Reportable/Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case No: C701/2019

In the matter between:

SOUTH AFRICAN MUNCIPAL WORKERS' UNION (SAMWU) obo SIZIWE PATRICIA MOOI	**First Applicant**

and

SIYATHEMBA MUNICIPALITY	**First Respondent**
SURIE VAN WYK (*N.O.*)	**Second Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Third Respondent**

Date of Set Down: 26 August 2021
Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 15h00 on 06 July 2022.

Summary: (Application under s 158(1)(c) – to make an arbitration award an order of court – Award embodying settlement agreement – performance of key provisions of the settlement agreement dependent on parties reaching an agreement on debt and repayments – agreements to agree unenforceable in absence of deadlock breaking mechanism – court exercising discretion to decline application)

JUDGMENT

LAGRANGE J

Background

[1] This is an opposed application under s 158(1)(c) of the Labour Relations Act, 66 of 1995 [‘the LRA’] to make a settlement agreement, which was made an arbitration award under section 142A, an order of court. It was previously set down on an unopposed basis on 6 October 2020. As it had become opposed it was removed to the opposed roll and re-enrolled on 26 August 2021. On that occasion owing to the prevailing Covid 19 pandemic, the application was heard using Zoom. Judgment was reserved pending the parties notifying the court by 2 September 2021 whether or not they had been able to settle the matter. On 15 October 2021 of the applicant’s attorneys of record notified the court that the applicant had met with the first respondent (‘the municipality’), but the municipality would not engage with her about settling the matter. No correspondence was received from the municipality. In any event, whatever might have transpired between the parties after the hearing, no new settlement was concluded.

[2] The settlement agreement dated 25 October 2018 was made an arbitration award on 21 December 2018. This application was launched on 11 November 2019.

[3] The settlement agreement read:

> “1. The applicant will be re-employed into the position of a general worker with effect from 1 November 2018.
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> 2. The employment will be for a fixed term of 12 months during which all financial losses incurred by the employer due to the misrepresentation of having a matric qualifications must be paid back by the applicant.

3. The amount will include the value of all higher salaries & benefits paid as well as costs for training her.

4. Upon payment of all monies due as stated above, the contract of employment will become permanent.

5. Failure to repay the money within the specified period of 12 months will result in the termination of employment and the latter will not constitute a dismissal as envisaged in section 186 of the LRA.

6. This agreement should also not be construed as a deviation by the employer with regards to discipline and cannot be argued to have created a new precedence (*sic*) by the employer.

7. Quantification will be finalised by the respondent by 1 November 2018, an (*sic*) agreement for the value of money and back payment will be signed."

(emphasis added)

Merits of the application

[4] It appears that signing the settlement agreement was one thing, but implementing it was another. The applicant, Ms S Mooi ('Mooi'), provided a reasonably detailed account of steps taken to give effect to the agreement. Without addressing the factual averments made, the municipality raised what it styled as an 'exception', which contained a number of objections.

[5] In brief, the applicant claims that she met with the municipal manager in November 2018 to discuss the payment of the debt arising from the settlement agreement. She claims she was told to sign an acknowledgment of debt requiring her to repay an amount of R 20,000 per month, calling it. She declined to sign it as her salary as a general worker was much less than that and was an impossibility. She considered the debt agreement she was expected to sign was in breach of the settlement agreement. From February 2019 onwards, efforts were made by the union and its attorneys of record to try and resolve the matter with the municipality

without going to court. On 7 October 2019, her attorneys of record demanded that she be allowed to resume her duties by 16 October 2019, failing which it would approach the court on an urgent basis for an order compelling it to reinstate her and other relief.

[6] I do not intend to detail all the exceptions raised by the municipality, many of which are simply trivial and, or alternatively, vexatious. The more serious objection raised concerns the necessity of the applicant approaching the court when it already has a certified arbitration award under section 142A. Without responding to the founding affidavit, the municipality also submitted that her reinstatement was an impossibility because the trust relationship between her and the municipality had broken down owing to the conduct of herself and her representative in dealing with the matter. No specific facts to support this submission were pleaded. It also claims that it is evident that the applicant is trying to secure her return to work without a commitment to agree on the repayment of damages.

