REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: J 1858/12

In the matter between:

SUPPLY TERMINATION OFFICERS (STOs)
[SIBUSISO MHLONGO AND 12 OTHERS] **First to Thirteenth Applicants**

and

CITY OF JOHANNESBURG REVENUE,
FINANCE AND ECONOMIC DEVELOPMENT **First Respondent**

CITY POWER (PTY) LTD **SECOND RESPONDENT**

Heard: **10 July 2014**

Delivered: **14 October 2014**

Summary:

JUDGMENT

LEPPAN AJ

Introduction

[1] This is an application in terms of section 158(1)(c) of the Labour Relations Act[1] ("LRA") to make a settlement agreement an order of court. The

[1] Act 66 of 1995

Applicants also pray for an order directing the Respondents to comply with the terms of the settlement agreement.

[2] The settlement agreement is a memorandum of understanding ("Memorandum") concluded by the parties on 19 April 2005.

[3] The Respondents oppose the application on the basis that-

3.1 any claim in terms of the Memorandum has prescribed; and

3.2 in any event, the subject matter of the Applicants' grievance is an unfair labour practice and falls outside the jurisdiction of this court.

3.3 the Memorandum is not capable of being made an order of court;

Facts

[4] The Applicants were employed by the First Respondent as Supply Termination Officers. In August 2000, the Applicants lodged a grievance based on the following complaints -

4.1 they did not receive a public allowance, which is also referred to as a "stress allowance"; and

4.2 complained that they did not receive a "locomotion" allowance.

[5] It is common cause that the Applicants were subsequently paid a stress allowance with retrospective effect, disposing of that issue.

[6] The Applicants raised a further grievance on 29 August 2001, in which they complained that their previous grievance had only been partially resolved. It appears from the annexures to the Applicants' founding affidavit that, while the stress allowance had been addressed, the Applicants had not yet received a locomotion allowance.

[7] Between April and June 2005, the Applicants were transferred from the employment of the First Respondent to the employment of the Second Respondent.

[8] On 19 April 2005, the parties concluded the Memorandum, in which they recorded certain conditions of settlement, of which the following is relevant:

> '1. The Applicants hereby reaffirm the implementation of the grievance hearing and that they cannot withdraw or suspend the findings.
>
> 2. The Applicants reaffirm that this matter will be referred to the third party to quantify the claim to give effect to the findings of the presiding officer. The terms of reference in respect of the third party shall be worked out by both parties.
>
> 3. In this connection the Applicants will be transferred to City Power (Pty) Ltd…The details of this transfer will be worked out in the consultation with the STO's.
>
> The old employer must –
>
> Agree with the new employer to a valuation as at the date of the transfer of any other payments that have accrued to the transferred employees but have not been paid to the employees of the old employer'.

[9] The Respondents allege that the Applicants were paid their locomotion allowance during April 2005. The Applicants admit this much, but contend that the payment of the locomotion allowance was not made retrospective. It does not appear from the papers whether the locomotion allowance was paid before or after the Memorandum was concluded.

[10] In February 2006, the First Respondent undertook what appears to be a quantification exercise in respect of the amounts that had accrued to the Applicants in terms of the locomotion allowance. The resultant report[2] shows a grand total of R1 128 936.00, although this amount had been crossed out in pen.

[11] On 5 March 2007, the Applicants lodged a request for conciliation at the South African Local Government Bargaining Council ("SALGBC"), stating that their grievances had not been completely addressed. The Applicants withdrew their request for conciliation within a few days of having lodged it, apparently in the belief that the First Respondent had proposed a meeting

[2] Annexure "M" to the founding affidavit

to "facilitate" their demands. Between March 2007 and October 2009, the Applicants repeatedly raised their grievance, but to no avail.

[12] The Applicants refer obliquely to "the Respondent's undertaking in March 2007 to resolve the issue of the STOs unpaid monies" at paragraph 28 of their Founding Affidavit, but there is no direct averment in respect of such an undertaking and it is not supported by any documentary evidence.

[13] On 15 March 2010, the matter was set down for conciliation (I can only assume that the Applicants must have re-instituted their request for conciliation), but on the date of the hearing the Respondents raised a jurisdictional point the SALGBC issuing a ruling that it lacked jurisdiction to determine the matter.

