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**REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

NOT REPORTABLE

CASE NO: J1101/14

In the matter between:

ZULU, BONGANI

Applicant

AND

**EVANGELICAL LUTHERAN
CHURCH IN SOUTHERN
AFRICA**

Respondent

Heard: 15 May 2014

Delivered: 28 May 2014

Summary: (Enforcement of a settlement agreement)

FINAL ORDER

LAGRANGE, J

[1] In this matter, I made an interim order on 19 May 2014 pending judgment which was postponed to 27 May 2014 and subsequently to 28 May 2014.

[2] The applicant sought a final order on an urgent basis, making a settlement agreement concluded between the parties on 24 April 2014 an order of court, compelling the respondent to uplift the applicant's suspension and preventing the respondent from taking disciplinary action against him in respect of the matters which gave rise to his suspension on 12 February 2014.

[3] The applicant is employed by the respondent as its General Treasurer, a position he has occupied since 1999 during his working life with the respondent of approximately [.....] years. He was initially suspended in July 2013 because of the work of an investigation task team into all financially related matters. Following representations he made opposing his suspension, he was subsequently allowed to return to work in August 2013. There were intimations from the presiding bishop of a further imminent suspension in September 2013, but nothing came of this. It was only on 12 February 2014 that he was suspended again. This time it was pending an investigation into whether he was meeting performance standards on technical output and managing the reports functions of subordinates and to superiors, as well as allegations of insubordination and inappropriate conduct. The applicant referred an unfair suspension dispute to the CCMA.

[4] The matter was set down for a hearing on 25 April 2014, but the parties concluded a settlement agreement of the previous day. The material terms of the agreement read:

"1 Settlement of Dispute

1.1 The respondent will notify the applicant of charges of misconduct and/or allegations of his failure to meet performance standards by no later than to May 2014 and will simultaneously notify the applicant where and when he is required to report for a hearing into such charges and/or allegations.

1.2 Should the respondent not have proceeded in a manner set out in 1.1, the applicant shall be entitled to resume his duties on Monday, 5 May 2014 without any further threat of suspension or disciplinary action being taken against him in relation to those matters which gave rise to his suspension of 12 February 2014.

1.3 The earliest date for the hearing of charges and/or allegations against the applicant will be a date not less than five consecutive days after the date on which any notification is served on the applicant, so as to 14 adequate opportunity to consult with his attorney in preparation for any hearing that may be convened..."

[5] Prior to the conclusion of the agreement the parties' legal representatives had exchanged correspondence in which the applicant had made it clear that he would continue with his unfair labour practice dispute unless amongst other things charges were formulated by the respondent and a date for a hearing was determined. The respondent's attorney indicated on 22 April 2014 that the respondent would formulate a charge sheet, whether for misconduct or capacity, which would be forwarded to the applicant by Tuesday 29 April at the latest.

[6] Despite the settlement agreement being signed by the respondent on 24 April 2014, when the applicant attended the CCMA proceeding the following day, the respondent's delegation advised the Commissioner they were not aware of the settlement agreement. After reading a copy of it provided by the applicant both parties signed an agreement that the dispute at the CCMA could be withdrawn.

[7] On 30 April 2013 the applicant was provided with an extensive charge sheet which included a charge that he had behaved dishonestly in attending the CCMA hearing on 25 April 2014 and engaging the employer without advising that the dispute was already settled. The charge sheet was sent

under cover of an e-mail from the respondent's attorneys in which she stated:

"Kindly note that we are currently waiting to obtain instructions from our client with regard to the application of a suitable date and time for the hearing of the disciplinary enquiry. We confirm that you will be duly informed as soon as we receive confirmation from our client for the date and time scheduled for the hearing of the disciplinary enquiry."

[8] By 2 May 2014, the respondent ought to have provided the applicant with the details of when and where he was obliged to report for a disciplinary enquiry. In consequence of the respondent's non-compliance with this provision the applicant reported for duty on 5 May 2014 in accordance with clause 1.2 of the settlement agreement. He presented a letter from his attorney to the respondent's general secretary in which it recorded his view that the respondent had failed to comply with the provisions of clauses 1.1 and 1.2 of the agreement and demanding that he be permitted to have access to his workstation and all amenities to enable him to carry out the work he performed for his suspension in February 2014. He was advised that he would be phoned before 12 o'clock, but his attorney was contacted by the respondent's attorney who advised him that the respondent would not allow him to resume his duties. Accordingly he left the office.

[9] Later that day, the respondent's attorney sent his attorney a letter in which it was stated that he had suffered no prejudice when he was not informed of the scheduled date of the enquiry on receipt of the charges on 30 April 2014 as the enquiry still could not be held for another five working days after 5 May 2014. The letter condemned the applicant's return to work that day as opportunistic in the light of the charges against him and advised that: "[w]e now confirm that an enquiry will be held in the week 12 May 2014 to 16 May 2014, the details of which will be confirmed with your office before close of business today."