[7] On the papers, it is true that on 21 December 2018 the applicant had the settlement agreement made an arbitration award in terms of section 142A. However, even though it appears to have been the intention to have the award certified under section 143 [3], this was never done. While there is no reason the applicant could not have used the cheaper and quicker procedure under that section, which would have enabled her to enforce the settlement agreement as if it were an order of this court under section 143 [1], the court nonetheless retains the power to make awards orders of court under section 158 [1][c]. The use of this mechanism rather than the cheaper alternative might become an issue when a cost order is sought. In any event, the municipality's objection that the award was already certified appears to be without foundation. Accordingly, in principle the application to make the award an order of court can be entertained.

[8] It is trite law that the court has a discretion in exercising its power to make an award an order of court[1]. There have been instances where the court has declined to

[1] See,e.g., *AB Civils (Pty) Ltd t/a Planthire v Barnard* [1999] 12 BLLR 1233 (LAC). See also *Ceramic Industries t/a Betta Sanitaryware v NCBAWU* (1999) 20 *ILJ* 123 (LC) and *NEHAWU obo Vermeulen v Director General: Department of Labour* [2005] 8 BLLR 840 (LC).

do so. In *South African Post Office Ltd v Communication Workers Union obo Permanent Part-Time Employees* [2013] 12 BLLR 1203 (LAC), the LAC stated:

> "[21] …What all this means is that before the Labour Court will grant an order sought in terms of section 158(1)(c) of the LRA it must be satisfied that, at the very least:
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> > "(i) the agreement, is one which meets the criteria set in s 158(1)(c) read with section 158(1A) of the LRA, and if it is an award, that it satisfies the criteria set in section 142A of the LRA;8
> >
> > (ii) that 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 the agreement or award; and,
> >
> > (iii) There has not been compliance by the defaulting party with the terms of the agreement or the award."
>
> [22] Once the Labour Court is satisfied with all of the above then it must, nevertheless, exercise its discretion whether to grant or refuse the order. In exercising the discretion, the Court must take relevant facts and circumstances into account, such as are necessary to satisfy the demands of the law and fairness. Necessarily, each case must be decided on its own facts and circumstances. There is, otherwise, no closed list of factors to be taken into account. A relevant factor is the time it took the party seeking the relief to launch the application to make the settlement or award an order of court. The Labour Court may, for example, be more reluctant to make an award for reinstatement of employees an order of court where the employees unreasonably delayed in seeking the enforcement of the award, yet a delay in years in seeking to make an award for payment of a sum of money may not be grounds for refusing to make the award an order of Court. Finally and most crucially, it must be remembered that the purpose of making an agreement or award an order of the Labour Court is to compel its enforcement, or enable its execution and not for some other purpose."

[9] It is common cause that the settlement agreement has not been implemented. The fundamental obstacle to implementing it was the failure to conclude an agreement on the value of the debt and its repayment. On the applicant's own version, it is clear that the municipality had quantified the amount it claimed was due by November 2018, and that the applicant did not agree with the amount (she does not explain why it was incorrect in her view) nor did she accept the repayment terms. Mooi argued that her reinstatement in terms of the agreement was not dependent on reaching an agreement on the outstanding debt and that the determination of the debt and its repayment was an issue quite separate from her resumption of service on a twelve-month fixed term contract as a general worker. By contrast, the municipality took the view that it was a precondition for Mooi's resumption of employment that the debt and its repayment terms had to be agreed on first.

[10] Whether or not agreement on the debt and repayments was a pre-condition for the applicant's resumption of employment, it was clear that her employment would come to an end in twelve months if the debt was not repaid by the end of that period. This necessarily implies that the amount of debt had to be determined before then. Similarly, the parties had clearly intended an agreement on the debt would be concluded by the time she was due to resume working on 1 November 2018.

