



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

JUDGMENT

**Not Reportable
Case No: J 1332/07**

In the matter between:

MESSINA ASSOCIATED CARRIERS CC

Applicant

And

HENRY H MASHABA

Respondent

Heard: 07 June 2017

Delivered: 07 June 2017

Edited: 11 September 2018

EX TEMPORE JUDGMENT

SALOOJEE, AJ

- [1] This is an application for declaratory relief that the second respondent is not entitled to any further relief or payment arising from an award to reinstate due to this, to reinstate the second respondent with full back pay. The background is as follows.

- [2] On 2 November 2000 an award was issued to reinstate the second respondent with full back pay. On 28 September 2004 an application was filed to make the award an order of court. On 9 September 2005 the award was made an order of court.
- [3] During June 2006 the second respondent returned to employment with the applicant. During November 2006 the applicant's attorneys addressed a letter to the second respondent's attorneys. This letter which is found at page 31 of the bundle, sets out a calculation for back pay of 11 months for periods of unemployment between 3 April 2000 to 2006 plus interest. This was as the second respondent was allegedly employed for some time over that period.
- [4] Attached to the letter was a cheque in favour of the second respondent's attorneys in the amount of R53,135.86. The letter also concludes with a sentence which states,

"We trust this settles the matter."

Subsequently the cheque was honoured and at the end of January 2007 the applicant received a demand for the outstanding amount of R172,349.03.

- [5] The issue in this application is whether there was a waiver of a court order in the honouring of the cheque for R53,000 odd. In the case of *Seagull v Seagull* 1992(3) SA 136C the court stated that the debtor can have no greater right to accept or reject the waiver where the creditor has already obtained judgment but waives the right to enforce it.
- [6] In *Ex parte Sussence* 1941 TPD 15 the court stated that the necessity for full knowledge of the law in the case of waiver follows from the principle that waiver is a form of contract in which one party is taken deliberately to surrender his rights therefore, there, to have surrendered its rights

there must therefore be prove of an intention so to surrender which can only exist where there is knowledge both of the facts and the legal consequences thereof.

[7] In this case the honouring of the cheque is important. Or if we even go a little, the honouring of the cheque is important, sorry. The cheque was deposited and honoured. There is no explanation as to why the second respondent's attorneys deposited the cheque or why there was no objection to the amount of the cheque and what would happen to the balance of the amount only until about two and a half months later after the cheque was made out.

[8] In Christie the Law of Contract at page 460 it is stated,

“Once it is decided that the sending of the cheque is an offer of compromise or a tender and not payment of the creditor's acceptance of the cheque normally commits him to acceptance of the compromise or tender so that he cannot sue for the balance.”

[9] And this statement is made on the basis of the case of *SA Scottish Finance Corporation Ltd v Smit*, 1966(3) SA 629P at page 635. The statement is conclusive of this case where the surrounding circumstances dictate what the intention of the second respondent was, that is to accept the cheque and also to accept the amount as settling the matter.

[10] It is also clear from the authorities that the second respondent is able to waive his right in terms of the court order and by accepting the cheque did so.

ORDER

[11] As a result I make the following order:

1. In terms of prayers 1, 2 and 3 of the notice of motion each party to pay their own costs.

YF Saloojee

Acting Judge of the Labour Court of South Africa