014, failing which they will be deemed to have abandoned their right to the relief awarded in the arbitration award.

20.3 The applicants are not entitled to backpay for the period 8 February 2008 to 9 July 2008.

20.4 There is no order as to costs.

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Steenkamp J

APPEARANCES

For the Applicants: MJ Ponyane (attorney).

For the Respondent: J Spamer (attorney).