IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case no: J1357/07

In the matter between:

EDDIE MATHOSI & 33 OTHERS	Applicants
and	
KINTETSU WORLD EXPRESS (PTY) LTD	First Respondent
SOUTH AFRICAN AIRWAYS TECHNIKON (PTY) LTD	**Second Respondent**

JUDGMENT

MOSHOANA AJ

Introduction

[1] This as an application brought in terms of the provisions of Section 158 of the Labour Relations Act. In particular the applicants are seeking the following order:-

1. The settlement agreement entered into between the parties at the CCMA on the 10th February 2006 is made an order of this Court.

2. It is declared that, in order for the parties to comply with paragraph B of the agreement, it is necessary for the parties to either determine the rationale and scope of application of the job evaluation exercise conducted by South African Airways Technical (Pty) Ltd by agreement or, failing agreement, to appoint an independent third party to conduct a fact finding exercise in order to make such determination.

3. That such determination be made within three (3) months from the date of this order.

4. The respondents to make payment of the costs of this application jointly and severally, the one paying the other to be absolved.

5. Further or alternative relief.

The application was opposed by the first respondent.

Background facts

[2] The applicants are employees of the first respondent, having been transferred to the first respondent in terms of the provisions of Section 197 of the Labour Relations Act. On or about 10 February 2006 a dispute which had been referred by the applicants to the Commission for Conciliation Mediation and Arbitration was settled and an agreement was produced and signed by both parties. It is apposite at this stage to quote in this judgement the entire agreement which read as follows:-

"1. The applicants referred a dispute to the CCMA GA42792/04.

2. The parties agree to settle the matter on the following basis:-

2.1Disclosure of information

2.1.1 The parties will meet on a day to be agreed but by no later than 30 days from the day hereof to:-

(a) Make available all relevant information pertaining to the job evaluation and related issues conducted by SAA.

(b) Conduct a fact finding exercise to determine the

rationale and scope of application of the job evaluation exercise conducted by the SAA.

3. The applicants withdraw the dispute lodged under case number GA42792/04. The parties agreed:-

3.1 This is in full and final settlement of the said dispute without further recourse.

3.2.1 No variation of this agreement will be legally binding unless reduced to writing and signed by both parties.

3.2.2 In the event of the respondent failing to comply with its obligation in terms of this agreement, respondent consents to this agreement be made an order of court in terms of Section 143 of the Labour Relations Act 66 of 1995.

Signed at Johannesburg on this 10th day of February 2006 in the presence of the undersigned witnesses applicants signed, respondent signed and SAAT."

[3] On or about 27 March 2006, following the settlement agreement, the parties met and some discussions were held. In the applicant's view the meeting was not in compliance with paragraph B of the agreement in that there was no fact finding exercise and there was no determination of the rationale and scope of the application of the job evaluation exercise conducted by South African Airways Technical (Pty) Ltd. The first respondent contend that paragraph B of the settlement agreement had been fully complied with and there is no basis for
the application before court. It does appear that the applicants sought and demanded a fact finding exercise and the determination of the rationale and scope of the job evaluation exercise. It is also apparent that the first respondent held to its contention and did not agree to the demand of the fact finding

exercise and a determination. According to the applicants, as a result of the inactivity on the part of the respondent and despite the settlement agreement, they then referred a further dispute to the CCMA in June 2006 under case number GAJB12946/06. In respect of that referral, the CCMA held that it did not have jurisdiction to entertain the dispute. On the 13th September 2006, the applicants referred yet another dispute to the CCMA under case number GAJB21801/06, which was, as set out in the applicants' papers, in an attempt to obtain compliance with the settlement agreement. That dispute was withdrawn on the 5th April 2007. Prior to its withdrawal, on the 6th February 2007, a letter was addressed by the applicants' Attorneys of record Ruth Edmonds inquiring whether the fact finding meeting ever took place and what its outcome was. It does appear that for a period of time the applicants did not receive response to the question. As a result a further letter was addressed on the 12th March 2007 wherein the applicants indicated their displeasure at the matter being ignored and indicated that it may be necessary for them to approach the court for the enforcement of the settlement agreement. It does appear that further correspondence were exchanged wherein opposing views were placed on record. Ultimately on the 18th October 2007, the Applicants lodged an application under consideration.

