



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: P206/16

In the matter between:

SIVUYILE PETER

Applicant

and

CAPACITY OUTSOURCING

Respondent

Heard: 15 February 2017

Delivered: 27 March 2017

JUDGMENT

MAHOSI AJ

- [1] This is an application in terms of section 158(1)(c) of the Labour Relations Act¹ ("LRA") for an order to make a settlement agreement issued by the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number ECPE 587-15 an order of the court. It is the applicant's case that this order is sought as a result of the respondent's failure to comply with the terms of the said settlement agreement.

¹ Act 66 of 1995.

- [2] The respondent objected to the applicant's late filing of his replying affidavit and submitted that it was not supported by an application for condonation. The applicant's advocate conceded at the hearing that the replying affidavit was filed on the 28th of November 2016, which was after the respondent's Heads of Argument were filed and that an application for condonation was not filed. The applicant's replying affidavit is, therefore, not properly before this Court. As such, it will not be taken into consideration.
- [3] It was common cause that on the 3rd of February 2016 and pursuant to an alleged unfair dismissal, the parties concluded a settlement agreement in terms of which the respondent would re-employ the applicant from the 17th of February 2016. The parties seem to have agreed on the re-employment of the applicant on wholly different terms. This is evident from the fact that paragraph 2.3 of the agreement was cancelled and the parties put their initials next to the said cancellation. Paragraph 2 of the said agreement states that:
- '2.1 The respondent agrees to re-employ the applicant with effect from 17 February 2016.
- 2.2 The applicant must report for duty on 17 February 2016 at 08h00 at 13 East Bourne Road, Central.'
- [4] The applicant alleged that the respondent failed to comply with paragraphs 2.1 and 2.2 of the settlement agreement by failing to re-employ him as of the 17th February 2016. He submitted that on the 17th of February 2016, he reported for duty at the offices of the respondent. However, he was allegedly informed that there was no site available for him to be placed accordingly. He further submitted that the respondent informed him that they would notify him as and when the site becomes available. On the 1st of April 2106, the applicant allegedly contacted the respondent through an sms to enquire whether the site was available for him to be re-employed. He allegedly received no response and that led to this application. In its answering affidavit, the respondent denied these allegations.
- [5] Instead, the respondent submitted that it complied with the settlement agreement when it re-employed the applicant on or about the 28th of August

2016 at its client, Grindrod. The applicant allegedly worked for one day and thereafter he absconded. The respondent further submitted that prior to the 28th of August 2016, it made reasonable attempts to comply with the settlement agreement in that it had secured alternative employment for the applicant but when contacted the applicant simply advised the respondent that he was not available for the positions offered.

[6] The applicant, on the one hand, argued that there was a substantial dispute of facts that emerged from the affidavits filed in this matter and sought an order to refer this matter for hearing of oral evidence. However, the applicant did not specify the facts that were in dispute. It is my view that the applicant has failed to make out a case for this Court to invoke the provisions of Rule 7(7)(b) of the Rules of this Court.² On the other hand, the respondent's case was that it complied with the settlement agreement when it re-employed the applicant and submitted proof of payment of his salary for the day he worked. The respondent asked for the dismissal of this application with costs.

[7] In the case of *South African Post office Ltd v CWU obo Permanent Part-Time Employees*,³ the Labour Appeal Court held that before the Labour Court will grant an order sought in terms of Section 158(1)(c) of the LRA, it must be satisfied, at the very least, that:

- i. the agreement, is one which meets the criteria set in s 158 (1)(c) read with section 158(1A) of the LRA, and if it is an award, that it satisfies the criteria set in section 142A of the LRA;
- ii. that the agreement or award is sufficiently clear to have enabled the defaulting party to know exactly what it is required to do in order to comply with the agreement or award; and,
- iii. there has not been compliance by the defaulting party with the terms of the agreement or the award.

² Rule 7(7) provides that "the court must deal with an application in any manner it deems fit, which may include-

(a) an order to hold a pre-trial conference;
 (b) referring a dispute for the hearing of oral evidence; and
 (c) an order as to costs."

³ [2013] 12 BLLR 1203 (LAC).

[22] Once the Labour Court is satisfied with all of the above then it must, nevertheless, exercise its discretion whether to grant or refuse the order. In exercising the discretion, the Court must take relevant facts and circumstances into account, such as are necessary to satisfy the demands of the law and fairness. Necessarily, each case must be decided on its own facts and circumstances. There is, otherwise, no closed list of factors to be taken into account. A relevant factor is the time it took the party seeking the relief to launch the application to make the settlement or award an order of court. The Labour Court may, for example, be more reluctant to make an award for reinstatement of employees an order of court where the employees unreasonably delayed in seeking the enforcement of the award, yet a delay in years in seeking to make an award for payment a sum of money may not be grounds for refusing to make the award an order of Court. Finally and most crucially it must be remembered that the purpose of making an agreement or award an order of the Labour Court is to compel its enforcement, or enable its execution and not for some other purpose.⁴ [Footnotes omitted]

- [8] In this case, it is not in dispute that the settlement agreement is one which meets the criteria set out in section 158(1)(c) read with section 158(1A) of the LRA and that the agreement is sufficiently clear to have enabled the defaulting party to know exactly what it is required to do in order to comply with the agreement.
- [9] The question is whether there has been compliance by the respondent with the terms of the settlement agreement. In other words, whether the respondent re-employed the applicant. Fundamental to the determination of whether the applicant was re-employed is the question of the existence of an employment relationship between the applicant and the respondent pursuant to the settlement agreement. The applicant's advocate conceded in the hearing that the respondent placed the applicant at its client, Grindrod, where he worked for one day. He also conceded that the applicant was paid for the day he worked for. What he took issue with was the fact that the compliance took place after this application was filed and that the applicant absconded after working for one day.

⁴ At paras 21-22.

[10] My view is that the employment relationship came into existence as a result of the applicant's tender of services to the respondent's client on the 28th of August 2016 after being assigned work. The respondent's submission that, prior to the 28th of August 2016, the applicant failed to make himself available when offered re-employment remains undisputed, as the applicant did not reply to the respondent's answering affidavit.

[11] Therefore, I find that the applicant failed to prove non-compliance on the part of the respondent. In view of the Labour Appeal Court judgment in the case of *South African Post office Ltd*,⁵ the applicant's application to make the settlement agreement an order of the court, cannot succeed. With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

Order

[12] In the premises, I make the following order:

- (i) The application for an order to make a settlement agreement issued by the CCMA under case number ECPE 587-15 an order of the court is dismissed.
- (ii) There is no order as to costs.

Mahosi AJ

Acting Judge of the Labour Court

⁵ [2013] 12 BLLR 1203 (LAC).

APPEARANCES:

FOR THE APPLICANTS:

Adv. D Bands,

Instructed by Jacques Du Preez Attorneys.

FOR THE THIRD RESPONDENT:

Adv. M. Grobler,

Instructed by Kirschmanns Incorporated.

LABOUR

COURT