[10] Despite the undertaking to provide details of the enquiry that day it was only on 8 May 2014 that the applicant was advised the respondent would hold the enquiry on 21 May 2014.

[11] The application was launched on 12 May 2014, four days after receipt of the notice of the hearing date. The urgency of the application was premised on the respondent's clear intention to proceed with the enquiry on 21 May 2014.

Evaluation

[12] It is common cause the respondent did not comply with the letter of clause 1.2 of the agreement by 2 May 2014. Although it provided details of the charges and allegations as required by clause 1.1 of the agreement, it failed to provide details of the venue and timing of the hearing. The missing details were only provided nearly a week after the due date. Clause 1.2 of the agreement provided in unequivocal terms what the consequence of non-compliance with the provisions of clause 1.1 could be and the applicant elected to resume his duties on 5 May 2014 as he was entitled to do.

[13] The respondent defends its non-compliance on two grounds. Firstly, it claims that on 30 April 2014, due to practical considerations, it was impossible for it to confirm the date and venue for the disciplinary enquiry. As such, the respondent suggests the applicant could not rely on its non-compliance with the provision in circumstances where it was impossible to do so within the timeframe of the settlement agreement. Secondly, it argues that the applicant suffered no real prejudice as a result of the delay and emphasised the importance to the organisation of taking disciplinary steps in such circumstances.

[14] The applicant argues that he was entitled to insist on strict compliance with the terms of the agreement and therefore could return to work without the threat of facing charges premised on the respondent's investigations. What is

notable about the terms of the settlement agreement is the inclusion of clause 1.2 which vested a clear right in the applicant to return to work without having to answer charges arising from the respondents prior investigations. Thus, the consequence of non-compliance with clause 1.1 was unequivocally clear and serious, because it effectively permitted the permanent scrapping of disciplinary proceedings the respondent was planning to bring on the basis of its investigations. Given the serious consequence of non-compliance with clause 1.1 there is simply no basis for interpreting a breach of clause 1.1 as a non-material breach of the agreement. The respondent ought to have been on its guard to prevent the possibility of the applicant invoking clause 1.2 in consequence of any laxity on its part in complying with clause 1.1. It should be mentioned in this regard that the importance of pinning down the proceedings in terms of the charges and timing thereof must be understood in the context of the prevarication on the part of the respondent in finalising disciplinary matters since mid 2013, when the issues giving rise to the charges first surfaced.

[15] The consequence may seem harsh and the respondent may well argue that the prejudice to the applicant of having to suffer the uncertainty of when and where his enquiry might take place was not substantial. However, the harsh consequences flowing from the application of clause 1.2 are ones that it is agreed to and could not have been unaware of. The argument it presents suggesting that it could not comply with the timeframe is simply not persuasive on the evidence. Nothing concrete was placed before the court to show that it was simply untenable for reasons beyond the respondent's control for it to determine a date and time for the venue by 2 May 2014.

[16] For these reasons, I am satisfied that the applicant was entitled to invoke the provisions of clause 1.2 of the settlement agreement and is entitled to return to work unencumbered by the prospect of pending disciplinary action arising from the respondent's investigations.

[17] The settlement agreement is unambiguous in its terms and the obligations of the parties under it are not in doubt. It is also a settlement of a dispute which the applicant was entitled to refer to arbitration under the Labour Relations Act, 66 of 1995 ('the LRA'). The respondent had demonstrated it did not intend to comply with it except on its own terms. Accordingly satisfied that the requirements for making the settlement agreement an order of court in terms of section 158 (1) (a) of the LRA have been met.

[18] Lastly, the applicant had been compelled to act when the respondent made it clear that it was intending to proceed to hold the enquiry on 21 May 2014 and would not allow him to return to work. I believe the applicant acted with reasonable expedition in launching the application when he did.

[19] On the question of costs, given the clear terms of the agreement it should never have been necessary for the applicant to incur the expense of bringing this application and even though there is an ongoing relationship between the parties I believe it would only be fair for the respondent to bear his costs.

Order

[20] In light of the above, it is ordered that:

20.1 the matter is dealt with as one of urgency dispensing with the rules governing the time periods for filing pleadings;

20.2 the settlement agreement concluded between the applicant and the respondent on 24 April 2014 is made in order of court in terms of section 158 (1) (c) of the LRA;

20.3 the respondent is ordered to uplift the applicant's suspension of 12 February so that he may resume his duties;

20.4 the respondent is interdicted from instituting and, or alternatively proceeding with disciplinary action against the applicant in respect of those matters that gave rise to the applicant's suspension on 12 February 2014, and

20.5 the respondent must pay the applicant's costs.

R LAGRANGE, J
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: S Collet instructed by K McDade

For the Respondent: J W Lamprecht instructed by I Vorster of Stegmanns
Inc