Argument

[4] Edmonds appearing for the applicants contended that there has been non-compliance with the agreement hence the application to make the settlement agreement an order of court. She submitted that the term "fact finding exercise and determination" has acquired legal meaning to the extent that it means, quoting from the **Engen Petroleum Ltd v**

Commission for Conciliation Mediation and Arbitration and Others 2007 28 ILJ 1507 (LAC), that parties or a third party must pass moral or value judgement when deciding the rationale and scope of application of the job evaluation exercise conducted by South African Airways Technical. She made reference to the provisions of Section 135 (3) of the Labour Relations Act which enables a commissioner at the CCMA to conduct a fact finding exercise which in her submission necessitates an agreed or objectively ascertainable findings of fact. In her submissions there was no such findings of fact ever been made either by the parties or a third party.

[5] In view of the refusal to have a determination, which she understood in the context of the **Engen** judgement, the applicants held an unshakable belief that the settlement agreement had not been complied with. On the other hand Van Zyl appearing for the first respondent, submitted that there has been no non-compliance with the agreement and as such the court should refuse to make the settlement agreement its order. He referred to various portions of the minutes of the meeting of the 27th March 2006, which the court shall refer to later in this judgment. He also submitted that the case for the applicants is one of interpretation of the settlement agreement. He made reference to authorities where the concept of implied terms of an agreement was considered at length. In view of the approach I take in this matter, it is not necessary to consider at length the submissions in that line. Suffice to mention that the court found those authorities and submissions to be helpful but not in the context of this judgment in view of the approach taken. Both parties submitted that costs should follow the result.

Analysis

[6] It does appear that the first prayer is one that the court can refer to as a 158 (1) (c) relief.

[7] Section 158 (1) (c) provides as follows:-

"The Labour Court may make any arbitration award or any settlement

agreement an order of the court."

[8] It should be undeniable that the court has a discretion in applications of this nature. In my view the court would make arbitration awards and or settlement agreements order of this court simply to comply with the doctrine of effectiveness. It is so that the orders of this court may be executed as if it were decision, judgement or order of the High Court.

See: PSA v National Health Laboratory Science (2007) 6 BLLR 559 (LC) and **Norkie v Diskom Discount (2001) 6 BLLR 652 (LC)**

[9] A bit of history would help, particularly for the purpose of considering whether it is appropriate for the court to exercise its discretion in favour of making the settlement agreement its order. Prior to the 2002 amendments, arbitration awards and settlement agreements reached at the CCMA could not be enforced unless they are made an order of court in terms of the provisions of Section 158 (1) (c). At that time it perfectly made sense why the court would wish to exercise its discretion in favour of making awards and settlement agreements its order.

The sense being that it renders the settlement agreement and or the arbitration award executable in terms of the provisions of the section 163 of the Labour Relations Act. As a result this court was flooded with applications in terms of Section 158 (1) (c), which at times were coupled with review applications. This court had indicated that it would exercise its discretion to make an arbitration award an order of court in instances where the other party bound by the award failed to comply with the arbitration award.

(See **City of Tshwane Metropolitan Municipality v Kampanela NO & Others (2004) 1 BLLR 1 LAC)**

[10] Of course in 2002, the position changed slightly in the sense that the provisions of 158 (1) (c) were not completely repealed but the provision of Section 142 (A) was introduced which provided that the commission may by agreement between the parties or on application by a party make a settlement agreement in respect of any dispute that has been referred to the commission an arbitration award. For the purpose of that subsection a settlement agreement being a written

agreement in settlement of a dispute that a party had a right to refer to arbitration in terms of the Labour Relations Act. Section 143 provides that an arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of court unless it is an advisory arbitration award. The provisions of section 143 (3) made a proviso that the arbitration award may only be enforced in terms of subsection one if the Director has certified that the arbitration award is an award contemplated in Subsection one. As a result of that there has been a decline in the 158 (1) (c) applications except in the context of it being a counter-application in a review application.

