



REPUBLIC OF SOUTH AFRICA

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN PORT ELIZABETH**

CASE NO: P 213/13

In the matter between:

DR E RANKWANA

Applicant

and

KOUGA MUNICIPALITY

First Respondent

Date of hearing: 17 April 2014

Date of judgment: 10 November 2014

Summary: (s 158(1)(c) – settlement agreement – pre-requisites for considering whether to make it an order - not met)

JUDGMENT

LAGRANGE, J

Introduction

- [1] This matter concerns an application in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995, brought by a former Municipal manager of the respondent, to make a settlement agreement, which he claims was entered into between himself and the respondent, an order of court.

Further, the applicant seeks an order against the respondent compelling it to pay him a performance bonus in terms of the provisions of the settlement agreement, which is discussed in paragraph [5] below.

- [2] The applicant had also brought a Rule 11 application challenging the authority of the deponent to the opposing affidavit to oppose the main application, but this was withdrawn at the start of proceedings. The applicant then contended that the same deponent to the opposing affidavit, who is the current municipal manager of the respondent, has no personal knowledge of the background to the settlement agreement and the only way to resolve the disputes of fact raised on the papers was to submit the matter to oral evidence. However, it first needs to be decided if an *in limine* point on jurisdiction raised by the respondent is valid. The respondent contends that the settlement agreement is not one that the court can make an order of court. Another interlocutory issue that needs to be decided is whether to condone the late filing of the respondent's opposing affidavit.

The condonation application

- [3] The opposing affidavit was eleven days late. The respondent points out that in terms of the paragraph 11.4.2 of Labour Court Practice Manual (2 April 2013) it is not necessary for a party that fails to file an opposing or answering affidavit on time to apply for condonation unless the other party files a notice of objection thereto within 10 days of receipt of the affidavit in question. Quite apart from the fact that the delay in question is not significant in the context of the course of this litigation, the applicant did not file a notice of objection and accordingly it is not necessary to condone the late filing of the opposing affidavit.

In limine jurisdictional point

- [4] The settlement agreement in question was concluded on 27 July 2011 according to the applicant, though the copy provided by him is only signed by himself. At the time the document was signed it would appear that the applicant was still the municipal manager of the respondent. For the purposes of the analysis which follows it is useful to record a few of the

pertinent provisions of the agreement. Clause 2 which forms part of the preamble states:

“Without any admission of liability or wrongdoing on the part of either party, the parties agreed to terminate their relationship on the terms and conditions set out in this agreement.”

The agreement goes on to record that the applicant's service will terminate on 31 July but that he would receive 7 months' notice pay and 39 days accumulated leave pay, which clause 8 describes as constituting a severance package. Clause 6A of the agreement records that the parties are in dispute about the payment of an amount of R 377,848.78 to the applicant in January and February 2011 and that the dispute is the subject matter of a private arbitration process. Two other provisions should be mentioned in full, namely clauses 9 and 12, viz:

“9. The settlement agreement constitutes the full and final settlement of any dispute (s) and/or claim (s) that the employee has or may have had, against the employer arising out of, or in any way connected with, the employment relationship between the employer and the employee and/or the termination of such employment relationship including, but not limited to, a claim based on the commission of an unfair labour practice, unfair dismissal, unfair constructive dismissal, a breach of contract or delict perpetrated by the employer against the employee and/or a claim relating to the payment of severance pay and/or any other claim of any nature whatsoever under the basic conditions of employment act 1997.”

and

“12. In the event that a dispute arises between the parties as to their rights or obligations under this agreement, or the performance by either party of the obligations of this agreement, the matter shall be resolved by the Magistrate Court for the District of Humansdorp. The prevailing party in any dispute that requires resolution by the courts, shall be entitled to recover all legal cost and expenses on scale as between attorney and client.”

