IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J4611/00

In the matter between:

DAVID BRAMLEY **Applicant**

and

JOHN WILDE t/a ELLIS ALAN ENGINEERING **First Respondent**

GENERAL EMPLOYERS AND MANAGEMENT ASSOCIATION **Second Respondent**

J U D G M E N T

CORAM FARBER AJ:

This judgment is in the main concerned with the proper

interpretation of section 158(1)(c) of the Labour Relations Act, No. 66 of 1995, prior to its amendment by Act 12 of 2002.

To facilitate an understanding of the point in issue, a short summary of the facts has been rendered necessary. They are relatively straightforward and may be detailed thus:-

1. The applicant is an erstwhile employee of the first respondent.

2. On 30 June 2000 the first respondent dismissed the applicant for what is described in the papers as "operational requirements".

3. Arising therefrom, a dispute arose between the applicant and the first respondent, which dispute, so it would appear, related to the fairness of the dismissal.

4. The dispute was settled on 16 July 2000, pursuant to the conclusion by the applicant and the first respondent, represented by the second respondent, of a written agreement, the body of which reads as follows:-

"Memorandum of Agreement

This is an Agreement entered into in full and final settlement between Ellis Alan Engineering (`the Company') and David Bramley (`the Employee').

(1) The Company shall pay to the employee a sum equal to two (2)

months salary for July and August 2000 = 2 x R17 000
= R34 000-00

(2) This sum shall be paid in two (2) equal instalments, one at the end of July and one payment at the end of August 2000.

(3) The above sum is in full and final settlement of any dispute arising from the termination of service of the employee. The employee waives his rights to contest his termination of service and may not contest his termination of service in any form whatsoever.

(4) The employee warrants that he has read, understands and agrees with the contents of this document. This Agreement supercedes[sic] all other Agreements entered into.

DATED & SIGNED ON THIS 16TH DAY OF JULY 2000 AT

JOHANNESBURG"

5. Given the conclusion of the agreement, there was no need for the applicant to invoke the dispute resolution mechanisms under the Act.

6. The first respondent failed to make good his obligations in terms of the agreement, and on 4 October 2000 the applicant instituted proceedings in this Court for relief in the following terms:-

"1. That the settlement agreement dated 6 July 2000 and entered into between Ellis Alan Engineering represented by the General Employers & Management Association acting as a lawful agent of First Respondent and David Bramley attached hereto marked Annexure "A" be made an order of court in terms of Section 158(1)(c) of the Act; and

2. That the costs of this application be paid by the Respondents jointly and severally the one to pay the other to be absolved.

3. Further and/or alternative relief."

(The reference in prayer 1 of the notice of motion to "6 July" is mistaken and ought to be a reference to "16 July".)

7. The first respondent's answering affidavit in the matter was delivered during October 2000. It raised a number of defences to the relief sought by the applicant. Reliance was not placed on any of them when the matter was argued and counsel for the first respondent advanced an entirely new ground as a basis for thwarting the relief claimed.

The sole contention advanced on behalf of the first respondent was that the written agreement in question did not constitute a "settlement agreement" within the meaning of section 158(1)(c), and that in consequence the Court had no power to make it an order of court. Counsel's fundamental premise was to the effect that section 158(1)(c) only applied to a "settlement" of a dispute which had been made the subject of dispute resolution under the Act. Counsel stressed that the dispute which had culminated in the conclusion of the agreement *in casu* had not been referred for resolution in terms of the Act and that, in the result, section 158(1)(c) did not apply to the situation.

The representatives of the parties seem to have approached

the matter on the basis that because proceedings had been instituted prior to 1 August 2002, the matter fell to be considered on the basis of section 158(1)(c) as it read before its amendment by section 36 of the Labour Relations Amendment Act, No. 12 of 2002, which amendment only became operative on 1 August 2002. I say this because neither argued the matter with reference to the recently introduced section 158(1A) of the Act.

In diffidence to them, and because I discern no intention on the part of the Legislature when enacting Act No. 12 of 2002 to interfere with already established rights, I will approach the matter on the basis that the situation is governed by section 158(1)(c), as it then read. I will thereafter *ex abundanti cautela* consider whether the position has in any way been altered by the amendment which, as I have already said, became operative on 1 August 2002.