[14] Nothing further appears to have occurred in respect of the dispute between 15 March 2010 and 17 July 2012, the latter date being the date when the Applicants served their Notice of Motion in the application before this Court.

Ordering compliance with a provision of this Act

Dispute of Fact

[15] The Respondents contend in their heads that there is a dispute of fact as to the retrospectiveness of the payment in terms of the locomotion allowance and that the *Plascon-Evans* Rule applies. The Rule states that –

> 'where in proceedings on 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 affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order'.[3]

[16] Accordingly, the Respondents contend that the dispute concerning the retrospectivity of the payments made by the Applicants should be determined on the Respondents' version.

[3] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A), see 1984(3)623 (A).

[17] I refer to the judgment of the Supreme Court of Appeal in *New Balance Athletic Shoe Inc v Dajee NO*[4], where it was held: 'the rule in Plascon-Evans is not blind to the potential for abuse. As this court said in Fakie NO v CCII Systems (Pty) Ltd, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials'. It was easily within the Respondents' power to adduce proof of the alleged retrospective payments by annexing this to their answering affidavit, or at the very least, to rebut the contrary inference which arises from the 2006 quantification report mentioned above. The Respondents declined to do so. Against this backdrop is the Applicants' contention that payment was not retrospective, which contention is strengthened by the presence of the aforementioned quantification report.

[18] Consequently, I find the Respondents' allegation that retrospective payment in terms of the locomotion allowance was effected in 2005 to be implausible. I cannot accept that the Respondents, having paid the amounts owing, commissioned a detailed quantification of those same amounts in the following year. I am therefore of the view that the locomotion allowance was not paid retrospectively.

Jurisdiction

[19] The Respondents contend in their answering affidavit that the true nature of the dispute is that of an unfair labour practice and that it must first be ventilated by way of arbitration, failing which, this court will lack jurisdiction to hear this matter. I do not agree. Section 158(1)(c) provides that the Labour Court may make "any settlement agreement" an order of court and Section 158(1A) provides that for the purposes of Section 158(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" (my emphasis). Consequently, it does not matter to which of the two forums the dispute could have been referred.

Prescription

[4] (251/11) [2012] ZASCA 3

[20] A period of over seven years elapsed between the date on which the Memorandum was concluded and the date on which this Application was instituted. Accordingly, the Respondents contend that any claim if competent in terms of the Memorandum has prescribed. The Applicants disagree, for the following reasons:

20.1 prescription does not apply to the Memorandum because it is an agreement and not a debt open to prescription;

20.2 alternatively if prescription were to apply, it would be applicable from 1997, being the date on which some of the payments accrued[5]. This contention has no merit, as we are concerned with prescription as it applies to the Memorandum and not to any grievances that preceded it;

20.3 alternatively, in the event that prescription applied to the Memorandum, the running of prescription was interrupted by:

20.3.1 payments made by the Respondents to the Applicants in partial compliance with the Memorandum, which payments constitute acknowledgement of liability; and

20.3.2 the referral of a dispute to conciliation.

Does the Prescription Act apply to the Memorandum?

[21] The Applicants have not advanced any argument in their heads to support the contention that the Memorandum is not subject to prescription on the basis that it is an agreement and not a debt.

[22] Section 16 of the Prescription Act provides as follows:

> 'Application of this Chapter.—(1) Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an

[5] Paragraph 15 of the Replying Affidavit; paragraph 10 of the heads of arguments

action for the recovery of a debt, apply to any debt arising after the commencement of this Act.

(2) The provisions of any law—

(a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; or

(b) which, if this Act had not come into operation, would have applied to the prescription of a debt which arose or arises out of an advance or loan of money by an insurer to any person in respect of an insurance policy issued by such insurer before 1 January 1974, shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation'.