- [5] The reason the applicant wishes to make the settlement agreement an order of court is that he complains that the respondent has not complied with clause 6B of the agreement which requires the employer to evaluate and determine his bonus entitlement of the periods 2009/2010 and 2010/2011 in accordance with the applicant's performance contract and legislative pre-scripts. The same clause required the employer to commence the evaluation of the bonus entitlement within 30 days of the date of the agreement in respect of the 1st period and within 30 days of the auditor general's final report being received for the 2nd period. Failing the employer completing those exercises within 60 days of the stipulated time limits, the applicant would be entitled to receive the maximum performance bonus entitlement due and payable immediately. It is this provision which the applicant seeks to enforce.
- [6] The jurisdictional question which has arisen is whether the settlement agreement is one that is capable of being made an order in terms of section 158(1)(c) of the LRA. The LAC has recently clarified the ambit of settlement agreements which may be made orders of court by addressing the question of settlement agreements of disputes which had not been referred to the statutory conciliation mechanisms of the LRA in **Greeff V Consol Glass (Pty) Ltd**.¹ The court identified the following minimum pre-requisites a settlement agreement must meet in order for the court to consider making it an order of court:

"[19] It is thus clear from a reading of s 158(1A) that s 158(1)(c) must be read with and subject to s 158(1A). Even though s 158(1)(c) refers to 'any settlement agreement' this cannot be taken to mean, literally, 'any' settlement agreement. Section 158(1A) describes what settlement agreements are being referred to in s 158(1)(c). So properly interpreted, in terms of s 158(1)(c), read with s 158(1A), the Labour Court may make any arbitration award an order of court and may only make settlement agreements, which comply with the criteria stated in s 158(1A), orders of court. A settlement agreement that may be made an

¹ (2013) 34 ILJ 2835 (LAC)

order of court by the Labour Court in terms of s 158(1)(c), must (i) be in writing, (ii) be in settlement of a dispute (ie it must have as its genesis a dispute); (iii) the dispute must be one that the party has a right to refer to arbitration, or to the Labour Court for adjudication, in terms of the LRA; and (iv) the dispute must not be of the kind that a party is only entitled to refer to arbitration in terms of s 22(4), or s 74(4) or s 75(7). Those kinds of dispute are excluded.”²

- [7] In this instance, all the applicant stated in his founding affidavit to identify the genesis of the dispute is that: “The parties had a dispute in term of the employment relationship, and entered into an agreement to terminate the employment relationship.” This colourless description tells the court little or nothing about the alleged dispute other than it was one concerning the employment relationship and that the dispute probably arose before the termination of the relationship by mutual agreement.
- [8] A termination of an employment relationship is not a dismissal.³ Consequently, the alleged dispute could not conceivably relate to any unfair dismissal claim that might be arbitrated or adjudicated in terms of the LRA. No factual averment of any detail is made that identify the dispute relied upon as one that could be the subject matter of an unfair labour practice claim or a claim that might be adjudicated by the labour court in terms of s 77 of the Basic Conditions of Employment Act, 75 of 1997. Consequently, the applicant has not made out a basis on affidavit that the dispute is one that could conceivably satisfy the third requirement identified in *Greeff*’s case.
- [9] It is only in the settlement agreement itself that reference is made to a claim that the parties have agreed must be referred to private arbitration for determination. What relationship the amount in dispute that is mentioned in that clause has to anything that might be the subject matter

² At 2843

³ *Kynoch Feeds (Pty) Ltd v CCMA & others* [1998] 4 BLLR 384 (LC) at 387, para [55].

of adjudication or arbitration is not apparent on the face of the settlement agreement and is not explained in the applicant's founding affidavit.

- [10] I have assumed for the purpose of the above that there is a dispute which gave rise to the settlement agreement. However, on the slender factual allegations there is nothing which discloses that the genesis of the settlement agreement was a dispute other than the one mentioned in the agreement. In any event, the applicant ought to specifically allege the nature of the dispute from which the settlement agreement supposedly arose.
- [11] It was suggested that clause 9 of the agreement clearly refers to disputes arising under the LRA. However, it is one thing to have a clause like this which tries to indemnify each party from any disputes arising from the employment relationship which might have arisen, or may arise in the future. The existence of such a clause does not necessarily imply that the agreement was concluded to settle any pre-existing dispute that had arisen, which is required in terms of the second criterion identified in *Greeff*.
- [12] For the above reasons, the Labour Court does not have jurisdiction to entertain the application to make the settlement agreement an order of court.
- [13] In light of this conclusion which is determined solely with reference to the applicant's own founding affidavit in which he had to set out the evidentiary basis for the relief he seeks, it is not necessary to consider the plethora of interlocutory disputes raised by the application, including a rule 11 application to dismiss the respondent's opposition based on an alleged lack of authority to oppose the s 158(1)(c) application.

Order

- [14] The s 158(1)(c) application is dismissed with costs.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: W Van Rensburg of W Van Rensburg Attorneys

For the Respondent: M Grobler

Instructed by: Labushagne & Van Der Walt Attorneys

LABOUR COURT