Prior to that date, section 158(1)(c) was couched in the following terms:-

"**158. Powers of Labour Court**

(1) The Labour Court may -

(a) .....

(b) .....

(c) make any arbitration award or any settlement agreement, other than a collective agreement, an order of the Court."

The words "any settlement" were not defined in the Act. In the result, they must be given their ordinary grammatical meaning, with obvious reference to the scope, purpose and ambit of the Act.

The words in question are undoubtedly of very wide import. Clearly, however, the Legislature could never have intended that every "settlement agreement", irrespective of its character, was open to be made an order of court. To ascribe that intention to the Legislature would in my judgment give rise to consequences which it never envisaged. As counsel for the first respondent put it, the Legislature could hardly have intended to confer a competence to make an agreement of settlement between husband and wife in a matrimonial dispute an order of court.

This submission is clearly correct. The wide meaning which would otherwise fall to be ascribed to the words in question must be curtailed. To that end, the scope, policy and purpose of the Act is of decisive importance. On this score, it is self-evident that the Act has established structures and mechanisms for, *inter alia*, the resolution of disputes between employers and employees, and in my judgment it is plain that section 158(1)(c) is concerned with the settlement of disputes of that kind. And it seems to me to be irrelevant to the exercise of the competence under section 158(1)(c) that the machinery of the Act had not been invoked when the dispute in question was settled. There is nothing in the Act which suggests a constraint of this type, and there appears to me to be no rational basis, whether rooted in policy or otherwise, for ascribing to the Legislature an intention to differentiate between settlements which are concluded before a dispute has, for instance, been referred for conciliation to the Commission for Conciliation, Mediation and Arbitration ("the Commission") and those which are only settled thereafter. On the contrary, a differentiation of the kind contended for

would give rise to so high a degree of artificiality that it could never have been contemplated by the Legislature. It, after all, has sanctioned legislation to resolve disputes efficiently, expeditiously and inexpensively, and I am unable to discern why it would seek to treat those who resolve their disputes at an early stage differently from those who have been required to invoke the machinery of the Act before so doing.

In my judgment then, and leaving aside that which has been expressly excluded (the collective agreement), the words "any settlement" in section 158(1)(c) (as it then stood) refer to a settlement concluded in respect of a dispute which is justiciable in terms of the Act, irrespective whether such dispute is settled prior to the need to invoke the dispute resolution machinery of the Act or at some point in time thereafter.

It is plain that the settlement *in casu* stemmed from a dispute which was, in its very nature, justiciable in terms of the Act. The settlement consequently falls within the scope

and ambit of section 158(1)(c), as it then read. In the result, the applicant is entitled to the relief sought.

The amendments to which I have referred do not in my judgment alter the position.

Section 158(1)(c) now reads as follows:-

"**158. Powers of Labour Court**

(1) The Labour Court may -

(a) .....

(b) .....

(c) make any arbitration award or any settlement agreement an order of the Court."

It must be read with the provisions of section 158(1A) which was introduced into the Act at the same time. This provision is cast in the following terms:-

"(1A) 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)."

The Legislature has, by way of the amendments in question, sought both to define and limit the type of settlement which might properly be made an order of court. Certain disputes are expressly excluded. For the rest, "settlement agreements" which are so subject must have as their genesis disputes of a particular kind, namely disputes which a party "has the right to refer to arbitration or the court" under the provisions of the Act.

In the context of the facts of this case, section 191 of the Act is of importance. It is manifest from the provisions thereof that, *strictu sensu*, a party's right to refer a dispute relating to the fairness of a dismissal based on operational requirements is not absolute and will only arise in circumstances where such dispute has been referred to the Commission and it has certified that it remains unresolved, or a period of thirty days has lapsed from the referral, whichever is the earlier.

