



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA33/24

In the matter between:

**HEAD OF DEPARTMENT: DEPARTMENT OF
HEALTH, FREE STATE**

Appellant

and

CHANTELLE VAN DER BIJL & 12 OTHERS

First to Thirteenth Respondents

PUBLIC HEALTH AND SOCIAL

Fourteenth Respondent

**DEVELOPMENT SECTORAL BARGAINING COUNCIL
COMMISSIONER THANDO NDLEBE**

Fifteenth Respondent

SOUTH AFRICAN MEDICAL ASSOCIATION

Sixteenth Respondent

**HEAD OF LEGAL: DEPARTMENT OF
HEALTH, FREESTATE**

Seventeenth Respondent

Heard: 4 September 2025

Delivered: 20 October 2025

Coram: Basson AJA, Tokota et Chetty AJJA

JUDGMENT

BASSON, AJA

Introduction

- [1] The respondents approached the Labour Court in terms of section 158(1)(c) of the Labour Relations Act¹ (LRA) to have a settlement agreement, concluded under the auspices of the Bargaining Council, made an order of court. The Labour Court granted the application in terms of s 158(1)(c) and, purporting to give effect to the settlement agreement, further ordered the appellant to pay the respondents R3 150 918.56 together with interest.
- [2] The central issue in this appeal is whether the Labour Court misdirected itself in ordering the appellant to pay this amount, given that the settlement made no provision for the respondents' actuaries to calculate it, and where a substantial portion of the claimed amount arose *after* the settlement agreement had been concluded.

Relevant facts

Resolution 3 of 2009

- [3] The first to 13th respondents (the respondents) are all registered doctors employed by the appellant – the Department of Public Health, Free State (the Department). They are represented by the sixteenth respondent – the South African Medical Association (SAMA).
- [4] The conflict between the respondents and the Department arose from a collective agreement concluded on 7 August 2009 between the Department and SAMA. Resolution 3 of 2009 (the resolution) introduced an occupational-specific approach to remuneration and a structured career progression process for various categories of medical practitioners, which include the individual respondents. The resolution establishes a performance-based pay progression mechanism for medical practitioners, whereby a medical practitioner can move from one salary notch to the next higher salary notch within their specific salary grade scales. The resolution provides for a biennial pay progression scheme, equating to a 3% increase in the basic salary, as outlined in the salary scales and career progression dispensation. The

¹ Act 66 of 1995, as amended.

resolution permits, in the alternative, for an annual pay progression of 1.5% of the basic salary where the relevant scale supports such progression. Eligibility for pay progression depends on the specific medical doctor maintaining satisfactory performance levels as determined by the department's performance management system. Once the criteria are met, the pay progression becomes effective as of 1 July of the year in which the requirements were fulfilled. Any disputes pertaining to the interpretation or implementation of the resolution are to be addressed through the dispute resolution procedures established by the Bargaining Council.

[5] It is not in dispute that the Department breached this agreement. In January 2019, the respondents referred a dispute to the Bargaining Council. The dispute concerned the interpretation of the collective agreement in terms of section 24(2) and 24(5) of the LRA. The respondents claimed that the Department failed to apply the pay progression to their salaries to the next salary notch when they qualified for such progression.

[6] The dispute was set down for arbitration on 31 January 2019. On that day, SAMA and the Department concluded a settlement agreement in terms of which the Department agreed to 'confirm' the individual employees' eligibility and quantification relating to pay progression by 2 March 2019. It was further agreed that the Department would approve the payment thereof and make payment by 1 April 2019. The settlement agreement reads as follows:

...

6.1 The Respondent [Department] shall confirm the eligibility and quantification (that is, amounts due) to each of the Applicants [Respondents] insofar as the Pay Progression due to them by the 2 March 2019. The Respondent will provide this information in writing to Dr. Hagemeister by 2 March 2019.

6.2 The [Department] will approve the payment of the Pay Progression due to the [Respondents] and pay same no later than 1 April 2019.

6.3 In the event the [Department] does not honour the above terms at paragraphs 6.1 and 6.2 the [Respondents] will have a right to enforce this agreement within 14 days.

