THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 1171/17

In the matter between:

IMATU OBO C ESPACH **Applicant**

and

POLOKWANE LOCAL MUNICIPALITY **Respondent**

Heard: **30 January 2020**
Delivered: **06 February 2020**
Edited: **17 November 2023**

Summary: Application to make a settlement agreement an order of Court – Legality of the Agreement – the settled dispute must be one that a party has acquired the *right* to refer to arbitration or to the Labour Court. The word *right* denotes that the dispute must have been referred to conciliation. However *Fleet Africa* followed. Held: (1) The application is refused. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application brought in terms of section 158 (1) (c) of the Labour Relations Act[1] (LRA). The applicant seeks to make a "settlement agreement" allegedly reached on 4 April 2017 an order of this Court. The application is opposed, however, the answering affidavit was filed outside the prescribed time period. In terms of the Practice Manual, the respondent was not required to seek condonation for the late filling, however, the applicant objected to the late delivery of the answering affidavit. In terms of the Practice Manual, it is only when there is an objection, that a party is prompted to seek condonation. Indeed, the applicant objected, as such the respondent was prompted to apply for condonation for the late delivery of the answering affidavit. The condonation application stands opposed.

[2] At the hearing of the application Mr De Beer, a Union official appearing for the applicant indicated that there was no point to oppose the condonation application. This was after this Court pointed out that the respondent is nonetheless entitled to raise a point of law, even if the Court were to refuse the condonation application. Thus, in this judgment, the condonation application would not be discussed any further. This judgment would depart from the premise that the late filing of the answering affidavit is condoned. The central issue sharply raised by the respondent implicated the jurisdiction of this Court. The issue being that the alleged settlement agreement is not valid. This Court is not empowered to make an invalid settlement agreement an order of itself. After hearing submissions on this central issue, this Court reserved its judgment.

Background facts

[1] No. 66 of 1995, as amended.

[3] The facts relevant to the central issue are largely common cause. In order to appreciate the context of this dispute, it is appropriate to mention that there is in place a collective agreement for the period 2015 to 2020. The Main Collective Agreement (MCA), as it is known, had in it a Grievance Procedure. The procedure was also deemed to be a condition of service. In terms of clause 13.1.3, the following obtained:

> "The objective of this grievance procedure is to ensure substantive and procedural fairness to resolve problems as quickly and as close to their source as possible and to deal with conflict through procedural and consensual means."

[4] Against that background, on or about 13 May 2015, one Coenie Espach (Espach), an employee of the respondent, lodged a grievance in line with the Grievance Procedure. The employee described her problem in the following manner: "*Long outstanding promises of post Upgrading/Acting*". The desired solution to the problem was identified as follows: "*That the longstanding promises to me be fulfilled"*. In the grievance form Espach stated the following: *"Despite all the previous promises, e-mails, reports, meetings, grievance of post upgrading and current promises of acting, no action take (sic) place. During the hearing of the grievance, full report will be submitted"*.

[5] As required by the Grievance Procedure, the problem as identified by Espach travelled through three stages. At the last stage, and on 04 April 2017, the following emerged, which the applicant refers to as a settlement agreement:

> "There was a meeting on the 17th January 2017 in relation to the grievance hearing herein. The employee was represented by Mr. M Malinga from IMATU and there was no appearance from HR Division. Mr Pine Pienaar the Manager in the Electrical department (SBU) attended and testified. There was only one version of the grievance and it was the submission of the employee – union, was not challenged. In the premise (sic) the employee's post must be upgraded to post level 5 with all existing benefits and the position be changed accordingly in the Electrical SBU organogram. Further that the grievance

lodged by the employee is upheld and that he be placed accordingly with immediate effect".

[6] It must be mentioned that at this step, the Grievance Procedure provides the following: Clause 13.4.2 thereof, *"the Municipal Manager or his nominee shall hear details of the grievance including proposals to resolve the issue and shall endeavour to reach an agreed outcome within ten (10) days of the referral in terms of clause 13.4.1 above*".

[7] Owing to the fact that Espach was not upgraded as upheld, the applicant on 17 April 2017, addressed a letter to the Acting Municipal Manager of the respondent, demanding the upgrade. The demand was not met. As a result, the applicant launched the present application in May 2017. As pointed out above, the application stands opposed.

