

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no.:JA6/99

**AB CIVILS (PTY) LTD t/a
PLANTHIRE**

Appellant

and

J A BARNARD

Respondent

JUDGMENT

CONRADIE JA

[1] Revelas J granted the appellant leave to appeal against an order made pursuant to the court's powers under section 158(1)(c) of the Labour Relations Act 66 of 1995 ('the Act'). Paragraph (c) empowers the court to make 'any arbitration award or any settlement agreement ... an order of court.'

[2] The appellant was brought by the respondent before a commissioner of the

Commission for Conciliation, Mediation and Arbitration ('the CCMA') to answer a claim that his dismissal for operational reasons had been unfair and that not all remuneration due to him had been paid. The parties agreed that the commissioner could arbitrate the unfair retrenchment claim.

- [3] A settlement agreement was concluded. In it the appellant undertakes to retrospectively reinstate the respondent with immediate effect 'on the same terms and conditions that existed immediately prior to the retrenchment.' and to pay 'all monies due to the applicant in terms of this agreement' on or before 7 September 1998. It is no simple matter to tell from the agreement what money was agreed by the parties to be due to the respondent. Before the court *a quo* the respondent introduced evidence of a document which he maintained had been before the commissioner. This document contains claims for unpaid commission going back more than a year from the date of the hearing before the commissioner and for remuneration for overtime work on unspecified dates. It also contains a claim relating to the respondent's unfair retrenchment and one for the delivery of certain documents.

- [4] The appellant in its answering affidavit seems to deny that the claims for commission and overtime were ever placed before the commissioner. At any rate it clearly denies that they had been compromised. I think that the appellant is probably correct in this. The commissioner would have had no power to make an award on the outstanding commission or overtime claims or

the claim for the delivery of documents. It is therefore unlikely that they were dealt with as the respondent thinks they were. In his replying affidavit he says, somewhat cryptically, that 'annexure 'G' (his claim document) was presented and discussed with respondent (now the appellant) and his attorneys on arbitration. The only item that was removed was the compensation sought for unfair retrenchment.' Elsewhere in his affidavit the respondent says -

'The contents of Annexure "G" was presented to and discussed with the respondent during arbitration and the matter was never opposed by the respondent in the matter, except the compensation for unfair dismissal which were removed because an agreement for re-instatement was reached, but the respondent failed to comply with it.'

- [5] According to the respondent, then, it seems that the only matter which was opposed - and which was therefore capable of being settled - was the respondent's unfair dismissal for operational reasons and the compensation therefor. I find it difficult to accept that if any other matters were meant to have been settled the commissioner would have allowed a settlement agreement making no mention of them to see the light of day. When the settlement agreement is interpreted in the light of these background features it seems to me reasonably clear that where it refers to 'monies due ... in terms of this agreement' it means the agreement by which the respondent was reinstated. The 'monies due' would then be the salary which the respondent had lost from 1 June to 7 September 1998.

[6] The respondent contended that he had not been properly reinstated. He had been employed as a plant controller and was reinstated as a mechanic's assistant. An amount of R5000.00 was withheld from his compensation on the pretext, so he said, that a loan of this amount had been given to him by the appellant.

[7] In the court *a quo* the appellant denied that the agreement had not been complied with. Its denial, however, lacked conviction. It repetitively asserted that it had complied with the settlement but gave no facts to support this assertion. An affidavit is not a pleading. It is a means of putting evidence before the court. It takes the place of *viva voce* testimony. If these had been proceedings in which oral evidence was received, it would have been clearly inadequate, in the face of a challenge, to baldly assert that the appellant had complied with the settlement. The same is true of evidence on affidavit. Facts must be detailed. In the present matter it could not have been difficult to do. All the relevant transactions would, in the normal course of keeping the appellant's books, have been recorded. The documentation should have been produced. If the appellant really did deduct R 5000.00 from the respondent's compensation, proof that there was a loan should have been furnished.

[8] The result of the appellant's failure to deal with the respondent's complaints head-on is that it is uncertain whether or not the settlement agreement has

been complied with. Since there would be no point in enforcing an executed agreement, a court would not normally make one an order of court. (Phefo & Another v Consteen Brickworks (Pty) Ltd (1998) 19 ILJ 874 (LC) at 877 para 9; Food & Allied Workers' Union v Buthelezi & Others (1998) 19 ILJ 829 (LC)). It was stated in Ceramic Industries t/a Betta Sanitaryware v National Construction Building and Allied Workers' Union (1999) 20 ILJ 123 (IC) that the power to make an award an order of court is a discretionary one which must, of course, be judicially exercised (Deutsch v Pinto & Another (1997) 18 ILJ 1008 (LC) at 1016 E). Where, however, there is a dispute about compliance with an award, the court's discretion is given full play. It would then, depending on all the factors in each individual case, decide whether it is or is not in the interests of justice to convert the binding but unenforceable award into an order of court which may be enforced through the court's execution machinery.

- [9] The crisp question, then, is whether Revelas J, in granting the order, exercised her discretion properly. She had before her a dispute of fact on affidavit. The appellant gives little, and then only generalised, information about implementation of the settlement agreement. The information is so sketchy that it tends to raise a suspicion about the appellant's compliance. It would not astonish me if Revelas J thought that the appellant's bland assertions lacked conviction. I am thus not satisfied that she exercised her discretion incorrectly.

[10] It may well be that another dispute will develop when the respondent seeks to execute on the order of court. One hopes that it does not come to that. But if it does, it will have been the fault of the appellant which could so easily before the court *a quo* have demonstrated its compliance with the settlement agreement. It chose to rely on generalities and legal niceties when, if it was not in breach, good old fashioned straight-forwardness would have carried the day.

The respondent has throughout appeared on his own. A costs order will therefore be of no use.

The appeal is dismissed.

CONRADIE JA

I agree

NICHOLSON JA

I agree

MOGOENG AJA

Date of hearing:

11 August 1999

Date of Judgment:

Attorney for appellant:

Mr Malan from Snyman

Van Der Heever Heyns Inc