6.4 No variation of the Resolution would be binding unless it was reduced to writing and signed by the parties thereto.

7. No variation of this agreement will be legally binding unless reduced to writing and signed by the parties.

8. The parties consent to this agreement being made an arbitration award in terms of s 142A(1) of the Labour Relations Act.

9. The parties agree that in the event of non-compliance of this agreement, the party defaulting will pay the full costs incurred by the other party in enforcing the agreement.'

[7] When the Department neither confirmed the respondents' eligibility and quantification relating to pay progression by 2 March 2019, nor approved the payment thereof by 1 April 2019, the respondents brought an application to the Bargaining Council in terms of section 142A of the LRA for the settlement agreement to be made an arbitration award.

[8] On 22 July 2019, the Bargaining Council, acting in terms of section 142A of the LRA, dismissed the application. The Commissioner refused to make the settlement agreement an arbitration award on the basis that it was not enforceable, as the amounts allegedly due to the respondents in respect of pay progression had not been quantified. The Commissioner advised that the settlement agreement be varied to incorporate a quantified pay progression amount before it could be made an arbitration award. The respondents did not challenge this ruling on review.

[9] The respondents again approached the Bargaining Council for a variation of the settlement agreement in terms of section 144 of the LRA. The variation application was dismissed on the basis that section 144 only applied to the variation of arbitration awards and rulings and not settlement agreements. The respondents likewise did not challenge this ruling.

- [10] In the interim, the respondents appointed their own actuaries to calculate any outstanding monies owed to them by the Department due to their non-progression to the next salary scale (the *retrospective* amount). On 19 May 2020, the respondents delivered a letter of demand to the Department, demanding payment of R1 217 254.00, an amount calculated by their actuary as outstanding at the time. They demanded payment of this amount by no later than 30 June 2020, failing which they would approach the Labour Court. The Department was also informed that the respondents would seek interest and a costs order. The reports were furnished to the Department. The Department, however, neither engaged with the respondents nor objected to the actuaries' quantification.
- [11] After the settlement agreement was concluded, the respondent's actuaries prepared a further calculation (the second actuarial report) on the basis that they now had a *new claim* against the Department because, since the delivery of the letter of demand dated 19 May 2020, they had been entitled to a *further pay progression*. In September 2020, the actuaries, on behalf of the respondents, calculated that they were now entitled to a further amount of R2 452 900.00 (*prospective* amount), bringing the total amount (which included both the retrospective and prospective amount) due to the respondents to R3 670 154.00.
- [12] Between October 2020 and March 2021, the Department conducted an internal enquiry and found that the respondents were eligible for the pay progression on an annual basis at the annual rate of 1.5%. The Department confirmed that the total amount that was due amounted to R 1 101 044.03. The Department then proceeded to pay the respondents in accordance with Resolution 3. Except for two of the respondents, all the respondents had been paid in full. The two respondents were subsequently paid in full. At the time of the order by the Court *a quo*, all the respondents had been paid in accordance with the Department's calculation.

Referral to the Labour Court

Order sought in the Notice of Motion

[13] On 14 October 2020, the respondents referred the dispute to the Labour Court. In paragraph 1 of the Notice of Motion, the respondents sought an order declaring that the settlement agreement dated 21 January 2019 be made an order of court in terms of section 158(1)(c) of the LRA. In paragraph 2 of the Notice of Motion, the respondents sought an order declaring that an amount of R 3 670 154.00 plus interest at a rate of 7.25% per annum, calculated from 31 January 2019, was payable to the respondents '*under the Settlement Agreement*'.

[14] Although the respondents concede in their papers that the prospective amount is not contemplated under the settlement agreement, they nonetheless insist that they '*seek payment of such amount in a separate prayer in the Notice of Motion*'. The respondents' contention is, however, clearly at odds with what is sought in terms of paragraph 2 of the Notice of Motion. In that paragraph, an order is sought declaring that the amount payable to the respondents '*under the settlement agreement*' is quantified in the sum of R3,670,154.00, being the sum of the retrospective and prospective amounts. Any doubt as to the genesis of the respondents' claim for payment is dispelled in the replying affidavit, where the respondents again assert that '*the amount due, owing and payable under the Settlement Agreement is R3,670,154.00 (less such payments as have, since the filing of the application, been made to the individual applicants, plus costs and interest)*'.