[11] On the material before the court, the municipality's estimated value of the over-payments made to the applicant between December 2015 and August 2018 was approximately R 174,000 in respect of wages alone, plus an additional amount for bonuses, pension contributions, overtime, S&T allowances and the like, which brought the total to about R 288,000. To pay off that amount over twelve months would have required Mooi to pay in the region of R 24,000 per month on a general worker's wage of R 10,000 per month, which was clearly an impossibility. To the extent that the applicant disputed the gross debt calculation of the employer, she did not give any indication why it was inaccurate and nowhere in the correspondence from her attorneys did she even estimate what her calculation of the debt would have yielded.

[12] In effect the agreement contemplated that over a period of twelve months employment as a general worker, Mooi would reimburse an agreed amount of the

debt, failing which her employment would end on the expiry of that fixed term. If there was no agreement on the debt, it would be impossible to determine if the repayment condition had been met at the end of the twelve months. It is inconceivable on a plain reading of the agreement that the parties contemplated the applicant could remain indefinitely employed after twelve months because no agreement had been reached on the debt, because permanent employment was made contingent on payment of all moneys due by the end of the twelve month period, and her employment would cease altogether if the debt was not repaid. A critical feature of the agreement which precipitated the failure to re-engage the applicant was the failure to sign an agreement on the quantum and back payments. The obligation on the parties imposed by paragraph 7 of the agreement was effectively an obligation to reach an agreement.

[13] The applicable common law principle relating to agreements to reach an agreement is that they are unenforceable in the absence of a deadlock breaking mechanism. In *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* 2020 (2) SA 419 (SCA), the SCA reaffirmed the principle in the following terms:

> [16] Thus, although the position in relation to 'agreements to negotiate in good faith' remains a complex one in Australia in the light of Coal Cliff Collieries, courts there, like other comparable jurisdictions, will not enforce 'an agreement to agree' . That accords as well with the position in our law. As Schutz JA made plain in *Premier, Free State, and Others v Firechem Free State (Pty) Ltd*:
>
> > 'An agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree . . . . Such a discretion was vested in the parties as they were to sign a "contract" the precise terms of which were not fixed in the letter of acceptance, which, unlike the action committee's recommendation, did not refer to annexure B. As the Tender Board neither awarded a contract for the whole of the Free State nor exactly followed that committee's recommendations as to demarcation, the elusive annexure, whatever it did contain, could not have served as

the contract to be signed. There was, accordingly, room for a breakdown in negotiations before a contract was concluded.

…

[17] The proper approach in an enquiry such as the present depends upon the construction of the particular agreement . Accordingly, it becomes necessary to analyse the relevant paragraph to decide whether its proper characterisation is merely an agreement to agree or whether it contained legally enforceable obligations. This was not a case where an external arbitrator was nominated to resolve certain outstanding differences. An arbitrator would have been ill-equipped to fill in the blanks or resolve the questions that the parties could not. An arbitrator certainly could not give effect to arrangements that the parties themselves had not concluded, and then require the party who is resisting to continue with the ongoing relationship. Nor, for that matter, could the arbitrator simply invoke certain vague, ill-defined, objective standards."

[14] The conclusion of a debt repayment agreement is critical to the complete implementation of the settlement. It cannot be severed from the rest of the agreement because it is determinative of the question whether the applicant would be permanently employed. Also, it was clearly intended to be resolved upfront, so that no uncertainty would exist about how she would pay off the debt during the twelve month period.

[15] Taking a bird's eye view of the agreement it is hard to believe the parties genuinely believed it would resolve the dispute. It is noteworthy that the applicant's representatives never directly entered the fray to attempt to negotiate the quantum of the debt, but rather tried to settle the matter.

[16] The court was willing to give parties a chance to resolve the matter because of the difficulty of giving effect to the terms of the settlement agreement.

[17] If the court were to make the award embodying the settlement agreement an order of court, the difficulty of enforcing the agreement to agree on the debt on which other obligations depended would arise as an insoluble problem. In these circumstances, this is one of those instances where it would be of no benefit to any party to make the award an order of court and the court should exercise its discretion to decline to do so.

Order

[1] The application to make the arbitration award dated 21 December 2018, which embodied the settlement agreement concluded between the Applicant and First Respondent on 25 October 2018 under case number NCD 091803, an order of court is dismissed.

[2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	S E Motloung instructed by Thiso & Partners
For the First Respondent	S R P Foster