IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG.

Reportable

Case No: J 1449/09

In the matter between

RALPH DENIS DELL Applicant

and

HPD CONSTRUCTION Respondent

JUDGMENT

Molahlehi J

Introduction

[1] The applicant in seeking to have the agreement concluded between him and the respondent made an order of court brought it in terms of section 142A of the Labour Relations Act 66 of 1996 (the LRA). The respondent took a point in *limine* regarding the jurisdiction of the court.

[2] The respondent argued that the court did not have jurisdiction to entertain the matter because section 142A of the LRA gives the power to the

Commission for Conciliation, Mediation and Arbitration (the CCMA), to make an agreement an arbitration award.

[3] During argument the applicant brought an application from the bar to have it application to be amended and to be read as brought in terms of section 158(1)(c) of the LRA. Mr. Ford appearing for the respondent did not oppose the application but indicated that if granted the matter should be postponed to afford the respondent an opportunity to challenge the validity of the agreement.

[4] The brief background of this matter is that the applicant was prior to termination of his employment contract employed by the respondent as a financial director. The contract was terminated by mutual agreement between the parties. However, the applicant complaint that he was underpaid by an R39 169. 47. Because the respondent would not agree that the applicant was underpaid, a dispute was referred to the CCMA conciliation during November 2008. A settlement agreement was then reached during the conciliation proceedings. The relevant part of the settlement agreement read as follows:

> "2. *The parties agree that an amount of R39169.47 (thirty nine thousand, one hundred and sixty nine rand shall be paid to him (applicant) within 7-days of signing this agreement."*

[5] The question to consider in determining whether or not to grant the amendment is whether the respondent would be prejudice if an amendment which is introduced at this stage of the proceedings should be granted. The respondent did not raise the issue of prejudice should the amendment be granted.

[6] The respondent was correct in not opposing the application because in both form and substance the provisions of sections 142A and 158(1) (c) of the LRA are the same. Section 142A reads as follows:

> *142A.* ***Making settlement agreement arbitration award***
>
> *"(1) The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award.*
>
> (2) *For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7)."*

And the relevant part of section 158(1) (c) of the LRA reads as follows:

> ***"158. Powers of Labour Court***

(1) The Labour Court may -

(a) . . .

(b) . . .

(c) Make any arbitration award or any settlement agreement an order of the Court;"

[7] In the light of the above I am of the view that the application to amend the applicant's notice of motion stands to be amended and the application should therefore be read as being brought in terms of section 158(1) (c) of the LRA.

[8] The question that then needs to be considered is whether the agreement between the parties qualifies to be made an order of court in terms of section 158(1) (c) of the LRA.

[9] *In Tsotetsi v Stallion Security (Pty) Ltd [2009] JOL 24384 (LC*), the Court held that:

"*In terms of section 158(1) (c) of the Labour Relations Act 66 of 1995, the court has the power to make any settlement agreement an order of court. There seems to be nothing in section 158(1) (c) that limits the powers of the court to only those settlement agreements relating to disputes for which the parties had the right to refer to the court*."

[10] It seems to me that the court has the power to make any settlement agreement an order of court that a party has a right to either refer to arbitration or the court. There is no specific reference to the definition of agreement in the Labour Relations Act. Thus in considering whether an agreement should be made an order of court, account should also be taken of the provisions of section 142A of the Labour Relations Act.

[11] In my view, agreements that may be made orders of court include those disputes which may have not yet been referred for which a party had a right to refer to the Labour Court. In other words, agreements which may be made orders of court would include those agreements concluded before such disputes are referred for conciliation or litigation. By way of example if parties reach an agreement regarding a discrimination dispute before it is referred to conciliation, such an agreement could be made an order of court. Similarly, in the case of an arbitral dispute, if parties reach an agreement regarding an unfair dismissal before such a dispute is referred for conciliation; such an agreement could be made an arbitration award because it is a dispute which a party has the right to refer to the Commission."

[12]In the case of *Tumelo Stephen Molaba v Emfuleni Local Municipality & others* [2009] JOL 23477 (LC), Van Niekerk J in considering whether to make a settlement agreement an order of court had the following to say:

"[6] The wording of s 142A suggests that for an agreement to constitute a settlement agreement, a number of requirements relating to nature and form must be met. First, the dispute that is the subject of the settlement must have been 'referred to the Commission'. 'Referred' cannot mean referred to arbitration in terms of s 136 – s 142A (1) requires that the dispute must be one that a party has the right to refer either to arbitration or to the Labour Court. 'Referred to the Commission' therefore means referred for conciliation in terms of section 134. This section, read with the requirement that the dispute be one that a party has the right to refer either to arbitration or to the Labour Court, means that it is only settlements of disputes about a matter of mutual interest that are either arbitrable or justiciable by this Court that may be the subject of an arbitration award in terms of s 142A. This excludes, for example, a settlement agreement in respect of a dispute about wages. Finally, the agreement must be in writing. Those cases that deal with the definition of a collective agreement (which in

terms of s 213 must be a 'written agreement') would obviously be helpful in giving content to this requirement."

[13] In *Mathosi & others v Kintetsu World Express (Pty) Ltd & Another (2008) 29 ILJ 2785 (LC*), it was held that: *the Court will only exercise discretion to make agreement an order of court where applicant provides sufficient evidence of non-compliance with an agreement*.

[14] In the present instance the respondent does not deny the existence of the agreement but suggested that there was a mistake as the amount which due to the applicant "was approximately R20 000, 00(twenty thousand) and not R39 169.47 (Thirty nine thousand and sixty rand, fourty cents) as contracted." According to the respondent the error in the settlement amount occurred because of the incorrect information supplied by the applicant. The respondent further contends that the applicant was aware that amount stated in the settlement agreement would not be paid because the respondent had resiled from the agreement.

[15] In my view the applicant has made out a case that indicates very clearly that an agreement was concluded between him and the respondent. That contract has not been set aside by the respondent. The agreement on face value is valid and signed for by a

representative who was authorized to do so by the respondent. There is clear evidence of non-compliance with the agreement on the part of the respondent. The plea of respondent that it signed the agreement on the basis misinformation by the applicant does not advance the case of the respondent in my view.

[16]In my view the applicant stands to succeed in his application to have the settlement agreement an order of court. I see no reason in law and fairness why costs should not follow the result.

[17]In the premises the following order is made:

1. The settlement concluded between the parties on the 17th November 2008, is made an order of court.
2. The respondent is to pay the costs of the applicant.

Molahlehi J

Date of Hearing : 23rd October 2009

Date of Judgment : 3rd February 2010

Appearance

For the Applicant: Adv K Ioulianou

Instructed by : Kevin Moodley & Associates

For the Respondent: Adv B Ford

Instructed by : Bartholomew & Associates