

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JS711/13

In the matter between:

MIDWAY TWO CONTRACTORS (PTY) LTD

First Applicant

DANNY NAICKER

Second Applicant

and

SOUTH AFRICAN TRANSPORT AND ALLIED

WORKERS UNION

First Respondent

A NTIMANE & 8 OTHERS

Further Respondents

Application heard: 28 March 2018

Judgment delivered: 21 May 2018

Edited: 22 May 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application in which an order is sought that the respondents are estopped from disputing the validity of a settlement agreement concluded on 3 March 2016 and to have the settlement agreement made an order of court in terms of s 158(1) (c) of the Labour Relations Act (LRA).
- [2] The matter has a long and chequered history. It has its origins in an unfair dismissal dispute in which the second and further respondents (the employees) disputed the fairness of their dismissal by the first applicant. The first respondent, the union, referred the dispute to this court for adjudication.
- [3] On 8 August 2014, Mohlahlehi J issued an order by default, in chambers, granted the following order:
1. The dismissal of the applicant, by the respondent was automatically unfair.
 2. The respondent is ordered to compensate the individual applicants in the amount equivalent to 24 (twenty four months) calculated at the rate of their remuneration as at their dismissal.

3. The respondent is ordered to reinstate the applicant retrospectively to the date of his dismissal without loss of any benefit that may have accrued (sic).
4. There is no order as to costs.

- [4] The union then instituted proceedings to enforce the order. These culminated in an order granted on 9 September 2015 in which the applicants were ordered to appear 29 January 2016 and to explain their conduct by affidavit on or before that date. On 29 January 2016, after refusing an application for postponement, Coetzee AJ declared that the applicants were in contempt of court by failing to reinstate the employees as required in terms of the order granted on 8 August 2014, and to comply with the order granted on 9 September 2015. Coetzee AJ directed the registrar to issue a warrant of committal to detain the second respondent, Mr Naicker. Present in court on 29 January 2016 was Mr Vusimuzi Shongwe, the union's national legal officer.
- [5] On 11 February 2016, the applicants' then attorney of record wrote to the union, for the attention of Shongwe. The letter confirmed the appointment of the attorney and a mandate to negotiate a settlement agreement. A meeting was proposed. That proposal was ultimately accepted by Shongwe and a meeting was duly arranged for 22 February 2016.
- [6] Shongwe was present at the meeting, as was Naicker and his attorney. Shongwe was advised that the applicants were prepared to settle the matter by making a payment of R100 000 to the union and the employees, in full and final settlement. Shongwe undertook to take instructions. Further correspondence ensued between the attorney and Shongwe, confirming the offer and the undertaking to revert after consultation with the employees.

- [7] On 1 March 2016, Shongwe sent a letter to the applicants' attorney stating that the employees were willing to accept the amount that had been offered in settlement of the dispute. The letter records that the employees had agreed *'to have their payment transferred to their legal representative's account for the purpose of a speedy recovery of such funds'*. The letter records further that the employees *'are currently having difficulties with their banks since they are not permanently employed'* and that *'previous experience relating to procedure attached to having member's funds released from SATAWU's account have made this arrangement too costly to them'*. Shongwe proposed that a settlement agreement be prepared and forwarded to him for signature on behalf of the employees.
- [8] Shongwe provided the banking account details into which the payment was to be made. It is common cause that the account was Shongwe's personal bank account.
- [9] On 2 March 2016, the applicants' attorneys sent an email to Shongwe, advising him that the settlement had been accepted, and attaching a settlement agreement. The agreement made provision for the payment of R100 000 to the union and the employees, in full and final settlement of all rights and claims, including costs. The amount was to be paid by way of an electronic transfer of funds into a bank account, which as I have indicated, was Shongwe's personal bank account.
- [10] The agreement was duly signed, and the money transferred to the designated bank account.