Evaluation

[8] In matters involving making a settlement agreement an order of Court, this Court retains a discretion to be exercised judiciously. Of importance is whether the agreement is one that is valid and that the other party to it is refusing to comply. It is common cause in this matter that the respondent is refusing to comply with what the applicant refers to as a settlement agreement. The contention of the respondent is that there was no settlement agreement in that Mr Maleta, who signed as the nominee of the Municipal Manager made a ruling, which ruling is invalid and unenforceable. There is merit in a submission that there was a ruling as opposed to any agreement. From what the applicant refers to as a settlement agreement emerges statements like "*one version*" and *upholding* of a grievance. All of these are characteristics or hallmarks of a ruling. The approach taken by Maleta was more adjudicative than endeavouring to reach an agreed outcome as commanded by clause 13.4.2 of the Grievance Procedure. The role of Maleta

was that of being the chairperson of a grievance hearing[2]. In arriving at his ruling he took into account one version, which is that of Espach.

[9] In terms of clause 13.4.3, the nominee is obliged to inform an employee in writing of the outcome of the hearing. The plain meaning thereof is that the product of step 3 is a written outcome of the hearing. It is indeed possible that in this step an agreement may be reached. Clause 13.4.2 does contemplate an agreed outcome. However, on the facts of this case, there can never be an agreed outcome in the absence of the other party. Properly defined, the outcome in this matter was more a default hearing outcome. This prompts me to consider the question, what is an agreement, which question I now turn to.

What is an agreement?

[10] In law an agreement comes into existence when there is an offer and acceptance. There must be a meeting of minds of the two contracting parties. As to an offer, a person is said to make an offer when he or she puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed. As pointed out above an offer may be made out of a grievance process, which by its mere acceptance a contract should be formed. The question is, did Espach make an offer? In Mr De Beer's submission, when Espach lodged a grievance, he made an offer to be upgraded and such an offer was accepted by the nominee of the Municipal Manager. I cannot agree that an offer was accepted.

[11] The grievance procedure exists to resolve problems in a consensual manner. Thus, Espach had a problem and did not strictly speaking make an offer. However, without being unduly semantical, when regard is had to the desired solution to the problem, it can be said that the proposal made by Espach is that the long outstanding promises to him be fulfilled. The promises were those of post upgrade and acting[3]. Thus, Espach expected the respondent in

[2] Clause 13, 4.2 requires him as the nominee of the Municipal Manager to hear details of the problem as it were and the proposals to resolve the problem.
[3] It is unclear from the papers which acting is being referred to. I can only assume that it is acting in the upgraded post.

its capacity as an employer to fulfil the promises. If the respondent accepted to fulfil the alleged promises, then an agreement comes into being. Clearly, there is no evidence of acceptance to fulfil the alleged promises. At the last step, the other party who is to have fulfilled the promises was absent hence a default outcome.

[12] Assuming that the desired resolution constituted an offer, which in my view, it was strictly speaking not, one must consider what became of that offer from step 1. There Mr Makoala, the immediate supervisor of Espach stated the following: "*There is a need to invite Training Department in discussion of this*". Espach recorded that: "*Again a promise was made and there is no positive outcomes of the promise*". What this Court can deduct from this step is that there was no acceptance of the offer to fulfil the promises.

[13] At the level of step 2, one Pienaar, the Business Unit Manager recorded that Espach must apply for an Engineering position when one is advertised[4]. Of importance is that Espach recorded that he was not totally happy with the outcome. Again, at this stage no acceptance of the offer. At the last step, I have already pointed out that instead of accepting the offer, if the desired resolution constituted an offer, Maleta made a default ruling. Where an offer is not accepted, the general rule is that there is no contract.[5] Thus, it must follow that an acceptance was never made. Clause 13.4.5 provides that if a grievance has not been resolved to the satisfaction of the aggrieved party the grievance may be escalated. In my view a resolution of a grievance may include a refusal to accede to the demand. It cannot follow, as argued by Mr De Beer that because Espach did not escalate the grievance, it was resolved to a point of acceptance of his offer. To the extent that it was argued that Maleta was accepting the offer, his legal authority to accept and/or bind the respondent was challenged. It is a cardinal principle of the law of contract that a simple contractual offer made to a specific person can be accepted only by that person; and that, consequently, a purported acceptance by some other

[4] The court was not provided with the typed version of the outcome. The handwriting is not legible. That which has been stated is what the court could decipher from the illegible handwriting.
[5] See: *Tel Peda Investigating Bureau (Pty) Ltd v Van Zyl* 1965 (4) SA 475 (E).

person is ineffective and does not bring about the conclusion of a contract. Corbett JA in *Levin v Driepork Properties (Pty) Ltd*[6], said amongst others the following:

> "Krause J said…Now it is trite law that an offer made by one person to another cannot be accepted by a third…for simple reason that there was no intention on the part of the one person to contract with the other person whatever the subject matter of the contract may be."

