

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number : J439-2010

In the matter between

THE PUBLIC SERVANTS ASSOCIATION

OF SOUTH AFRICA o.b.o its members

Applicant

and

T T GWANTA N.O

1st Respondent

G NKWINTI N.O

2nd Respondent

JUDGMENT

Conradie AJ

1. In this matter the Applicant seeks an order declaring that the First and Second Respondents are in contempt of a court order granted by this court on 13 November 2006. In the alternative it seeks an order declaring the First and Second Respondents to be in breach of the court order and a further order compelling them to comply with the court order.
2. The First Respondent was cited in his official capacity as the Director General of the Department of Rural Development and Land Reform (the Department). The Second Respondent was cited in his official capacity as the Minister of the Department.

Background

3. The Applicant's members in this case are employed in the office of the Registrar of Deeds. Their responsibilities include, amongst other things, the verification and examination of documents lodged with the Registrar of Deeds.
4. During 2006 the Applicant's members and the Department were in dispute regarding the implementation of an incentive bonus scheme known as the "Piece Work Production Incentive Scheme." The dispute led to the situation where the Applicant's members were set to embark on strike action on 7 November 2006.
5. In response to the threatened strike the Department brought an urgent application in this court for an order interdicting the strike. The Applicant opposed the urgent application.
6. The urgent application was, however, not heard because the parties concluded a settlement agreement which sought to regulate the payment of an incentive bonus going forward. This settlement agreement was made an order of court.
7. It appears that the parties complied with the terms of the settlement agreement until 15 January 2009, when the Department informed the Applicant that it was terminating the agreement.
8. The Department argues that the economic downturn experienced in the country during recent years caused the workload in the Deeds Office to be reduced to such levels that the scheme no longer found application.

9. According to the Department the settlement agreement of 13 November 2006 was concluded at a time when the economy was booming. A high volume of property purchases lead to a high volume of registrations. In order to maintain the normal turnaround time for the registration and transfer of property, the high volume necessitated that extra work be done by employees. In return employees would benefit from the incentive scheme. This was done by placing a cap on the number of deeds which would ordinarily be examined in a day. Any deeds examined over and above this number would result in employees being paid at a specified rate per extra deed examined.
10. The Respondent also argues that when the parties concluded the settlement agreement they were committed to resolving the issue and averting the strike. At this stage the question of what would happen in the case of an economic downturn was not necessarily discussed by the parties. In particular, whether or not the incentive scheme would remain in place indefinitely was not discussed, nor was it addressed in the settlement agreement.
11. The Applicant on the other hand argues that as the settlement agreement is an order of court, it stands until it is set aside or varied by a subsequent order of court. This is the case even though the party to whom it applies may believe itself entitled to an amendment or rescission of the terms of that order.
12. The Applicant also contends that the settlement agreement, as an agreement which regulates the terms and conditions of employment of its members, varied the contracts of employment concluded between its members and the Department. As a result, even if the Department is entitled to terminate the

settlement agreement, this does not have the effect of undoing the variation of the individual contracts of employment as they exist between the Department and each of the Applicant's members.

The Settlement Agreement

13. The settlement agreement consists of six clauses. Clause 1 deals with introductory issues such as definitions and a recordal of the events leading up to the settlement agreement. The remainder of the clauses, which I quote in full, provide as follows –

2. *“The parties are now desirous of settling this matter and wish to record the terms and conditions pertaining thereto as follows:*

2.1. *The parties agree that the Collective Agreement signed on the 11th of February 2004 no longer regulates relations between the parties.*

2.2. *The parties agree that the norms that applied on the 30 June 2002 will continue to be utilised until the 31st of December 2006.*

2.3 *The tariffs that applied since 30 June 2002 will be adjusted upwards on an annual basis at the same rate as the annual salary Increments that applied to the affected staff, with effect from 1 July 2002.*

2.4 *That the Department will recalculate the amounts payable to employees in terms of clauses 2.2 and 2.3*

above and then any outstanding amounts payable to such employees will be paid to them in monthly batches with final payments to be made by no later than 31 March 2007.

2.5. That the attached norms approved by the Director General on the 11 August 2006 will apply with effect from 1 January 2007.

2.6 The aforesaid tariffs will continue to be adjusted on an annual basis in the same way indicated in Clause 3 above.

3. Withdrawal

3.1. Upon signature of this agreement by both parties the parties will attend upon the Labour Court , Braamfontein, by no later than the 13th of November 2008, being the date to which this matter has been stood down for hearing, to inform his Lordship that this matter is withdrawn on the basis that it has become settled between the parties.

3.2. The parties agree that this agreement may be made an order of court in terms of section 158(1) of the Labour Relations Act 66 of 1995.

4. The parties agree that the terms of this agreement are in full and final settlement of all claims that either party may have against the

other.

5. General

5.1. *No agreement varying, adding to, deleting from or cancelling this agreement shall be effective unless recorded in writing and signed by or on behalf of the parties.*

6. Costs

Each party shall bear its own legal costs occasioned by the Labour Court Application under Case Number J2064/06.”

The Nature of the Settlement Agreement

14. Before the question of contempt of court can be considered, the status of the court order, read with the settlement agreement, must be analysed.