[15] Both the actuarial reports and the Department's own calculations served before the Labour Court. In their replying affidavit, the respondents do not dispute that these payments were made to them. They, however, persist in contending that, because the Department did not dispute their calculations at the time when the letter of demand was sent to it, their actuarial reports stood uncontested. On that basis, they assert an entitlement to the full amount of R3 670 154.00, less the payments already made. I will return to this submission.

Labour Court

- [16] The Labour Court made the settlement agreement an order of court in terms of s 158(1)(c) of the LRA and quantified the amount payable to the respondents *under the settlement agreement* at R3 150 918.66. The Labour Court rejected the Department's calculation as a mere estimate but accepted the calculations set out in the respondents' actuarial reports. The Labour Court reasoned that, because the respondents had provided these reports to the Department for consideration prior to this application, and because they were not disputed at the time, the actuarial quantification remained unopposed and should be treated as such. The Labour Court further held that no *bona fide* dispute arose from the two opposing calculations and that, due to the failure of the Department to meet its obligations, the respondents were entitled to assume the Department's role and take it upon themselves to quantify the amount due to them by employing actuaries. The Department was also ordered to pay the costs of the application.
- [17] No appeal lies against the order of the Labour Court making the settlement agreement an order of court in terms of section 158(1)(c) of the LRA. The parties accept that this part of the order was made correctly. The Department, however, takes issue with the fact that the Labour Court, in an application under section 158(1)(c), granted substantive relief to the respondents that was not provided for in the settlement agreement and in circumstances where a substantial portion of the relief granted related to amounts that arose only *after* the conclusion of the settlement agreement.

Section 158(1)(c)

- [18] It is well established that making a settlement agreement an order of court serves to protect the rights of the parties in that it enables a party to enforce the agreement through the court's execution processes or to institute contempt proceedings in the event of non-compliance. Once made an order of court, the settlement order, in the words of the Constitutional Court in *Eke v*

Parsons,² has the same status and force as any other court order and ‘will be interpreted like all court orders’:

‘The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.’³

Further, regarding the effect of a settlement order, the Court held:

[31] The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes *res judicata* (literally, ‘a matter judged’). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a *mandamus*.’

[19] Section 158(1)(c) of the LRA gives effect to this principle by empowering the Labour Court to make a settlement agreement or arbitration award an order of court. Making a settlement agreement an order of the court, therefore, enables a party to compel its enforcement or to enable its execution.⁴ This section does not, however, permit the court to grant substantive relief beyond what the parties had agreed upon. As pointed out by the Labour Court in *Kolobe v Proxenos (Sophia Restaurant)*,⁵ ‘[s]ection 158(1)(c) is intended to achieve little more than to bring to bear the power of enforcement vested in this Court, as a superior court, which the CCMA does not itself enjoy in relation to the awards made under its auspices’. Section 158(1)(c), therefore,

² 2016 (3) SA 37 (CC) at paras [29] – [30].

³ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) at para [13].

⁴ *SA Post Office Ltd v Communication Workers Union obo Permanent Part-Time Employees* (2014) 35 ILJ 455 (LAC) at para [21].

⁵ [2000] 11 BLLR 1291 (LC) at para [21].

only permits the Labour Court to make a settlement agreement an order of court in order to set in motion the Labour Court's enforcement procedures: It is not a vehicle to vary the terms of the settlement agreement, create a new monetary obligation, or introduce a fresh cause of action.

- [20] In the present matter, the respondents approached the Labour Court to claim a quantification of an amount due that was never agreed upon in the settlement agreement. The original claim referred to the Bargaining Council was settled or compromised to provide only for a procedure whereby the *Department* would *confirm* the respondents' eligibility for pay progression and quantify the amounts due to them by a specific date. The respondents cannot now pursue the original claim that was before the Bargaining Council. The Constitutional Court in *Mafisa v Road Accident Fund*⁶ explains:

'A compromise is an agreement between the parties to prevent or terminate a dispute by adjusting their differences by mutual consent. It is trite that a compromise gives rise to new contractual rights and obligations which exist independently of the original cause of action. Once a compromise is reached, the parties are precluded from proceeding on the original cause of action (unless, of course, the compromise provides otherwise).'