[11] Therefore in view of what has been stated above this court would only exercise its discretion to make an arbitration award an order if there is sufficient evidence of non-compliance. The parties to the settlement agreement made a provision that in the event of non-compliance either of the parties may approach the court to make the settlement agreement an order of the court, although reference is made to section 143 of the Labour Relations Act as opposed to section 158 (1) (c) of the Labour Relations Act. So in effect for the applicant to persuade the court that it should exercise its discretion in favour of making this settlement agreement an order of the court, it ought to show that there has been non-compliance.

[12] The basis thereof is clear in that, it will superfluous for the court to make an arbitration award or a settlement agreement an order of this court when it cannot be executed and no evidence exist that a party has refused to comply.

[13] In this matter, the contention of the applicants is that there has been non-compliance, in that, in its view the fact finding and the determination had not occurred. As appointed out earlier the

respondent is of the view that it had complied. It therefore means that there is a material dispute of fact and if it is to be resolved on the papers it has to be resolved on a basis of admitted facts and what the respondents contend.

(**See Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 3 SA 623 (A)**)

[14] From the agreement, applying the ordinary principles of interpretation, it is apparent that the parties sought to consider paragraph A and paragraph B of the agreement in a meeting. Therefore, it follows that the first step of compliance would be to have a meeting, which meeting as it is common cause was held on the 27th March 2006. Most importantly and in relation to the complain that Part B of the agreement had not been complied with, the minutes of the meeting of the 27th March 2006 reveals the following:-

"In terms of the settlement agreement, and I'm just going to record this settlement agreement:-

The parties agreed to settle the matter on the following:-

1. *Disclosure of information. The parties will meet on a day to be agreed, but no later than 30 days from the date hereof:-*

2 *Make available all relevant information pertaining to the job evaluation and related issues conducted by SAA, conduct a fact finding exercise to determine the rationale and scope of application of the job evaluation exercise conducted by SAA.*

3. Withdrawal of action.

U: Johan you must tell us what you need from us and how you want us to do this.

JC: We are here, you have your meeting, thank you. Thank you for this opportunity, can I use the board also. According to my understanding and documents in our possession, it was recorded in August; wait let me just ... August 2000. There is documentation that in August 2002 a right to our view to job evaluation. (Johan, just press it at the back like a ball point). This one...Job evaluation, right to a job evaluation was established. But the relevant recording at what was said at the meetings reads something to the following that after restructuring a job evaluation would occur. Now relative to the first one, we want info...Here are the vice words...info, the first agreement, the second one is make available...job evaluations,

yes an info relative to that ...job evaluation, the third one in the fact finding about rationale and scope. Yes...fact find to the rationale in the scope. Obviously is important for us to establish that is why we need the info it is important for the dispute group to establish what the scope of this job evaluation was. And what the outcome was... for that ... another thing that

I need info on in order for me to really be geared because, that is our case the reason for signing that document even though my client is not very happy about that, because I need info."

Further the said minutes reveal the following:-

"JC: Ja the job evaluation exercise ...

U: The reason behind the whole job description and job evaluation doing one the same job, but being paid differently. Which was ...

JC: But can you give me something more...

U: This is what I'm indicating to you... Based on that exercise of submission of their job description and the evolution thereof, they were all alive, the once of similar grade, similar functions, they were aligned and they were paid accordingly that's the rationale...

JC: I would ...

U: And then the scope be the entire as a Technical. I don't know as to what...

JC: This maybe the answer let's argue for a second that there were twenty employees.

