REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN PORT ELIZABETH

JUDGMENT

CASE NO: P 550/11

In the matter between:

MAWETHU CIVILS **Applicant**

And

SMITH S *N.O.* **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

MAZOKA MABUTHI **Third Respondent**

Heard: 02 September 2014

Delivered: 03 September 2014

Summary: (Review – 142A order – settlement agreement not reflecting parties intention – alternatively waiver of terms of settlement agreement).

REASONS FOR JUDGMENT

LAGRANGE, J

Introduction

[1] Judgment in this matter was handed down on 3 September in the following terms:

> *"The application to review and set aside the ruling of the first respondent under case number ECPE 5112-10 on 22 February 2011 is dismissed with costs".*

The reasons for the judgment are set out hereunder.

[2] The applicant in this matter is the employer party to a settlement agreement which was made an arbitration award following an application in terms of section 142A of the Labour Relations Act 66 of 1995 (' the LRA'). The applicant unsuccessfully opposed the application and sought to set aside the ruling making the settlement agreement an order of court.

[3] The settlement agreement was concluded in respect of an unfair dismissal claim. The material terms of the agreement concluded on 22 February 2011 the read:

> *"1. REINSTATEMENT*
>
> *1.1 the respondent agrees to reinstate the applicant on the same terms and conditions of employment which governed the employment relationship prior to the dismissal dated 8/7/2010.*
>
> *1.2 the said reinstatement*
>
> *1.3 …*
>
> *1.4 the applicant must report for duty on 22/2/2011 at 12 H00 at the…..*
>
> *…*
>
> *6 OTHER*
>
> *- The applicant will return the Kerb Master Uniform (1X to piece overall & 1X pair of safety boots). The company work done must be refunded to period 23 February 2011.*

-The applicant is reinstated at the same rate of remuneration, but the company will decide on the position."

[4] It is common cause that when the third respondent returned the same day to resume his employment, he was presented with a three month fixed term contract which he signed. When the employer issued him with a notice on 7 April 2011 confirming that the fixed term contract would end on 21 April 2011, the third respondent refused to sign the document. The third respondent denies that when the settlement agreement was entered into it was on the basis that he would accept a three month fixed term contract in circumstances where he was a permanent employee of the applicant prior to his dismissal. He claims that he was not given an opportunity to read the fixed term contract and he was unaware at the time of signing it that it was for a limited duration, which he understood to be contrary to the settlement agreement.

[5] The third respondent referred a second dispute to the CCMA arising from the expiry of this fixed term contract, but withdrew the claim at the conciliation of the dispute on the advice of the presiding Commissioner. He then pursued the application to have the settlement agreement made an arbitration award.

[6] The applicant claims that at the proceedings in which the settlement agreement was concluded it had offered the third respondent a three month fixed term contract which he had accepted. However, it blames the Commissioner for recording this "in a badly worded settlement agreement". It further claims that the inexperienced representative of the applicant who made the offer trusted that the Commissioner would record the agreement clearly and correctly.

[7] The third respondent in reply to these contentions denied that there had been any agreement on a three month contract at the CCMA proceedings and recorded that the Commissioner read the settlement agreement and gave it to both parties to read and understand it before they signed it.

Grounds of the review

[8] At the hearing of the review application, the applicant persisted with the following grounds of review:

8.1 The arbitrator committed a reviewable irregularity by not convening a hearing of the matter, particularly because in deciding to make the settlement agreement an award he took account of his prior knowledge as the Commissioner who had facilitated the settlement agreement.

8.2 He failed to apply the rule in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd***[1] in so far as he did consider the evidence on the affidavits before him.

8.3 He failed to consider the settlement agreement in the context of events following the conclusion of the settlement agreement, which

[1] 1984 (3) SA 623 (A) at 634-5, viz: *"In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E - G, to be:*

"... 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 respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

This rule has been referred to several times by this Court (see Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd 1976 (2) SA 930 (A) at 938A - B; Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd 1982 (1) SA 398 (A) at 430 - 1; Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere 1982 (3) SA 893 (A) at 923G - 924D). 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, 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. 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 respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D - H). 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 (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) 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 final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the Associated South African Bakeries case, supra at 924A)."

clearly demonstrated that the third respondent either acted in a manner consistent with the applicant's interpretation of the true nature of the settlement agreement which had been concluded or, if the agreement had indeed meant that he should have been reinstated on a permanent basis, he elected to waive his rights under the agreement and concluded a fixed term contract instead.

[9] In terms of the court's approach to such review it was argued by the applicant that "the thrust of the case was one of jurisdiction" and the court could determine the matter on the basis of what it considered right and or wrong and not on the standard of reasonableness.

[10] It should also be mentioned that it was argued by the third respondent that since the settlement agreement itself contained the standard provision in the pro forma CCMA settlement agreement to the effect that the parties consented to the agreement being made an arbitration award in terms of section 142A of the LRA, there was no basis for the Commissioner to exercise any discretion on the issue of making it an award. However, I am not aware of any principle that fetters the discretion of a forum being asked to give an agreement concluded between litigants the status of an enforceable award or order to the extent that the forum is bound to give the agreement an official imprimatur irrespective of its terms or whether it has been complied with. No doubt the fact that the parties have agreed it may be made an award or order will carry some weight when considering an application to confer this status, but the adjudicating functionary is not bound by what the parties have agreed to between themselves.