In *Secretary for Inland Revenue v Kirsch* 1978(3) SA 93 (T)

at 94E-H, Coetzee J (as he then was), on behalf of the Full Bench, dealt with the meaning of the word "right" in the following terms:-

"The word `right', in legal parlance, is not necessarily synonymous with the concept of a `legal right' which is the correlative of duty or obligation. On the contrary, legal literature abounds with `right' being used in a much wider sense and, as is pointed out in Salmond on *Jurisprudence* 11th ed at 270, in a laxer sense to include any legally recognised interest whether it corresponds to a legal duty or not. An owner, for instance, has at common law the *right* to use or abuse his property. The problem, *in casu*, is simply to determine whether the Legislature employed this term only in its strictest sense as the correlative of a legal duty or whether its wider meaning could be included.
There are many cases in which `right' when used in a statute has been interpreted in the wider sense - see, eg, *R v Tamblin* 1911 TPD 772 at 779-780; *United Dominions Corporation Ltd v Nel* 1962(3) SA 64 (SR) at 67. More significant is the common use of `right', in the wider sense, in the very field of financial activity covered by s 8A."

The words "right to refer", as used in section 158(1A), may at first blush, on a strictly literal and narrow construction, invite the consequence that only a settlement which has been concluded after the right to refer to arbitration or to the Court, as the case may be, has arisen, falls within the

scope of section 158(1)(c). Applying this approach, and again in the context of the facts *in casu*, the settlement agreement was not open to be made an order of court, as the applicant had not referred the dispute to the Commission, which in turn had not been required to fulfil any functions in regard thereto.

On closer analysis, this construction does not bear scrutiny. The words "right to refer" in section 158(1A) postulate futurity and thus in a strictly literal sense connotes a point in time between the accrual of the right and its actual exercise. On this basis, and once the right has been exercised, a settlement which might then eventuate could not be made an order of court as, having already been referred, the dispute would no longer be open to referral. On this basis, the Court would be precluded from exercising its competence in terms of section 158(1)(c) in relation to a settlement concluded after the referral of the matter. This is so because there would at that point be no right to refer the dispute as such referral would already have taken place. An intention to confine the competence of the Court to a

settlement which has been concluded during the subsistence of the right to refer, and not thereafter, cannot be imputed to the Legislature. On this score, the Legislature, it would seem to me, would hardly have sought to distinguish between a settlement which has been concluded within that period and one which is only concluded thereafter. This, to my mind, would give rise to a wholly unjustified and artificial distinction. Surely, the intention must be to confer the competence on the Court to make a written settlement agreement an order once the referral in question had already taken place. And, if that be so, there appears to me to be no reason why a settlement of a dispute which would otherwise fall within the scope of section 158(1A) should not be made an order in circumstances where it is concluded before the dispute resolution machinery of the Act has been invoked at all.

In short, I am of persuasion that the words "the right to refer" in section 158(1A) are not to be construed in a narrow, literal sense so as to equate to a right which is open to immediate exercise. In my judgment, it connotes a far

wider concept, such as an entitlement which may only fall to be exercised once the pre-requisites for doing so have been satisfied. Thus, provided only that the dispute is of a kind which is amenable to adjudication by the Commission or the Court in terms of the structure of the Act, albeit not as a matter of immediacy, but once the pre-requisites for such adjudication have been satisfied, a settlement in relation thereto may be made an Order in terms of section 158(1)(c), irrespective of the date of its conclusion.

This construction does no violence to the wording of section 158(1A). As previously indicated, it has been recognised that the word "right" in the language of the law may be used in a wider and laxer sense and not in the sense that it is synonymous with the concept of a "legal right", correlating to a duty or obligation.

It is in this wider sense that the word "right" is in my judgment used in 158(1A) of the Act. It follows, in my view, that the character of the right referred to in section 158(1A) is such that it need not be open to immediate exercise, but

may be invoked at some time in the future when the pre-requisites therefor have been fulfilled. It nonetheless is something which is extant in the sense that, bar a subsequent resolution of the matter, the machinery of referral may be resorted to.

In summary, both under the old and new regimens, the Labour Court has the competence to make the written agreement of settlement *in casu* an order of court.

In the result, the written agreement referred to in prayer 1 of the applicant's notice of motion of 4 October 2000 is made an order of court. The costs of the application are to be paid by the first respondent.

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G FARBER
ACTING JUDGE OF THE
LABOUR COURT

DATE OF HEARING:
15 NOVEMBER 2002

DATE OF JUDGMENT:
28 NOVEMBER 2002

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