

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

REPORTABLE

CASE NO. J1438/07

J1443/07

J1439/07

In the matter between:

TUMELO STEPHEN MOLABA

First Applicant

MMAPHEELO ROSELINE MOKOENA

Second Respondent

MOHAPINYANE BEN MAKUME

Third Respondent

and

EMFULENI LOCAL MUNICIPALITY

Respondent

JUDGMENT

VAN NIEKERK J

- [1] The parties agreed that these applications should be consolidated, and they were argued on that basis. The applications raise the meaning of a “settlement agreement” for the purposes of section 158(1) (c) of the Labour Relations Act. That subsection empowers this court to “make any arbitration award or any settlement agreement an order of the Court”.

- [2] The facts that give rise to these applications are not contentious. The applicants are all employed by the respondent. During early 2006, they contended that they were performing the same jobs as other employees engaged on a higher level, and that they were being paid less than their comparators. The applicants had individual meetings with the respondent's acting human resources manager, Mr. Chesty Mokoena. After each meeting, Mokoena addressed letters to each of the applicants. The wording of each letter, headed "Salary Discrepancies: Re-Adjustment of Your Salary" is similar. The salient part reads as follows:

"The pay-office has subsequent to our negotiations and agreement on the above in my office, in Vanderbijlpark on 17 May 2006, been asked to do the following:

- 1. Adjust your salary to the third notch of level 10 with effect from 1 August 2005 to pay you as such and to retain your salary incremental date as 1 August.*
- 2. That the adjustment of your salary and employment will also include all due benefits as they would have been applicable on 1 August 2005.*
- 3. To deduct any amounts that has to be (including amounts to be paid as tax).*
- 4. To deduct and pay on your behalf all monies due to your pension fund, medical aid, UIF and etc.*

Kindly confirm in writing not later than 22 May 2006 that you accept the above-mentioned conditions.

And I also confirm that by acceptance of the above-mentioned conditions that Council's obligations in your instance (i.e. on salary disparities), are considered closed.

It is hoped that you will find the above to be in order."

- [3] The applicants contend that the respondent has failed to comply with the terms of the letters addressed to them by Mokoena. The respondent contends that it is not bound by Mokoena's letter. First, it avers that in June 2006, subsequent to the letters being addressed to the applicants,

a memorandum of understanding was concluded between the respondent and SAMWU, which effectively replaced any individual agreements concluded by Mokoena with any of its employees. The applicants admit that they are members of SAMWU, but contend variously that SAMWU had no mandate to conclude any agreement with the respondent on their behalf, that they are not parties to the memorandum of understanding, and that their individually concluded agreements trump the memorandum. Secondly, the respondent contends that Mokoena had no authority to conclude any agreement with the applicants, and that any agreement that may have come into existence is *ultra vires*. In response, the applicants contend that Mokoena held himself out to have the authority to conclude the agreements with each of the applicants, and that the respondent is estopped from denying that authority.

- [4] On 25 June 2007, the applicants filed this application, seeking to have what they termed a settlement agreement (in the form of the correspondence addressed to them by Mokoena) made an order of this court in terms of section 158(1) (c).
- [5] The Act does not define a “settlement agreement”. Section 158(1) aside, the only other reference in the Act to a settlement agreement is found in section 142A. That section provides that the CCMA may make any settlement agreement in respect of any dispute that has been referred to the commission, an arbitration award. A settlement agreement is defined for this purpose as “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 entitled to refer to arbitration in terms of either section 74(4) or 75 (7).” (The latter references are to disputes in essential services and maintenance services, and are not material to this application).
- [6] The wording of s 142A suggests that for an agreement to constitute a settlement agreement, a number of requirements relating to nature and

form must be met. First, the dispute that is the subject of the settlement must have been “referred to the Commission”. “Referred” cannot mean referred to arbitration in terms of s 136 - s 142A (1) requires that the dispute must be one that a party has the right to refer either to arbitration or to the Labour Court. “Referred to the Commission” therefore means referred for conciliation in terms of section 134. This section, read with the requirement that the dispute be one that a party has the right to refer either to arbitration or to the Labour Court, means that it is only settlements of disputes about a matter of mutual interest that are either arbitrable or justiciable by this Court that may be the subject of an arbitration award in terms of s 142A. This excludes, for example, a settlement agreement in respect of a dispute about wages. Finally, the agreement must be in writing. Those cases that deal with the definition of a collective agreement (which in terms of s 213 must be a “written agreement”) would obviously be helpful in giving content to this requirement. (See, for example, *SAMWU v Weclogo* [2000]10 BALR 1160 (CCMA)).

- [7] To the extent that s 158(1) (c) permits this Court to make “any” settlement agreement an order of court, a broad interpretation of this court’s powers may be defensible. In *Harrisawak v La Farge (SA)* (2001) 22 ILJ 1395 (LC), for example, Pillay J said:

“The settlement occurred without the direct intervention of the CCMA. In the circumstances, Mr Lawrence submitted for the respondent, it was a private agreement not determined by the CCMA at conciliation or arbitration and should therefore be enforced in the civil courts as the cause of action arose from the agreement itself and not from the employer-employee relationship. (Du Toit et al (3 ed) at 582.) Support for this view cannot be found in s 158(1)(c) which reads:

‘The Labour Court may make any arbitration award or any settlement agreement other than a collective agreement an order of court.’

