IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 1194/10

In the matter between:

THE PREMIER, LIMPOPO PROVINCE		**Applicant**
and		
THIVAKHONI DAVID MAKGOKA	**1ST**	**Respondent**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**2ND**	**Respondent**
THE REGISTRAR, LABOUR COURT OF SOUTH AFRICA	**3RD**	**Respondent**
SHERIFF OF THE HIGH COURT FOR THE DISTRICT OF POLOKWANE	**4TH**	**Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1. This is an application to stay a writ of execution on a settlement agreement, which was brought on an urgent basis. The matter was set down on 22 June 2010.

2. The settlement agreement had been made an arbitration award under section 143(3) of the Labour Relations Act 66 of 1995 ('the LRA'). The applicant seeks to set aside the writ pending an order of this court that it has complied with the award or, alternatively, seeks an order remitting the matter back to the bargaining council to have the quantum of what is owing to the first respondent in terms of the settlement agreement determined.

Background

3. The first respondent attended a human resources planning course in India from 1 February to 31 October 2008 at the invitation of the office of the Indian High Commission.

4. The cost of the course, return air tickets, book allowance and a living allowance of ten thousand rupees a month were paid for by the High Commissioner.

5. On his return to South Africa, the applicant claimed a subsistence allowance for the time spent in India. On account of the amounts paid from the High Commission, the applicant states it was only willing to pay the first respondent a subsistence allowance of R 74,00 per day. The first respondent disputed the proposed rate of the allowance, believing he was entitled to an allowance of R 95-00 per day. He based his claim on the tariffs for overseas official visits to India which are set out in a document entitled "Accomodation on Official Journeys outside the Republic" issued by the Department of Public Service and Administration ('the DPSA document'). The first respondent referred an unfair labour practice dispute over the unpaid allowance to the bargaining council.

6. The parties concluded a pre-arbitration minute in terms of which they agreed that the matter to be determined was *"...(w)hether or not the respondent's decision to use a flat rate of R 74-00 per day for paying the applicant's subsistence and traveling*

allowance for the period he was nominated to study in New Delhi, India constitutes an unfair labour practice."

7. The applicant concedes that its representative "*...realised that the First Respondent was in fact entitled to be paid in accordance with the DPSA document*", and consequently concluded a written settlement to that effect with the first respondent.

8. The key provision of the settlement agreement was that the parties agreed that the "*...the applicant/employee will be paid his subsistence and traveling allowance for the period 1 February 2008 to 31 October 2008 using the tariffs and rates that were applicable to official trips outside the RSA as contemplated in Annexure A of the Financial Manual.*[1]"

9. However, the applicant took the view that the DPSA document provided for an allowance of $ 63 (US) per day for employees who traveled to India, but this was subject to the provisions of paragraph 2 of the DPSA document.

10. Paragraph 1.1 of the document reads as follows:

> "*1. When expenditure on accommodation is wholly met from public funds an employee is compensated on the following basis:*
>
> *1.1. In the case of official visits to countries listed in the table hereunder:*
>
> *1.1.1. The reasonable actual expenses in respect of accommodation, dry cleaning and laundering; and*
>
> 1.1.2. *A special daily allowance to compensate for the employee's three meals (breakfast, lunch and dinner) and incidental expenses (e.g. reading matter, private telephone calls, soft drinks which do not form part of meals, etc).*"

[1] The DPSA document.

11. India is one of the countries listed in the schedule which follows. On the applicant's version of the schedule the special daily allowance for India, which is specified for employees who are not heads of department or accompanying a minister applicant was $ 63 (US) per day.