The arbitrator's findings

[11] The arbitrator, in summary, made the following findings:

11.1 At the con-arb meeting on 22 February 2011 where the settlement agreement was concluded the applicant's representative had indicated that the so-called 'Kerb Master' position was no longer available and offered to reinstate him to a position with the same terms and conditions to that of the Kerb Master position. The

representative had emphasised that there were a number of positions at the same level.

11.2 The third respondent made it clear that he accepted the offer on the condition that the position was the same level as the previous one he held, and accordingly agreed to return the uniform for the Kerb Master post.

11.3 The return of the uniform could not be construed as an acceptance of employment on a fixed term period of three months.

11.4 The settlement was explained to both parties before they signed.

11.5 The plain text of clauses 1 and 6 of the settlement agreement, which were initialled by both parties, clearly speaks of reinstatement on the same terms and conditions he was previously employed under.

11.6 At no stage did the applicant's representative offer to reemploy the third respondent on a three month contract and this was not mentioned anywhere in the agreement.

11.7 What the parties did after the agreement did not alter what they had agreed upon and accordingly it was not necessary to consider the reasons why the third respondent signed a three month contract on his return to the applicant.

11.8 There was nothing complex or technical requiring specialist knowledge of the applicant's representative in making the offer of reinstatement.

Evaluation

[12] I agree that the arbitrator should not have taken account of his own knowledge of the events at the hearing on 22 February 2011, without alerting the parties to that. It was fortuitous that the application came before the same Commissioner who had facilitated the settlement and the parties could not have known prior to the consideration of the matter that he would consider the 'evidence' of his own recollection apart from the evidence tendered by the parties in the form of the settlement agreement itself and their affidavits.

[13] But if the court ignores the evidence of the arbitrator's own recollection, does the evidence support his finding that the settlement agreement as concluded was not complied with applying the *Plascon-Evans* test? Considering the affidavits alone, the nub of the dispute is really contained in the allegations and responses in the answering and replying affidavits, the applicant may be right that a strict application of the test might not be capable of justifying the arbitrator's finding on the affidavits.

[14] However, this attack overlooks a crucial issue. Essentially the applicant's case is that, the settlement agreement does not reflect the true nature of the agreement reached and should have reflected that the applicant was only being employed on a fixed term contract. The procedure for dealing with this, in the absence of an agreement between the parties to vary the agreement, is by means of an application for rectification in the Labour Court. The applicant seeks to do this indirectly in the course of reviewing the s142A ruling, having satisfied itself that its interpretation of the agreement had in fact been given effect to by the conclusion of the fixed term contract.

[15] The applicant assumes the arbitrator is at liberty to consider what it contends is the true nature of the agreement, based mainly on the subsequent conduct of the parties. There are circumstances in which the subsequent conduct of parties may legitimately be considered as a factor in interpreting the correct meaning of a contract. But those are instances in which there is an ambiguity in the agreement itself. Thus in ***Coopers & Lybrand and Others v Bryant*** [2] it was held that it was legitimate to have regard to "…*extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions*." [3](emphasis added).

[2] **1995 (3) SA 761 (A)**

[3] At 768D-E

[16] In this instance, not only is there no ambiguity in issue, because the applicant does not contend the wording is ambiguous, and it is plainly not, but the applicant contends the arbitrator should have regard to its representative's allegations about what he intended when concluding the agreement. Such an enquiry would have plainly been at odds with the principle stated in *Bryant's* case.

[17] However, even if the arbitrator improperly took account of his own recollection, in terms of the revised approach to reviews in cases where the arbitrator has adopted the wrong approach, the question the court must decide is if the outcome is one that could reasonably have been reached on what was properly before the arbitrator. See ***Herholdt v Nedbank*** [4] and ***Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA***.[5]

[18] Applying the correct approach to the evidence, which would entail a consideration of the plain meaning of the contract having regard primarily to the language of the document, the conclusion that the agreement meant that the third respondent would be placed in another position other than the Kerb Master job, but that all other conditions would remain unchanged is a perfectly plausible, and arguably the most plausible, interpretation of the agreement.

[19] On that interpretation, what happened after the conclusion of the settlement agreement would seem to be at odds with its terms and was not conduct in compliance therewith. While those events are not ones that can be considered in interpreting a document which, on the face of it is unambiguous, they are of course relevant to whether the award was complied with.

Conclusion

[20] There was therefore sufficient material before the arbitrator to make the settlement agreement an arbitration award, without recourse to evidence

[4] (2013) 34 ILJ 2795 (SCA) at 2806, para [25]

[5] (2014) 35 ILJ 943 (LAC) at 950, para [21]

he ought not to have considered. Accordingly, the ruling should not be set aside.

[21] Having said that, it must also be mentioned that the applicant raised an alternative attack, but strictly speaking it was not necessary, in my view, for the arbitrator to determine for the purposes of the s 142A ruling. The applicant contended that the applicant by his conduct in signing the fixed term contract had, in any event, indicated an election not to enforce it, which amounted to a waiver of his rights. A consideration of that defence is not something that has to be determined at this stage, but may well become an issue if and when the applicant takes a further step to enforce the award. I mention this because I do not wish it to be understood that this judgment is in anyway intended to decide the validity of such a defence against the enforcement of the contract on the facts.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: H Lee of Snyman Attorneys

THIRD RESPONDENT: J D Van Der Walt