15. In my view the fact that a settlement agreement is made an order of court does not mean that all the terms of the settlement agreement automatically become terms of the court order. Too often it is simply assumed that this is the case, with little if any consideration given to the nature of the settlement agreement.

16. There are inherent difficulties in clothing a settlement agreement in the terms of a court order. In the case of *Thutha v Thutha*¹, Alkema J, in dealing with a similar situation relating to a deed of settlement which was made an order of court as part of divorce proceedings, postulated the problem as follows:

¹ 2008 (3) SA 494 Tkh at 499 16 – 17.

“The following difficulties flowing from the terms of a contract being embodied in a court order come to mind in the case of a dispute between two contracting parties regarding the terms of their contract. Is the result that one or both of them is/are in breach of the court order and may such party/parties in these circumstances be compelled to comply with the court order even if non-compliance may be contractually excused? If not, what is the object and purpose of the court order if it cannot be enforced? Is it expected of contracting parties to approach the court every time they amend or change their contract to apply for an order of variation of the court order? If the object and purpose of the court order is to allow either or both contracting parties to proceed immediately to execution without resorting to a resolution of their contractual disputes, may any of the parties be deprived of their contractual rights or remedies, including the right to have their disputes settled in a court of law? If not, again the rhetorical question: What then is the purpose and effect of incorporating a contract into an order of court?”

17. It is arguable in this case that when the court made the settlement agreement an order of court, all that it was doing was acknowledging that the matter before it was withdrawn, and that the parties had reached an agreement as to how they would address the underlying dispute going forward. In other words the specific terms of the settlement agreement does not necessarily form part of the court order.

18. It is noteworthy that clause 4 of the settlement agreement records that the parties would inform the court on the day when the interdict application was to be heard that the matter is withdrawn on the basis that it has become settled between the parties. The fact that the settlement agreement contains an

option to make the agreement an order of court does not mean that the details relating to the incentive scheme also form part of the court order. All that is included in the ambit of the order is that the parties have reached agreement on how to resolve the matter going forward.

19. In *Thutha v Thutha* it was also stated that:

“I believe with respect that a court should distinguish clearly between orders of court and their enforcement on the one hand, and deeds of settlement on the other hand. The former is concerned with procedural principles and the protection of the court’s dignity and honour: and the latter with the law of contract.²”

20. The learned judge goes on to say that if it is found that a court order is merely a recording of a settlement agreement between the parties without an element of the court requiring obedience with its terms as a court order, it cannot and should not be treated as a court order.³ In such a case the remedy of the applicant is to sue on the contract and for the court to decide the matter on contractual principles.

21. I agree with the above sentiments which show that the mere fact that a settlement agreement is made an order of court does not mean that it is enforceable as such. The purpose of a court order should not, except in appropriate circumstances, be to record contractual terms between the parties, as the court is not a registry of obligations. Rather the purpose of the court order should be to bring a dispute to closure. This cannot be achieved where the settlement agreement is not capable of ready enforcement by

² At 506 C-E.

³ At 508 C-E.

execution. The settlement agreement in question is in my view one that is not capable of ready execution. A host of disputes could arise relating to the interpretation and application of the settlement agreement, which would make enforcement of it on the strength of a court order undesirable.

The Settlement Agreement as a Collective Agreement

22. The settlement agreement in this matter is also, in fact and in law, a collective agreement as contemplated in the Labour Relations Act 66 of 1995 (the LRA).

23. The normal principle applicable to a collective agreement which is concluded for an indefinite period, such as the one in question, is that it may be terminated on reasonable notice. In this regard section 23(4) of the LRA provides that *“Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.”*

24. In this case, to the extent that there is a conflict between the duty to observe a court order and the right to terminate the collective agreement, I am of the view that the collective agreement must prevail.

25. The conclusion of collective agreements through the process of collective bargaining is what underpins our labour relations system. If the Applicant's argument is accepted, then the Department would never be in a position to alter or terminate the incentive scheme without approaching this court for an order that the underlying agreement is varied or terminated. This court would be called upon to resolve through litigation that which must be resolved

through collective bargaining. Such an approach would be inconsistent with the LRA. This would also mean that if the parties agree to vary, add to, delete or cancel the agreement as provided for in Clause 5, this would be of no force and effect unless sanctioned by the court. This clearly cannot be correct.

The Variation of the Contracts of Employment

26. I do not agree that the Applicant's members' contracts of employment were varied to include the incentive bonus and as such they should continue to be entitled to the bonus even though the agreement is cancelled. Given the nature of the right, they only enjoyed it for as long as the collective agreement was in force.

27. Based on the reasons above I do not believe that there was a breach of the court order. The Respondents cannot therefore be held to be in contempt of court.

28. As far as costs are concerned I can see no reason why the Applicant, as the unsuccessful party, should not pay the costs of this application.

In the circumstances I make the following order-

1. The application is dismissed with costs.

Conradie AJ

For the Applicant

Adv H A Van Der Merwe, instructed by Martins Weir-Smith

For the Respondents

Adv WR Mokhare, instructed by the State Attorney

Date of Judgment: 20 December 2011