[14] It can never be said that the alleged offer made by Espach was made to Maleta. It was made to the applicant as a legal entity and in its capacity as an employer of Espach. In local government sphere, the Municipal Manger is empowered by section 55 of the Municipal Systems Act[7] (MSA) to appoint staff. Section 59 of the MSA does allow delegation of powers. It has not been shown that Maleta was delegated to accept any offer on behalf of the Municipal Manager. In terms of section 59 (2) (b) a delegation must be in writing. Maleta was nothing else but a nominee of the Municipal Manager to chair and/or hear the problem. He could not have been nominated to accept an offer allegedly made by Espach.

The doctrine of legality suggests that all actions must be lawful. Maleta is not empowered to exercise statutory powers of the Municipal Manager. The Constitutional Court has already clarified that by not being challenged, any action, which lacks legality does not attract legality by mere failure to challenge it. An argument by De Beer that the respondent ought to have applied to have the illegal decision of Maleta set aside only goes to the fact that the decision as a fact remains in existence but does not colour it with any validity in law.

[15] I arrive at a conclusion that there was no agreement in law and as such, this Court cannot exercise its discretionary powers under section 158 (1) (c). Where a Court does not have powers, there is no jurisdiction. In the absence

[6] 1975 (2) SA 397 (A).
[7] Act 32 of 2000.

of a valid contract – as in offer and acceptance as required by the common law, this Court cannot exercise its statutory powers[8].

Have the statutory requirements of section 158 (1A) been met?

[16] Even if I had arrived at a conclusion that there was a valid agreement, I still had to be satisfied that the statutory requirements of the above section were met. In terms of the section the settlement must be one of a dispute that a party has the right to refer to arbitration. At first blush, one may wrongly assume, in my view, that the dispute of Espach is that of an unfair labour practice. If that assumption is wrongly made, a party has the right to refer a dispute involving an unfair labour practice to arbitration.[9]

[17] In my view, a wrong assumption would be occasioned by the failure to have regard to the provisions of section 186 (2) of the LRA. If the conduct does not amount to unfair labour practice as defined, then such a dispute may not be referred to arbitration. I have pointed out above that the grievance procedure is there to deal with problems and conflict. On the evidence before me the problem raised by Espach was that he was promised acting and upgrading of a post. The debate that continued for the longest of time was, amongst others, what conduct would constitute an unfair labour practice in relation to either promotion, demotion or provision of benefits. The Labour Court in *Polokwane Local Municipality v SALGBC and others*[10] concluded that the grading of a post is a matter of mutual interest and cannot amount to an unfair labour practice. In *Thiso and 6 others v Moodley and others*[11], doubt was expressed by the late Steenkamp J that *Polokwane* was still good law in the light of *Apollo Tyres SA v CCMA*[12]*. Thiso* concluded that even if there is no right shown an employee may opt to refer a dispute of unfair labour practice[13].

[8] *Fleet Africa (Pty) Ltd v Nijs* [2017] 38 1059 (LAC).
[9] Section 191 (5) (a) of the LRA.
[10] [2008] 8 BLLR 783 (LC).
[11] [2014] ZALCCT 65 (2 December 2014)
[12] [2013] 5 BLLR 434 (LAC).
[13] Compare with: *Minister of Labour v Mathibeli and others* [2013] 34 ILJ 1548 (LAC).

[18] My discomfort does not necessarily lie on the question whether there is or there is no right but on what constitutes a promotion in relation to this matter. For a conduct to be unfair, it must be one to be measured in relation to either promotion, demotion, training or provision of benefits. Collins Dictionary defines promotion to mean advancement in rank, grade or position. It is clear that the grievance of Espach has to do with promises with regard to advancement of grade – a promotion in plain language. In any event, the respondent does not dispute that the grievance of Espach is an unfair labour practice which should have been referred to the bargaining council. On that score, the statutory requirements have been met. The issue is not whether the dispute was referred but whether Espach has as a right to refer the dispute about promotion to arbitration. Certainly at first blush particularly when regard is had to the nature of the dispute only, Espach had a right to refer the alleged promise of advancement of grade to arbitration.