12. The applicant now contends that this allowance was subject to the provisions of paragraph 2 of the PDSA document, which states:

> "*2. The amounts set out in the table hereunder are maximum amounts. Therefore when accommodation expenditure and related expenses are wholly or partially sponsored by a donor or sponsor or where part of the meals (e.g breakfast included in hotel accommodation expenses) is paid by the Employer, the payment of a reduced special daily allowance must be considered.*
>
> *Due to the above, it is advisable to have a departmental policy on the payment of such reduced amounts. In the formulation of such policy, departments are strongly advised to consider the following breakdown of the special daily allowance to determine the reduced special daily allowance to be paid:*
>
> *2.1 Incidental expenses (15%)*
>
> *2.2 Breakfast (20 %)*
>
> *2.3 Lunch (20 %)*
>
> *2.4. Dinner (45 %)*"

13. The first respondent disputes the applicability of the reduced allowance provisions as he contends the applicant has never had a departmental policy as paragraph 2 recommends. He further contends, as I understand his argument, that a reduced tariff has not been applied to other employees with similar entitlements.

14. The first respondent, using the same DPSA document but one with a revised schedule of daily allowances effective from 1 September 2008, demanded to be paid a special daily allowance of $ 95 (US) per day for each day he was away from1 February to 31 October 2008. This he calculated to be R 208,744 - 92 based on a rand-dollar exchange rate of R 8.02055 over the 274 day period.

15. By contrast, the applicant took the view that the amount payable was 15 per cent of a daily allowance of $ 63 (US) per day. Using the same exchange rate as the applicant this amount works out as R 20,767.61, which the applicant paid to the first respondent in April 2010, which it claims amounted to compliance with the award.

16. The first respondent first lodged his claim for the larger amount in November 2009 and when the applicant did not satisfy his claim he set in motion the enforcement proceedings in the LRA. It seems it was his notification to the applicant of 10 March 2010 that he was going to apply to have the agreement, which had already been certified as an award in October 2009, made an order of court which galvanised the applicant to initiate the payment it made in April.

17. The first respondent disputes the validity of this payment as proper recompense of his claim and alleges that the claim form for S & T expenses in the same amount, which purportedly bears his signature and dated 8 March 2010, is unrelated to his claim and moreover, is a fraudulent document.

18. The first respondent pursued his claim and ultimately obtained a writ on 20 May 2010 in an amount reflecting his calculation of what was due to him. On 4 June the applicant allegedly asked for his indulgence for 14 days before executing the writ, in order for the applicant "to assess the situation".

19. After apparently consulting the state attorney and counsel, the applicant took the view that the only way to resolve the dispute over the quantum of the settlement agreement was to refer the matter back to the bargaining council.

20. The applicant then sought to arrange a meeting between itself, its advisors and the applicant to discuss the matter and avoid what it believed would be unnecessary

litigation to stay the writ. The first respondent was not receptive to these overtures and declined to meet with the applicant and its representatives. He advised them that he would be pursuing execution of the writ. The first respondent was by that time of the view, understandably, that the applicant had been dragging its heels since the settlement in September 2009 and was seeking to avoid giving affect to it. He contends therefore that the urgent application is brought too late to justify the short notice on which it was brought, and represents a belated attempt by the applicant to thwart his legitimate claim.

21. The applicant for its part alleges that the writ was not issued in strict compliance with the interim requirements laid down by the constitutional court in its recent decision in ***Minister for Justice and Constitutional Development v Nyathi*** **2010(4) BCLR 293 (CC)** for the execution of writs against the state pending the revision of the State Liability Act.[2] There appears to be some substance to this claim. The first respondent retorts that he has substantially met the requirements even if it has not complied with all of them in having the writ executed.

Evaluation

22. The application is for interim relief staying the execution of the writ, pending either confirmation by this court that the first respondent's claim has been satisfied by the belated payment of R 20,767.61 by the applicant, or the determination of the correct quantum of the settlement agreement by the bargaining council.

23. In relation to the alternative claim, the applicant has taken the view that the bargaining council is the appropriate forum to determine the quantum. Essentially the issue of the correct quantum stems from a disagreement about the interpretation of the settlement agreement. It is well established that the arbitral powers of CCMA commissioners and bargaining council arbitrators are limited when it comes to matters of interpreting agreements to the interpretation and application of collective agreements.[3] This court has routinely deals with the interpretation of settlement

[2] At 309-310, par [57] of the judgment.
[3] See e.g, ***Independent Municipal & Allied Trade Union v Northern Pretoria Metropolitan Substructure & Others*** **(1999) 20 ILJ 1018 (T)** at 1022 C-F or, more

agreements particularly where there is a dispute about whether a settlement agreement which has been made an order of court has been complied with or not.[4]

24. Accordingly, it would seem that the appropriate forum to determine the dispute about what is due in terms of the settlement agreement is the Labour Court, and whether the payment made by the applicant amounts to compliance with the award.