[23] The Appellate Division in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A)[6] held, in reference to the Prescription Act, that a debt is 'that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another'. That court continued: 'See Shorter Oxford English Dictionary; and see also Leviton and Son v De G Klerk's Trustee 1914 CPD 685 at 691 in fin. "Whatever is due - *debitum* - from any obligation'. This definition was referred to with approval by this court per Molahlehi J in *Fredericks v Grobler NO and Others*.[7]

[24] The case of *Mampuru and Others v Maxis Strategic Alliance (Pty) Ltd*[8] concerned an application to make a settlement agreement an order of court in terms of Section 158(1)(c) of the LRA. There, this court held per Molahlehi J that a settlement agreement constitutes a debt for the purposes of the Prescription Act.[9]

[25] In light of the very broad interpretation given to the word "debt" and the decision in *Mampuru* above, and in view of the fact that the Applicants have declined to substantiate their contention that the Prescription Act does not

[6] Cited in LAWSA Volume 21, paragraph 125.
[7] [2010] 6 BLLR 644 (LC)
[8] [2009] 8 BLLR 762 (LC)
[9] This decision was referred to by Bhoola J in *Frans v PPC Cement (Pty) Ltd and Others* [2011] 12 BLLR 1198 (LC)

apply to the Memorandum, I am satisfied that the Memorandum is a debt for the purposes of the Prescription Act.

When does prescription commence to run?

[26] Section 11 of the Prescription Act provides as follows:

> 'Periods of prescription of debts.— The periods of prescription of debts shall be the following: … (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt'.

[27] Section 12 of the Prescription Act provides as follows:

> 'When prescription begins to run.—(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due'.

[28] Prescription commences running in respect of a debt once a creditor has a complete cause of action,[10] The Memorandum does not indicate any time period within which the parties were required to perform their obligations. Mr Goldberg, for the Applicants, argued that prescription could not have commenced to run before the Applicants had the necessary information to prove their claims and that the Respondents had withheld such information. I cannot accept this argument. A cause of action has been defined as '…every fact which it will be necessary for the plaintiff to prove…in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved'[11] (My emphasis).

[30] If, as the Applicants contend, the Memorandum was enforceable, then it was enforceable from the date on which it was concluded. Therefore, prescription commenced to run upon a claim arising in terms of the Memorandum.

Interruption of prescription: partial compliance by Respondent

[10] *AngloRand Securities Ltd v Mudau and Others*, unreported SCA case no. 125/10, cited in Saner, *Prescription in South African Law* at 3–49
[11] *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A)

[31] The Applicants allege that prescription was interrupted by partial compliance with the Memorandum by the Respondents. Section 14 of the Prescription Act provides that:

> 'Interruption of prescription by acknowledgement of liability.—
>
> (1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.
>
> (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due'.

[32] It is decided law that partial payment by a creditor constitutes an acknowledgement of liability.[12]

[33] In order to determine whether the Respondents at any stage complied with the Memorandum, the criteria for compliance must first be identified. The Memorandum required the Respondents to agree to a valuation as at the date of transfer of any other payments that had accrued to the transferred employees but had not yet been paid to the employees of the old employer. This clause refers only to payments that had accrued at the time of the transfer and not to any payments which might accrue thereafter; in other words, the clause demands retrospective payment (back pay) for amounts owing on the date of the transfer. It follows that compliance with the Memorandum would have to take the form of an agreement between the Respondents as to the amount of back pay owing, alternatively actual payment of the back pay.

[34] The Applicants allege that the Respondents have partially complied with the Memorandum in that they paid the stress allowance, a locomotion allowance (since 2005), salary increases (since 2005) and a cell phone allowance (since 2006). However, the Applicants also claim (as part of their grievance) that with the exception of the stress allowance, none of these allowances included back pay. In a confirmatory affidavit attached to their

[12] *Roestorf and Another v Johannesburg Municipal Pension Fund* [2012] 3 All SA 68 (SCA)

supplementary affidavit, one of the Applicants alleges that he received a cell phone allowance as recently as January 2010. There is nothing in the papers before this Court to indicate that any of these payments had already accrued to the recipients at the date of the transfer. It follows that, with the exception of the stress allowance, none of these payments constituted compliance with the Memorandum.

[35] In respect of the payment of the stress allowance, it was effected some years before the Memorandum was concluded and cannot interrupt prescription.

[36] In the circumstances, I am satisfied that the Applicants have not proven that there has been partial compliance with the Memorandum within three years of the date on which the present proceedings were instituted.