- [11] Consequent on the signature of the settlement agreement and payment of the agreed amount, the applicants did not attend at court on 4 March 2016. They assumed that Shongwe would do so, to have the settlement agreement made an order of court and the writ of committal cancelled.
- [12] On 29 March 2016, Shongwe sent the applicants' attorney an email enclosing a copy of what purported to be an order by Cele J granted on 4 March 2016. In terms of the order, it was recorded that the parties had reached a full and final settlement, that the writ of committal was uplifted, and that all current and future proceedings against the applicants were withdrawn, and the settlement agreement made an order of court.
- [13] Some four and a half months later, on 11 August 2016, a union official, Mr Zwelibanzi Maphanga, wrote to the applicants' attorney stating that the settlement agreement had been concluded by Shongwe without a mandate from the employees, or authorization by the union. The letter recorded further that Shongwe had appropriated the money for his personal use, and that the union had opened a case of fraud at the Hillbrow SAPS under case number CAS 668/7/2016. The letter concluded with what amounts to an expression of cautious optimism – *'we look forward to hearing from you soon'*.
- [14] The applicants' attorneys replied on 12 August 2016, expressing sympathy at the consequences for the employees of Shongwe's conduct but at the same time denying any liability by the applicants to the union or the employees, on the basis that Shongwe had represented himself to be a union official, that the applicant had acted on that representation to its prejudice and that the union and its members were accordingly bound by the agreement.

- [15] On 13 March 2017, Cele J issued a directive requesting the parties to attend a meeting in his chambers. At the meeting, Cele J advised the parties representatives that he had not issued the order dated 4 March 2016, that the writ of committal remained valid and that the parties were to appear on 5 May 2017, when Naicker was to answer to the writ of committal. On 5 May 2017, Cele J postponed the matter *sine die* to enable the applicants to file an answering affidavit.
- [16] On 27 October 2017, Lagrange J issued an order requiring the applicants to appear on 8 December 2017 to show cause why they should not be held in contempt on account of their failure to comply with the order granted by Cele J on 17 July 2017 and their non-compliance with the order granted by Mohlahlehi J on 8 August 2014.
- [17] On 8 December 2017, Lagrange J postponed the application to 16 March 2018 and directed, *inter alia*, that if the applicants wished to set aside the settlement agreement, they should file an application to this effect by 30 January 2018. On December 2017, the applicant filed the present application, in which it seeks to have the settlement agreement made an order of court and the warrant of committal set aside. The employees have filed a counter-application, in which they seek to have the settlement agreement set aside. They submit that the settlement agreement is fraudulent and unlawful that they were not aware of it and that they would never have authorized Shongwe to enter into the agreement given the default judgment granted in their favour.
- [18] Section 158 (1) (c) confers the power on this court to make settlement agreements orders of court. The power to make a settlement agreement an order of court is a discretionary power that must be exercised judicially, having regard

to all of the relevant factors (see *AB Civils (Pty) Ltd t/a Planthire v Barnard* [1999] 12 BLLR 1233 (LAC)).

- [19] The applicants submit that the agreement is valid and remains so, on the basis of ostensible authority. In particular, they submit that the conduct of Shongwe should not be viewed in isolation. He was employed by the union and held out that he had authority to act on behalf of the employees, since the union was a party to the proceedings. He corresponded with the applicants using the union's stationary and he unconditionally represented that the employees had accepted the proposed settlement, this after he had consulted with them. On this basis, the applicants contend that the union and the employees are estopped from disputing the validity of the settlement agreement and that if there is any liability that flows from the agreement, the union, as Shongwe's employer, remains responsible to the employees on the basis of its vicarious liability. The basis on which the order making the settlement agreement an order of court is sought is apparent from the founding affidavit. The applicants submit that such an order would protect them from suffering and injustice, and that it is not in the public interest or in the interests of justice and fairness and that they, as innocent parties, be punished for Shongwe's conduct.
- [20] The misconception that underlies the applicant's submissions is that it does not automatically follow that simply because a settlement agreement is valid in contractual terms, the court is obliged to make the agreement an order of court. As the authorities indicate, the discretion of the court is broad. Even if I were to accept for present purposes that the agreement is valid, in my view, given the circumstances in which it was concluded, it is not in the interests of justice for the court to grant an order which would have the effect of elevating an agreement concluded in circumstances tainted by deceit to the status of an order of court. The settlement agreement is and remains tainted by Shongwe's fraud and his betrayal of the employees whose interests he was employed to advance.