25. I am satisfied despite the certainty of the first respondent about the correctness of his claim that there is some doubt about the basis of his calculation even if he is ultimately shown to be correct that the agreement meant that the applicable tariff in the schedule of the DPSA document should be applied without a reduction. As mentioned above, he seems to base his calculation on a tariff that only came into effect in September 2008. Equally there are questions which need to be answered by the applicant about how it justifies its application of 15 % of the specified tariff.

26. Accordingly, I am not satisfied that the sum mentioned in the writ correctly reflects the intention of the settlement agreement. As mentioned above there are *prima facie* good grounds for believing the writ does not comply with the precepts laid down by the Constitutional Court, which is another good reason to stay its execution pending the determination of what is due in terms of the settlement agreement.

27. Although the applicant could have defended its position on the settlement agreement more vigorously, I accept that it did attempt to try and address the matter with the applicant to try and avoid having to bring an application to stay the writ. The applicant's reluctance to engage with it at that stage and his execution of the writ did justify the urgency of this application in my view.

28. I agree that the applicant might have acted more expeditiously in defending its claim about what was due and its heel dragging in implementing the settlement might have

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recently ***First National Bank Ltd (Wesbank Division) v Mooi NO & Others*** **(2009) 30 ILJ 336 (LC)** at 340, par [16].

[4] See e.g, ***Mathosi & Others v Kintetsu World Express (Pty) ltd & Another*** **(2008) 29 ILJ 2785 (LC)**

caused understandable frustration for the first respondent. However, the first respondent should at least have explored the applicant's belated attempts to resolve the matter before pressing ahead with execution of the writ, which would only have entailed a relatively short delay.

29. In the light of these considerations, I make the order below. However, I believe that if the parties look dispassionately at their respective interpretations of the settlement agreement and engage constructively with each other to try and settle this matter it should be unnecessary for this court to deal with the matter again.

Order

30. Accordingly, the following order is made:

    30.1. The writ issued by the fourth respondent in the amount of R 208,744 – 92 is stayed pending the determination of the quantum of the settlement agreement and whether it has been complied with by the applicant;

    30.2. the dispute over the determination of the quantum of the settlement agreement and whether it has been complied with by the applicant is to be set down on the opposed motion roll for hearing on 11 November 2010, after the parties have supplemented their papers as set out below;

    30.3. the first respondent may file a supplementary affidavit setting out the basis on which he believes he is entitled to the amount claimed in the abovementioned writ, by no later than 9 July 2010.;

    30.4. the applicant may file answering affidavit dealing with the first respondent's supplementary affidavit and his answering affidavit in this application insofar as it is pertinent to dealing with the dispute referred to in paragraph 30.2 by no later than 23 July 2010;

    30.5. the first respondent may file a replying affidavit to the applicant's answering affidavit by no later than 30 July 2010.

30.6. in the affidavits mentioned above, the parties must *inter alia* address the following issues:

30.6.1. the applicable tariffs during the period the first respondent was in India;

30.6.2. the first respondent's explanation for why he believes the tariff published in September 2008 applies to his claim.

30.6.3. the applicant's explanation of the origin of the claim form for S & T expenses on which it calculated the amount owing to the first respondent;

30.6.4. the applicant's explanation for the application of a reduced tariff on a rate of 15 %, and

30.6.5. whether or not other employees of the applicant who travelled abroad in similar circumstances have been subject to the same reduction in the tariff in the DPSA document.

30.7. No order is made as to costs.

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing: 22 June 2010
Date of Judgment: 29 June 2010

Appearances:

For the Applicant: C Prinsloo instructed by the State Attorney

For the Respondent: Mr H T Mathotho of N T Mathothoho Attorneys