U: No, Johan, what I'm saying is ...the scope would be the SAA Technical as a whole, so I'm not sure ...as to what is it that within the scope that you would want. Do you want us specifically to ...our controllers and supervisors.

JC: Yes...the two groups.

U: So ... in terms of the scope you would get the same information that of job evaluation and job description that would be your scope...

JC: Ok for those two grades what are those grades.

U: That is supervisors and stock controllers, so your scope will be the same as the supervisors and nothing or nothing less

because we do not want to involve the entire ...otherwise it will be a tedious exercise. So it will be supervisors and stock controllers, that is your scope and that is what you want from us.

JC: Yes, but now just have a look at this and follow the logic, I think in my argument... this past August 2002, when this meeting took place where this was mentioned let's argue there were twenty employees, and from this twenty were supervisors and some were stock controllers... I need to establish, that I can do. What has happened there, after this extraction, no see this moving picture please...

U: Johan, there was no restructuring... I should we think that we did said that a number of times at SAA there was no restructuring ...and there is still no restructuring up to now. What we did was the exercise we did discuss...

JC: Outsourcing...only.

U: The outsourcing was before the exercise."

[15] It is therefore clear from the exchange that had been referred to, being an extract of the minutes which Mr.Krause, who was representing the applicants at the time confirmed to be a true reflection, that parties were engaging in the issues relating to rationale and the scope of the job evaluation as set out in the settlement agreement.

[16] In the same letter, confirming the correctness of the minutes, dated 25 May 2006, the representative of the applicants went on record to say the following:-

"We therefore see that the objectives in the agreement at the CCMA led to the discovery that the job evaluation result in the benefits accruing to SAAT employees (by virtue of the Mark Antrobus award).

Indeed following the finalisation of the 2000 job evaluation. SAAT cannot provide, or at least did not provide any proof of any other evaluation or anything similar to the Mark Antrobus award at our agreed meeting. Kindly indicate the current KWE attitude relating to the dispute as the employees indicated that they are desirous for a re-referral of the case as the objectives in the CCMA agreement led to a re-enforcement of the grounds in which they referred initially and also because the statements made by SAAT were proved to be without any substance and indeed, which leads to the possible conclusion of bad faith from role players".

[17] Again it is clear from the letter that the objectives of the agreement were met after the discussion held in the meeting of the 27th March 2006. It therefore appear that what the applicants were seeking was to re-refer in order to re-enforce the grounds of the initial referral.

[18] In the circumstances and applying the ***Plascon-Evans*** test, I do not see how I should find that there has been non-compliance with a settlement agreement to the extent that this court should exercise its discretion in favour of making the settlement agreement its order. If the court were to make this settlement agreement an order, given the views held by the applicants that there has been non-compliance, it would be opening up the respondents to committal to imprisonment, in that if they do not do what the applicants suggests emanates from the agreement, which in their view they have done, they shall be considered to be in contempt. Although in such circumstances, committal to imprisonment could not be decreed, the applicants may attempt to bring such an application to the inconvenience of the respondent.

[19] The second and third prayers are more of a declarator, which seem to suggest that there was a breach of the agreement, hence there is a quest for what appears to be specific performance. Obviously the court in considering declarators it takes the same approach as it does in interdicts. The version of the applicants has been strenuously disputed by the respondents. In the circumstances it is inappropriate for the court to issue a declarator in such circumstances.

[20] It does appear that the course open for the Applicants is that submitted by the respondent, which as I have pointed out earlier in this judgement I shall not dwell much on, being the one of breach of the agreement. Such would call up issues like the proper interpretation of the clauses and where necessary issues of rectification would come in to play.

Order

[21] For reasons set out above I make the following order:

1. The application is dismissed with costs.

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Moshoana AJ
Acting Judge of the Labour Court
Johannesburg

Appearances

For the applicant	: Ruth Edmonds
For the respondent	: Adv Brian van Zyl
Instructed by	: Francois Le Roux Attorneys
Date of hearing	: 19 March 2008
Date of Judgment	: 31 March 2008