[21] Further, it is clear to me that the only apparent purpose of the s 158(1) (c) application is to head off the application by the respondents to hold the applicants in contempt of the order granted on 8 August 2014. This much is apparent from paragraph 23 of the heads of argument in which the applicants submit that should the settlement agreement be made an order of court, then the issues pertaining to contempt would be extinguished.

[22] After I had reserved judgment, I requested the parties to file submissions on whether the order granted on 8 August 2014, given the judgment by the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* [2008] 12 BLLR 1129 (CC), especially at paragraph 42 where the court stated the following:

It follows that the sum of money paid to an unfairly dismissed employee subsequent to an order of reinstatement with retrospective effect is not compensation as contemplated in section 193(1) (c) or section 194. The remedies in section 193 (1) (a) are thus in the alternative and mutually exclusive.

I made this request because it appeared to me that on the face of it, the judgment granted on 8 August 2014 had been erroneously granted, in that it afforded a remedy of both reinstatement with retrospective effect and compensation. In terms of s 165 of the LRA, the court is entitled, *mero motu*, to rescind any judgment or order erroneously granted in the absence of a party, or in which there is an obvious error.

[23] The applicant submits that the order granting both reinstatement and compensation is bad in law, is inconsistent with the Constitution and thus invalid. However, they submit that the settlement agreement was a *novus actus* which supersedes the order, and persist with the application to have the settlement agreement made an order of court.

- [24] The respondents submit that the court was empowered to grant the order it did on 8 August 2014 and pursue their contention that the applicants are in contempt of that order.
- [25] The interpretation of s 193(1) by the Constitutional Court is clear. Reinstatement may be granted with back pay to a date not earlier than the date of dismissal, or the employee may be re-employed or granted compensation. These are mutually exclusive remedies. The terms of the order envisage reinstatement with full retrospective effect, to the date of dismissal, plus the maximum compensation that may be awarded (24 months' remuneration). To this extent, the order is *ultra vires* s 193 (1) and for the purposes of s 165, it was thus granted erroneously or in error. The order therefore stands to be rescinded.
- [26] I fully appreciate that in these circumstances, the application to hold the applicants in contempt for their refusal or failure to comply with the order is rendered academic. In regard to the merits of that application, I would observe that in any event, given the test to be applied, it could not be said that the respondents in that application (the applicants in the present application), beyond reasonable doubt, acted in willful default and were *mala fide* by not complying with the order concerned (see *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)). It is clear from the papers that the applicants were of the entirely reasonable view that the matter had been settled on the terms reflected in the settlement agreement after negotiation with a person employed as a union official and who held out that he had authority to conclude the agreement. It may be that the applicants' attorney was naive to accept Shongwe's explanation about why the employees preferred to have the money transferred to a bank account other than that of the union, but naivety does not amount to *mala fides* or wilful default. In short, there is no merit in the contempt application. It follows that there is no basis on which to set the settlement agreement aside as the employees seek to do. The employees have a remedy against the union and Shongwe.

[27] It remains for me to comment on the conduct of Shongwe, which for obvious reasons is of considerable concern to this court. The terms of the agreement that he concluded and his appropriation of the settlement amount is nothing less than a fraud perpetrated on the union and the individual respondents. Indeed, given that Shongwe was employed specifically to advance the rights and interests of the individual respondents, his conduct amounts to a betrayal of trust of reprehensible proportions. Further, there is the matter of the order of this court that was forged by Shongwe. The forgery of court orders is a serious offence and remains a perennial problem in this court and others. I intend therefore to direct the registrar to forward a copy of this judgment to the SAPS Hillbrow with a request to report on progress in the investigation.

I make the following order:

1. The order granted by this court on 8 August 2014 is rescinded.
2. The application in terms of s 158(1) (c) to have the settlement agreement dated 3 March 2016 made an order of court is dismissed.
3. The application to hold the applicants in contempt of court is dismissed, and any warrants of committal issued against the second applicant are set aside.
4. The application to set aside the settlement agreement is dismissed.
5. The registrar is directed to forward a copy of this judgment to the station commander SAPS Hillbrow, with a request to report on progress made in the investigation of the case reported under CAS 668/7/2016.
6. There is no order as to costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr AK Khan, Azgar Ally Khan & Associates

For the first respondent: Mafenya Attorneys

For the second to further respondents: J Malesoena instructed by T Nkuna Attorneys