- [21] On proper construction, the settlement agreement does not provide for substantive relief to the respondents. The settlement agreement contemplates only a process for resolving the pay-progression dispute. In the event of non-compliance, the respondents are afforded a right to enforce the agreement within 14 days. The obligation to determine eligibility and, thereafter, the amounts due is, in terms of the settlement agreement, the Department's responsibility alone. The settlement agreement does not incorporate any provision that imposes an obligation upon the Department to pay any *specified* amounts. To restate: The Department was merely required to confirm the eligibility and pay. By directing payment of amounts not agreed between the parties, including amounts that arose only *after* the settlement was concluded, the Labour Court exceeded the settlement's scope. It further erroneously allowed the respondents to usurp the Department's role by

⁶ 2024 (4) SA 426 (CC) at para [33].

determining their own eligibility and quantum and compelling payment thereof. This new claim can also not form part of the terms of the settlement agreement.

[22] It should also be mentioned that the respondents proceeded by way of motion proceedings to have the settlement agreement made an order of court and to obtain substantive relief flowing from it. Although the Department did not oppose the relief sought in terms of section 158(1)(c) of the LRA, it raised, at the outset as a point *in limine*, the argument that the settlement agreement does not provide for any calculation of the Department's indebtedness and that permitting the respondents to do so would impermissibly vary the agreement, contrary to clause 7. For this reason, the Department sought the dismissal or striking out of prayer 2 of the Notice of Motion at the outset. Unfortunately, the judgment of the Court *a quo* is conspicuously silent on this issue. At no stage does the Labour Court properly assess the terms of the settlement and engage with the question raised on the papers as to whether the settlement does indeed allow for such interpretation. This ought to have been the Labour Court's point of departure. By failing to do so and by uncritically accepting that the agreement permitted such a calculation, the Labour Court misdirected itself.

[23] Leaving aside for a moment the misdirection in granting substantive relief not provided for in the settlement agreement, the Labour Court further erred in reasoning that, because the Department did not challenge the respondents' actuarial quantification when afforded an opportunity to do so in a letter of demand, the quantification should be treated as unopposed. That can never be so. A failure to respond timeously to a letter of demand cannot, without more, constitute an unequivocal admission of liability, nor does it justify an inference that the Department had tacitly admitted the indebtedness. Moreover, in treating the respondents' actuarial calculations as unopposed, the Labour Court overlooked the fact that the Department, in its answering affidavit, squarely put the quantification of the amounts allegedly owed in issue.

[24] The Labour Court also erred in dismissing the Department's schedule, setting out the amounts it said were owing, as a mere estimate, while accepting the respondents' actuarial calculations as conclusive. It did so despite the actuaries' express disclaimer that the underlying figures could not be verified and that their calculations relied on information supplied by SAMA and the doctors, whether orally or in writing. The Court further misdirected itself in holding that, because the Department allegedly failed to perform its obligations, the respondents could unilaterally assume the Department's role, obtain third-party pay-progression calculations, and impose those figures on the Department. The settlement agreement does not permit this: it places the duty to confirm eligibility and to quantify any amounts due squarely on the Department. By allowing the respondents to do so, the Court overstepped the bounds of the settlement agreement.

The Labour Court's costs order

[25] The Labour Court made an adverse cost order against the Department, holding the view that the Department had defended the application with no basis, and that it '*sat on its hands and only made part payment when this application was launched*'. The Department submitted that both grounds for the costs order are factually incorrect and therefore the Labour Court misdirected itself in the exercise of its discretion by awarding costs.

[26] It is not controversial that a costs order made by the Labour Court is appealable.⁷ Costs in the Labour Court are regulated by s 162 of the LRA, which requires the court, when making a costs order, to have regard to the requirements of law and fairness.

[27] In deciding whether to order payment of costs, the Labour Court may consider, among others, the conduct of the parties in defending the matter and during the proceedings before the court. The award of costs is a matter

⁷ *Zungu v Premier of the Province of KwaZulu-Natal and others* [2018] 39 ILJ 523 (CC) para [25] (Zungu). *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and others* [2021] 12 BLLR 1173 (CC) (*Union for Police*) and *Vermaak v MEC for Local Government and Traditional Affairs, North West Province and Others* (JA15/2014) [2017] ZALAC 2 (10 January 2017) (*Vermaak*).

which falls within the discretion of the court making such an order, and a court on appeal will not readily interfere with the exercise of that discretion.

