



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1236/16

In the matter between

DAVID MARK MCCARTHY

Applicant

and

MICHELANGELO HOTEL (ROBERTO ROSA)

Respondent

Heard: 8 June 2017

Order: 8 June 2017

Reasons: 8 August 2017

REASONS FOR ORDER

TLHOTLHALEMAJE, J:

Introduction:

[1] The applicant approached this Court in terms of section 158(1)(c)¹ of the Labour Relations Act² for an order making the settlement agreement entered

¹ Section 158. Powers of the Labour Court

(1) The Labour Court may-

(a) ...

(b) ...

(c) Make any arbitration award or any settlement agreement an order of Court.

² Act 66 of 1995

into between the parties under case number GAJB 10149-16, under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) an order of this Court.

- [2] The matter came before me on the pre-enrolment hearing roll on 8 June 2017. Upon having had regard to the substance of the matter, the oral submissions by the parties, I had issued an order in the following terms:

(1) *The application is dismissed;*

(2) *There is no order as to costs.*

- [3] The applicant appeared before me in person when his application was dismissed. He has since requested the reasons for my order. What follows hereunder is a brief background to the application and the reasoning behind the order;

Background:

- [4] The applicant was before his dismissal, employed by the respondent as a Maintenance Supervisor. During April 2016, he was charged and found guilty of four (4) counts of misconduct.³ The charges were framed as follows:

“ ...

- (1) Failure to produce a valid sick note from a doctor for dates 30/03/2016 up to 31/03/2016 when you claimed to be sick and were not on duty as per duty roster.
- (2) Unauthorised absence from work on the 01/04/2016.
- (3) Bringing the Company's name into disrepute in that you wearing company uniform and name badge at an adult Entertaining Centre on the evening of the 29/03/2016 and early morning of the 30/03/2016.
- (4) Dishonesty in that you misrepresented your wellbeing to go off duty at 15h00 on 04/04 for not feeling well, but later in the evening you were at the Marco Polo.”

³ Page 3, para 6.2 of the answering affidavit

- [5] Upon being found guilty of the aforesaid charges in an internal disciplinary enquiry, the applicant was then dismissed. He subsequently referred an unfair dismissal dispute to the CCMA. The matter was successfully conciliated on 2 June 2016 by Commissioner D.H Smith, resulting in the parties concluding a settlement agreement in terms of which an amount of R11 000 (Eleven Thousand Rand Only) was to be paid to the applicant. It was further agreed that in order to assist him with prospects of future employment, all future references and requests were to be directed to the General Manager, who would in turn give a neutral reference, which would also indicate that the parties had separated by mutual consent.
- [6] On 8 June 2016, the respondent paid an amount of R9 030 (Nine Thousand and Thirty Rand Only) in satisfaction of the monetary component of the settlement agreement. The total amount paid is in exclusion of the statutory tax deductions.

The Section 158(1)(c) application:

- [7] On 16 February 2017, the applicant approached the Court with his application to make the settlement agreement an order of court. He did so by using the *pro forma* notice of motion as obtained from the office of the Registrar. In his application, and to the extent that it is relevant, he merely contended that the respondent had failed or refused to comply with the settlement agreement. Not much particularity was given in this regard.
- [8] The respondent had filed a statement of response, and submitted that it had fully complied with the terms of the settlement agreement. At the proceedings, Counsel for the respondent, Ms Collet had further submitted what she termed an 'explanatory affidavit' in response to the application, wherein it was reiterated and averred that the respondent had fully complied with the settlement agreement on 8 June 2016, after having obtained a tax directive on the settlement amount from SARS. It was pointed out in the affidavit that the applicant had not in his application, set out any instances in which the respondent had not complied with the settlement agreement. Ms Collet further submitted that although the respondent was not averse to the settlement

agreement being made an order of court, no purpose would be served with such an order in the light of the respondent having fully complied with the terms of the settlement agreement.

- [9] The applicant upon being questioned by this Court as to whether the settlement amount was paid had indicated that he was unsure, and that however, the issue remained that of the references as stipulated in the agreement. His contention was that the respondent had not fulfilled its obligations in respect of providing neutral references, and had instead, provided negative references.
- [10] It is trite that courts should not adjudicate or determine matters which will only have an academic effect.⁴ Our courts should only determine matter, which have a live factual or legal dispute unless there are exceptional circumstances that dictates otherwise.⁵ The reasoning is that a court does not need to make an order that will be incapable of execution by virtue of the matter having become academic.⁶ This Court is further enjoined with wide powers in terms of section 158(1) (c) of the LRA to make arbitration awards and/ or settlement agreements orders of the Labour Court. However, for a party to succeed in an order sought in terms of section 158(1)(c), such party must demonstrate that the respondent has failed or refused to comply with the terms of the settlement agreement or arbitration award⁷.

⁴ Legal Aid South Africa V Magidiwana And Others 2015 (2) SA 568 (SCA) at para 2

⁵ *City of Cape Town v SA Municipal Workers Union on behalf of Abrahams & others supra* at para 11 in was held:

"The principle implicit in this provisions has been applied by our courts for some time to the effect that courts are there to resolve real and existing disputes and not to deal with issues that are academic or to provide advice on abstract questions. In *Geldenhuys and Neethling v Beuthin* the principle was articulated in the following terms: 'After all, courts of law exist for settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advise upon differing contestations, however important.' In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Constitutional Court explained that: "a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which exist if the Court is to avoid giving advisory opinion on abstract propositions of law. [Footnotes omitted]"

⁶ *Potgietersrust Platinum Limited & another v Godfrey Ditsela & 2 Others* Case No. JA66/12 at para 9

⁷ See *South African Post office Ltd v CWU obo Permanent Part-Time Employees* [2013] ZALAC 20; (2014) 35 ILJ 455 (LAC); [2013] 12 BLLR 1203 (LAC) at para 21, where it was held that;

"Section 158(1)(c) of the LRA provides that the Labour Court has the jurisdiction to make any settlement agreement, concluded in respect of a matter arising within the scope of the LRA, an order of court. This does not mean that the order is there for the taking. The Labour

- [11] In view of the submissions made on behalf of the respondent as further supported by the responses to the applicant's application, I was satisfied that the settlement amount had been paid. Crucially, the applicant failed to demonstrate that the respondent had not complied with the terms of the settlement agreement. To the extent that there might be merit in the allegation that the applicant had received a negative reference, I had further directed the him to approach Ms Collet privately with a view of sorting out this outstanding issue.
- [12] In the light of the above, I did not see any need whether based on law or fact, it was necessary that the settlement be made an order of court, as it had been complied with. In my view the granting of the application would have no practical effect and therefore would only be academic⁸. It was in the light of these considerations that the application was dismissed.

E Tlhotlhemaje

Judge of the Labour Court of South Africa

Court has a discretion to make it an order of court even if it otherwise meets the criteria provided in section 158(1A), read with section 158(1) (c) of the LRA...

⁸ See section 16(2)(a) of the Superior Courts Act 10 of 2013

Appearances:

For the Applicant:

In person

For the Respondent:

Adv. S Collet

Instructed by:

Shapiro-Aarons Inc.

LABOUR COURT