Interruption of prescription: referral to conciliation

[37] The Applicants referred a dispute to conciliation at the SALGB on 5 March 2007. The Applicants contend that this referral interrupted the running of prescription. Mr Goldberg argued that, for purposes of prescription, conciliation is equivalent to arbitration, which itself interrupts prescription in terms of Section 13(1)(f) of the Prescription Act. I cannot accept that argument. For the purposes of prescription, conciliation and arbitration differ significantly: arbitration proceedings unlike conciliation proceedings culminate in an award which, barring review brings finality to a dispute.

[38] Nor can the Applicants contend that conciliation had the effect of judicial interruption of prescription under Section 15 of the Prescription Act, for that section requires the creditor to prosecute his claim successfully and to final judgment. The conciliation ended on 15 March 2010 when, on the Applicant's own version, it was ruled that the SALGBC lacked jurisdiction to hear the matter.

[39] In the premises I am satisfied that the claim has prescribed.

The general approach to Sections 158(1)(c) and 158(1A) of the LRA

[40] Section 158(1)(c) of the LRA provides as follows:

'The Labour Court may…

(c) make any arbitration award or any settlement agreement an order of the Court';

[41] Section 158(1)(c) is qualified by Section 158(1A), which states:

'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)'.

[42] In *Greef v Consol Glass (Pty) Ltd*[13] the Labour Appeal Court set out the correct approach to be followed when considering applications in terms of Section 158(1)(c):

'…A settlement agreement that may be made an order of court by the Labour Court in terms of s 158(1)(c) must (i) be in writing, (ii) be in settlement of a dispute (i.e. it must have as its genesis a dispute); (iii) the dispute must be one that the party has the right to refer to arbitration, or to the Labour Court for adjudication, in terms of the LRA; and (iv) the dispute must not be of the kind that a party is only entitled to refer to arbitration in terms of s 22(4) or s 74(4) or s75(7). Those kinds of dispute are excluded.

…Section 158(1)(c) provides that the Labour Court 'may' make it an order of court. This means that the Labour Court has a discretion in that regard, which it would have to exercise in a judicial manner, taking into account all the relevant facts and circumstances.

…Accordingly, in deciding whether to make a particular settlement agreement an order of court, it would first have to be established whether the settlement agreement satisfies the criteria stated in s 158(1A). If it does not, then the court does not even have a discretion. It cannot make such an agreement an order of court. On the other hand, if the agreement does satisfy the criteria, the court, nevertheless, would have to consider all the relevant facts and circumstances that militate against making a settlement agreement, which otherwise meets all the criteria stated in s 158(1A), an order of court'.

[13] *Maryka Greef v Consol Glass (Pty) Ltd*, unreported, case number CA02/12.

The Section 158(1A) inquiry: can the Memorandum be made an order of court?

[43] The Memorandum satisfies the criteria in Section 158(1A) in that –

43.1 the Memorandum is in writing;

43.2 the Memorandum is in settlement of a dispute, in the sense that it had its genesis in a dispute;

43.3 the dispute was one that the Applicants had a right to refer, whether to arbitration or to the Labour Court; and

43.4 the dispute is not of the kind that may only be referred to arbitration in terms of s 22(4) or s 74(4) or s75(7) of the LRA.

The Section 158(1)(c) inquiry: should the Memorandum be made an order of court?

[44] Section 158(1)(c) is discretionary, not pre-emptive. Counsel for the Respondents argued that the Memorandum is unenforceable and therefore should not be made an order of court. This argument relies on the following premises:

44.1 There is a factual dispute about whether the Respondents have complied with the Memorandum.

44.2 The Memorandum does not provide for the payment of quantified sums of money.

44.3 The Memorandum does not provide whether and what amounts would be payable at the time of conclusion of the findings by the presiding officer referred to in clause 2.

44.4 The terms of reference of the presiding officer have not been worked out.

44.5 The Memorandum is silent on the possibility that the presiding officer may decide that no claim is payable.

44.6 The Memorandum is silent on the possibility that the new employer might not agree on the valuation or any amount payable.