[5] The interpretation that Mr Lawrence seeks to place on s 158(1) (c) is restrictive and not justified by the use of the word 'any' before the word 'settlement' in the section. Furthermore, the settlement agreement relates to the employment relationship. The stated purpose of the LRA is to provide effective dispute resolution in labour disputes. That includes the provision of services by personnel competent and qualified to resolve labour disputes. Moreover, the dispute at the time the settlement agreement was entered into was pending as arbitration before the CCMA.

[6] In the circumstances, the court has the jurisdiction to hear a dispute relating to the enforcement of the settlement agreement about an employment dispute concluded without the direct intervention of the CCMA."

These remarks were made in the context of a dispute that had been referred to the CCMA for conciliation, which proved unsuccessful. The parties entered into the settlement agreement in question after the conciliation meeting but before arbitration proceedings commenced.

[8] The *Harrisawak* judgment was delivered before the 2002 amendments to the LRA were promulgated. Those amendments introduced section 142A and deleted the qualification in s 158(1) (c) that related to collective agreements. After the 2002 amendments, a settlement agreement concluded in the circumstances of *Harrisawak* can be made an arbitration award in terms of s 142A (because the dispute had been referred to the CCMA for conciliation) and it would not be necessary to seek this court's intervention to secure the enforceability of the agreement. But that leaves open the question whether the broad interpretation afforded s 158 (1) (c) in *Harrisawak* should survive the 2002 amendments.

[9] I think not. The interpretation adopted in *Harrisawak* might suggest that this court ought to entertain an application in terms of s 158(1) (c) only

because the agreement in question settles an employment-related dispute. It implies that any party to the settlement of an employment-related grievance, whatever its nature, is entitled to approach the court to have that settlement made an order. It would also entitle any party to a collective agreement to have that agreement made an order, thus blurring the line between a constitutive and a judicial act,¹ a line that s 142A clearly draws and that the broad architecture of the LRA preserves.² A broad interpretation would also suggest that the limitations established by s 142A could be entirely undermined - none of the conditions attached to having a settlement agreement made an arbitration award in terms of that section would apply if a party were simply permitted to approach this court to have any employment-related agreement made an order. Finally, a broad interpretation would blur the line between what are properly contractual claims to be enforced either by the civil courts, or by this court under s 77(3) of the BCEA.

[10] An alternative, narrower interpretation of s 158(1)(c) is to limit its application to those instances where a party has validly referred a dispute to this court for adjudication and where the dispute, at any time after the referral, has been settled. An interpretation to this effect would preserve the integrity of s 142A. It would also avoid all of the difficulties, conceptual and practical, that the broad interpretation presents.

[11] In the present instance, at best for the applicants, they raised a grievance about their remuneration, discussed their concerns with the respondent's human resources manager who then presented them, in writing, with what amounted to a mutually agreed variation of their employment contracts. At no stage prior to the signature of the letters did they declare a dispute, or refer a dispute to the bargaining council. For the reasons stated above, the letters addressed to them confirming the arrangements that they reached with Mokoena were not "settlement agreements" as contemplated by s 158(1) (c).

¹ See Du Toit, et al. *The Labour Relations Act of 1995* (1ed. at p. 337).

² Collective agreements are enforceable through arbitration in terms of s 24(5) of the Act.

[12] Finally, s 158(1) (c) clearly confers a discretion on this court to make a settlement agreement an order of court. Even if I am wrong in my view that only settlements of disputes referred to this court are capable of being made orders under s 158(1) (c), I would, in the exercise of my discretion, refuse to make the correspondence relied on by the applicants a court order. The respondent has raised a number of defences to the claim that are not easily resolved. After receipt of the correspondence from Mokoena, the applicants filed an unfair labour practice claim with the bargaining council in which they effectively seek enforcement of the terms of the letters addressed to them. Those proceedings remain pending. If the respondent has reneged on the undertaking represented by the correspondence addressed to each of the applicants, they are also free to pursue a claim in contract. Section 158(1)(c) was not intended for use as a vehicle to bypass other more directly available causes of action contemplated by the LRA and the common law, and to provide the means to what amounts to final relief by way of motion proceedings.

[13] In summary, the correspondence addressed to the applicants by Mokoena did not constitute a settlement agreement for the purposes of s 158(1)(c). Even if it did, the nature of the dispute between the parties is such that it would not be prudent to exercise the discretion to make the agreement an order of this court.

I accordingly make the following order:

The applications are dismissed, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 30 January 2009

Date of Judgment: 17 March 2009

Appearances:

For the applicants: Ms M Chenia from Glyn Marais Inc.

For the Respondent: Ms Koulontis from Koulountis Inc.