- [28] In terms of what has become known as the *Zungu*-rule,⁸ it is well established that costs in the Labour Court do not follow the normal rules relating to costs, and in most instances, there will be no order as to costs. Where a court awards costs, it must give reasons for departing from this general rule.
- [29] Having regard to the reasons proffered for granting costs against the Department, the Court, in my view, erred in finding that the Department did not have a legitimate basis to oppose the application. At the risk of repetition: The respondents had approached the Court to obtain substantive relief based on a settlement agreement that does not provide for such relief. The respondents further sought substantive relief in respect of a separate claim that, on their own version, did not arise from the settlement agreement. Also, at the time when the matter was served before the court, the full amounts owed, as confirmed by the Department as it was obliged to do in terms of the settlement agreement, had been paid to the respondents. The Department therefore had every reason to defend the matter.
- [30] An appellate court may interfere only if the discretion was exercised on a wrong principle, exercised capriciously, or otherwise not judicially. Put differently, intervention is warranted only where the exercise of the discretion is vitiated by misdirection or irregularity, or where no court acting reasonably could have made the order. In applying this principle to the present case, it is concluded that the Labour Court did not exercise its discretion properly and did not properly consider the facts on which it reasoned that an adverse costs order is warranted. This Court may therefore interfere with the award of costs and make an order that is considered appropriate in the circumstances. Taking into account considerations of law and fairness, the order of the Labour Court should be substituted with one of no order as to costs.

⁸ Ibid.

- [31] With regard to the costs of this appeal, both parties sought a costs order against the other. I am of the view, with due consideration to law and fairness, that no order of costs should be made.⁹

Referral to oral evidence

- [32] The respondents submitted that, if unsuccessful, the matter should be remitted to the Labour Court for the hearing of oral evidence. It is not in contention that a Court may consider referring a matter for oral evidence where a timeous application to this effect has been made. Where such an application is not timeously made, a Court is entitled to proceed with a matter on the basis that the applicant accepted that factual disputes would be resolved by applying the principles set out in *Plascon-Evans*.¹⁰ The application of this principle, however, presupposes that a genuine dispute exists on the papers.

- [33] Leaving aside, for the moment, whether a *bona fide* dispute of fact existed on the papers regarding the quantification of the amounts claimed, there is a more fundamental reason why this Court should not consider referring the matter to oral evidence: The respondents seek to enforce a monetary claim said to arise from the settlement agreement, whereas, on a proper consideration of that agreement, the founding affidavit, even if accepted, does not make out a clear case that the settlement agreement supports such a cause of action. It was for this very reason that the Department raised the issue as a point *in limine* in its papers; yet the Labour Court did not engage with it at all. The Constitutional Court in *Mamadi v Premier, Limpopo and others*¹¹ explains:

'It bears emphasis, however, that litigants cannot permissibly apply for referral to oral evidence or trial 'where the affidavits themselves, even if accepted, do not make out a clear case, but leave the case ambiguous, uncertain or fail to make out a cause of action'. In that event, the application should of course fail without recourse to *Plascon-Evans* or oral evidence. But where a case is

⁹ *National Union Mineworkers v East Rand Gold & Uranium Co. Ltd* (1991) 12 ILJ 1221 (A) at 1242A - I.

¹⁰ *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

¹¹ 2024 (1) SA 1 (CC) at para [45].

properly made out, the disputes of fact are genuine, far-reaching and fundamental and cannot be resolved by application of *Plascon-Evans*, the proper course in rule 53 proceedings is, in general, referral to oral evidence or trial.'

[34] In the result, the following order is made:

Order

1. The appeal is upheld with no order as to costs.
2. The order granted by the Labour Court in terms of paragraphs 4, 5, and 6 is set aside and substituted by the following:

“The relief sought in terms of prayer 2 of the Notice of Motion is dismissed with no order as to costs.”

Basson AJA

Tokota AJA and Chetty AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Adv Feroze Boda SC & Adv Fundile Sangoni

Instructed by Phatshoane Henny Attorneys.

FOR THE RESPONDENTS:

Adv Andrew Redding SC & Adv Riaz Itzkin

Instructed by Cliffe Dekker Hofmeyr