[45] As to the first point, I have already dealt with the alleged dispute of fact and, for the reasons discussed above, I do not believe it to be genuine.

[46] The Respondents' second and third points have merit. The Memorandum does not provide for the payment of quantified amounts.

[47] Counsel for the Respondent referred me to the decision in *PSA obo 59 Members v National Health Laboratory Service* [2007] 6 BLLR 559 (LC) ("*PSA*"), where this court declined to make a settlement agreement an order of court. The facts of that case are very similar to those in the present matter. There, the applicants were employees who had been transferred from one employer to another and had concluded a settlement agreement requiring the new employer to verify claims for overtime pay, which had allegedly accrued to the employees under the old employer, and to pay those claims which it found to be valid. The new employer undertook a verification exercise and ultimately declined to validate any of the claims, on the basis that the overtime work had not been authorised. The employees claimed that the settlement agreement contemplated an investigation about whether the overtime work had been performed and did not contemplate a wholesale rejection of all claims on the basis that they had not been authorised. The employees approached the court for an order in terms of Section 158(1)(c) of the LRA.

[48] The Court in *PSA* declined to grant the application, for the following reasons:

> '[M]aking the settlement agreement an order of court does not achieve an order which translates the claim into a money amount which is capable of being executed. They are left still with the dilemma that there has to be litigation – distinct from a mere application for making the settlement agreement an order of court – to determine the true liability, if any, of the NHLS [new employer]. That further litigation no doubt would have to determine whether the NHLS was legally justified in determining, in its verification exercise, that no claims were authorised or payable'

[49] The court in *PSA* quoted with approval from the submissions of the respondent's counsel:

> '[I]n the exercise of the court's discretion, an application to make a settlement agreement an order of court should be declined where 'it would not serve any purpose, inter alia, it cannot cut out the necessity for instituting action, neither can it be enforced, nor can it proceed direct to execution'.

[50] The requirements of certainty and enforceability were again emphasised by the LAC in *South African Post Office Ltd v Communication Workers Union obo Permanent Part-time Employees*,[14] where it was held that before granting an order under Section 158(1)(c), a court must be satisfied that, apart from meeting the Section 158(1A) criteria, '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 that agreement or award'.

[51] The Memorandum is problematic in two respects. First, it is doubtful whether its terms are enforceable. Clause 3 of the Memorandum provides 'The Applicant reaffirms that this matter will be referred to the third party to quantify the claim to give effect to the findings of the presiding officer. The terms of reference in respect of the third party shall be worked out by both parties'. This is nothing more than an agreement to agree, and as such, is unenforceable.[15]

[52] Second, the Applicants have not suggested any quantum for the payments which they are allegedly owed. The absence of a quantum will not be fatal where a quantum can easily be determined. However, that is not the case here. Although there was a quantification report annexed to the Applicants' founding papers, the Applicants did not place any reliance on it, except to prove that a quantification exercise had been conducted. There was no suggestion that the report was sufficient to prove the quantum or that the Respondents concurred with its results.

[53] Mr Goldberg, for the Applicants, alleged that the Respondents refused to supply the Applicants with further information necessary to compute the

[14] [2013] 12 BLLR 1203 (LAC)
[15] *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA)

quantum and therefore they had no choice but to bring the present Application. This contention is without merit; it merely goes to show that the Applicants ought to have proceeded by way of action, not application. Had they done so, they would have been able to compel discovery of the necessary documents.

[54] Absent any suggestion of a quantum, or a means of ascertaining a quantum, a court order would find it impossible to execute or enforce. I find that making the Memorandum an order of court would not serve any rational purpose.

Conclusion

[55] I am of the view that a claim in terms of the Memorandum has prescribed and, in any event, that it cannot be made an order of court. I am further of the view that it should have been obvious to the Applicants that to ground a claim, it would be necessary to compute the quantum of the payments they seek and that would in turn have necessitated discovery of the relevant documents.

Order

[56] In the circumstances, I make the following order -

56.1 the Application is dismissed; and

56.2 there is no order as to costs.

Leppan AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants: Mr Goldberg (Goldberg Attorneys)

For the Respondents: Advocate F J Naleni

Instructed by: Mogaswa Attorneys