[19] However, in my view, the provision of the section ought to be understood from the context of the LRA as a whole. It is by now settled law that an employee has a right to refer a dispute to arbitration or adjudication if the dispute was referred to conciliation or have been conciliated upon. To my mind, the settlement agreements that the legislature had in mind in this section are those of a dispute which had already been referred to conciliation and not those disputes that are by only their nature and character capable of being referred to conciliation. If I am right, then since Espach had not referred his dispute to conciliation, then he had not acquired the right to refer his dispute to arbitration, even if it may meet the definition of an unfair labour practice. I take a view that it was for a reason that the legislature chose to use the word "right". The reason being that in terms of the LRA a right to refer to arbitration or adjudication can only arise once a dispute has been referred to conciliation.

[20] Upon proper consideration of section 142A of the LRA, the position I am propagating above emerges. Section 142A reads thus: -

> '(1) The Commission may, by agreement between the parties or on application by a party, make a settlement agreement in respect of <u>any</u>

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…'

[21] It is curious to note that the legislature chose exactly the same wording in subsection (2) as in section 158 (1A). The principle of interpretation is that same words if employed in the same statute must be given the same meaning[14]. It is clear from subsection (1) of 142A that a settlement agreement contemplated is one of a dispute that has been referred to the Commission. I may add, if the legislature contemplated any dispute that an employee has a right to refer, the legislature would have expressly stated so. Curiously, the legislature expressly chose arbitration and referral to the Labour Court to the exclusion of referral to conciliation. This, in my view, is occasioned by the fact that the legislature knew very well that the right to refer to arbitration and/or adjudication can only happen once conciliation has failed. The scheme of the LRA is one that requires disputes justiciable under it to be subjected to a specific resolution route. This point was made clear by Zondo J in a dissenting judgment in *September and others v CMI Business Enterprise CC*[15] when he said:

[114] …The main judgment and the concurrence were both majority judgments. The main judgment said:

[31] On the point crucial to this case, the majority (in *Driveline*) firmly rejected the proposition that the Labour Court has jurisdiction to adjudicate a dispute not referred to conciliation at all. It said that it was –

"as clear as daylight that the wording of section 191 (5) imposes the referral of a dismissal dispute to conciliation

[14] *Holeni v The Land and Agricultural Development Bank of SA* (266/08) ZASCA 9 (17 March 2009).
[15] (2018) 39 ILJ 987 (CC).

> before such dispute can either be arbitrated or referred to the Labour Court for adjudication".
>
> [32] The reasoning of the *Driveline* majority is, in my, convincing. Section 191 (5) stipulates one of two preconditions before the dispute can be referred to the Labour Court: …If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication. As Zondo J shows in his judgment, with which I concur, this requirement has been deeply rooted in South African labour-law history for nearly a century. We should not tamper with it now.

[22] Thus I take a firm view that when the legislature used the word *right*, it sought to denote a right of referral acquired after the conciliation referral. Therefore, where the settled dispute was never referred to conciliation its settlement agreement is not, in my view, one contemplated in section 158 (1A) of the LRA. The situation prior to the insertion of section 158 (1A) compelled the Labour Court in interpreting the phrase "any settlement agreement" to conclude that the settlement must be in relation to a labour matter justiciable under the LRA[16]. The reason for that was obvious. The function of the Labour Court and other dispute resolution bodies is to resolve labour disputes as commanded and guided by the LRA.

[23] Despite my views above, the Labour Appeal Court (LAC) in *Fleet Africa (Pty) Ltd v Nijs*[17] took an approach that all what section 158 (1A) requires is the existence of a dispute that a party has the right to refer to arbitration or adjudication. The LAC considered only the nature of the dispute and respectfully did not consider the issue of a right. The LAC went on to say:

> "This was a kind of dispute which either party was entitled to refer to the CCMA (or accredited council) for arbitration…

[16] See: *Harriawak v La Farge (SA)* (2001) 6 BLLR 614 (LC).
[17] [2017] 38 1059 (LAC).

[24] For the LAC, it did not matter whether the dispute in question was referred to conciliation in order to acquire the right to be referred to arbitration[18]. The Constitutional Court in *September supra*, seem to have endorsed the principle that the Labour Court lacks jurisdiction over a dispute that has not been referred for conciliation. The corollary of this conclusion, in my view, is that a party who has not referred a dispute for conciliation has no right to refer the dispute to the Labour Court. The same corollary applies *mutatis mutandis* to disputes to be referred to arbitration in terms of the LRA.

[25] Another point to be made, which in my view is married to the point I am making is that once a matter is referred to conciliation, if a settlement is arrived at, such would be with the assistance and guidance of a CCMA or Bargaining Council commissioner and shall be in line with the LRA. One is reminded of the findings by Madlanga J in *Eke v Parsons*[19] when he stated the law as follows:

> '[25] This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. There can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place "relate directly or indirectly to an issue or *lis* between the parties". Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court.'

[26] Similarly, in my view, if a party has not referred a dispute for conciliation, that party has no right to arbitration or adjudication, thus, an order of a settlement agreement outside the context of the legislated dispute resolution mechanism is incompetent and improper. It does seem that other considerations, other than

[18] This finding flows from the judgment of *Greef v Consol Glass (Pty) Ltd* (2013) 34 ILJ 2385 (LAC) in which the court favoured an interpretation by *Bramley v John Wilde t/a Ellis Allan Engineering and another [2003] 4 BLLR 360 (LC)* that gave the right to refer a wider meaning – a dispute that once settlement fail may be referred to arbitration or adjudication in future. The reasoning adopted by the LAC was that retardation, or discouragement of early settlement of disputes is not consistent with the objects of the LRA. This, in my view, is debatable.

[19] 2016 (3) SA 37(CC)

the lack of rational basis to differentiate settlement orders before and after statutory events, by the LAC[20], in rejecting the principles in *Molaba and others v Emfuleni Local Municipality*[21] and accepting those in *Bramley v John Wilde t/a Ellis Allan Engineering and another*[22], was the discouragement of early settlement of disputes, something which is inimical to the objects of the LRA. I can only conclude that the LAC in *Fleet Africa* was endorsing this consideration. However, I am bound by *Fleet Africa* and must reluctantly[23] conclude that despite the fact that Espach had not referred a dispute to conciliation, the requirements of section 158 (1A) has been met.

[27] Mr De Beer placed heavy reliance on the judgment[24] of the Labour Court under the hand of Acting Justice Laubscher. The Acting Justice followed the approach in *Fleet Africa* without reservations. In dealing with the validity of the agreement, the learned Acting Justice took a view that the desired resolution by Nathan was an offer within the contemplation of contract law. The respondent's counsel submitted that such a view is wrong. I disagree. As pointed out above, out of a grievance process a proposal may be made. He further submitted that the matter was distinguishable. I agree. In that matter, the offer, as made by Nathan, was accepted by Mr Lubbe in his capacity as an acting municipal manager. Paragraph 67 of the judgment records that at step 3, Mr Lubbe agreed that the practice was not fair, that all superintendents had to be on the same level, and that Mr Nathan had to be placed on post level 6 with immediate effect. The judgment further records that the legal authority of Lubbe was not challenged. In the matter before me, Mr Lubbe was an acting Municipal Manger at the time, however, as at the step 3 process he was not a party to this process. It appears to be common cause though that Maleta was assigned by Lubbe to handle the grievance. The

[20] See: *Greef v Consol Glass (Pty) Ltd* (2013) 34 ILJ 2385 (LAC).
[21] (2009) 7 BLLR 679 (LC).
[22] [2003] 4 BLLR 360 (LC).
[23] To my mind although *Molaba and others v Emfuleni Local Municipality* (2009) 7 BLLR 679 (LC) has been overruled by the LAC, it seems to reverberate the views as expressed in *September.* There seem to be a valid reason to afford the word right to refer a restricted meaning.
[24] *IMATU obo Nathan v Polokwane Local Municipality* case J846/2017 delivered on 18 October 2019.

applicant does not allege that the agreement was concluded by the Municipal Manager acting on behalf of the respondent.

[28] The respondent before me squarely placed the legal authority of Maleta at issue. It was pleaded that Maleta knew or reasonably ought to have known that he had no legal authority to conclusively decide on Espach's grievance. The applicant did not properly answer this assertion. Instead it stated in reply that Maleta derived validity and authority from section 66 (1) (d) of the MSA. I do not agree. Section 66 obliges a Municipal Manager and Maleta was not a Municipal Manger. Subsection (1) (d) obligates a Municipal Manager to establish a process or mechanism to regularly evaluate staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service. For reasons set out above, the judgment of the Acting Justice is not binding on me with regard to the issue of the validity of the settlement agreement on the basis that the facts are distinguishable.

Conclusions

[29] In summary, it is my view that no valid agreement came into being, resultantly, I exercise my discretion by refusing to make the alleged settlement agreement an order of this Court.

[30] For all the above reasons, the following order is made:

Order

1. The application in terms of section 158 (1) (c) of the LRA is hereby dismissed.
2. There is no order as to costs.

_____

GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr P De Beer IMATU Official.

For the Respondent : Advocate K Ramarumo

Instructed by : Popela Maake Attorneys, Johannesburg