THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: J 564/23

In the matter between:

SIMON MASINGA **Applicant**

and

ALMAR INVESTMENTS (PTY) LTD **Respondent**

Heard: **15 August 2024**
Delivered: **08 October 2024**

(This judgment was handed down electronically by circulation to the parties, by email, publication on the Labour Court's website and released to SAFLII. The date on which the judgment is delivered is deemed to be 08 October 2024.)

JUDGMENT

LENNOX, AJ

[1] This matter concerns the Court with two issues. Firstly, the Applicant seeks payment for the period of time between the date of his reinstatement in terms of an arbitration award and the date on which he actually returned to the service of the Respondent. The second issue arises from attempts to settle the matter after the application was launched, and by the question as to whether, in fact and law, it had been settled or not.

[2] The Court must first determine whether or not a settlement had been reached and then if not, whether the Applicant has made out a case for the relief sought.

Brief history

[3] The Applicant was dismissed on 3 July 2019 whereafter he referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) He was ultimately successful in his referral and was retrospectively reinstated. For this the value of the monies owing to him was calculated as being R138 000.00. The Applicant was directed to report for duty on 6 January 2020.

[4] The Applicant avers that he reported as directed for duty but was advised by Ms Irene Mazuna of the Respondent to return home until further notice. The Respondent did not deny this averment and merely “noted” the content in its Answering Affidavit.

[5] The Respondent then brought review proceedings on 22 January 2022 which were dismissed by this Court on 16 August 2022.

[6] There is no dispute that the Respondent then permitted the Applicant to return to work on 1 September 2022. The dispute centres on the payment of the Applicant’s salary for the period between 6 January 2020 and 30 August 2022, being the period between the launching and dismissal of the review application.

[7] The Respondent raised a number of defences to the claim. The primary defence is that the matter has been settled, which is disputed by the Applicant.

The settlement defence

[8] The Respondent avers that a settlement agreement was concluded between the parties. It avers that the terms of the settlement are contained in an unsigned settlement agreement annexed to its Answering Affidavit as "AI 10".

[9] The Applicant accepts that efforts were undertaken to settle the matter, but denies that an agreement was reached and further takes issue with the disclosure of "without prejudice" correspondence which record the interactions between the parties. The view of the Court is that the correspondence which shall be referred to is not "without prejudice", nor was it marked as such, and is central to determining the intention(s) of the parties.

[10] On the Respondent's version an agreement was concluded and an amount of R550 000.00 was owing to the Applicant. It has, notwithstanding this, declined to make payment of this amount. The excuse originally proffered is that it is holding the Applicant to the settlement amount, whereas the Applicant has sought to repudiate the settlement, *alternatively* as stated in argument by the Respondent's Counsel that there are tax considerations that mitigate against payments being made in dribs and drabs.

[11] The Respondent relies on the following communication from Advocate Serogole, who acted on behalf of the Applicant, to prove the existence of a settlement agreement:

> "Dear Adv Le Roux
> Thank you for your email.
> We have consulted with our client and it is our client's instructions that the amount of R550 000 will be accepted provided you apply for tax (sic) directive and see how much is due and payable after deductions.
> We are however not amenable to UIF deductions since this is a settlement amount."

This email is not marked as being "without prejudice".

[12] The response from Adv Le Roux who represented the Respondent is also not marked “without prejudice”. It reads:

> “Dear Adv. Serogole
> Thank you for your speedy response in this matter. We are pleased to confirm that the Respondent has accepted the terms offered in your previous email and consequently, we have reached agreement.
> We thank you Sir for your input and guidance in the matter and would also like to thank Mr. Moswane. Last but not least, we also thank Mr Masinga and further trust that the entire dispute will now be put behind us.
> I further trust that it will be in order for me to write-up a concept agreement for your consideration?”

[13] Adv Serogole replied in correspondence which is not marked as being “without prejudice” as follows:

> “Morning Counsel
> Please note that we still have to see after the tax directive, how much is payable.
> Kindly send us the tax directive from SARS.
> We raised a concerns about UIF deductions and hope it has been considered.
> Please go ahead and send us a draft settlement agreement for further consideration.”

[14] The above correspondence was entered into after the institution of the present application. A draft written agreement was drawn up by the Respondent but not signed by the Applicant. Contrary to the views of the Respondent, the Applicant argues that there had not been a meeting of the minds between the parties.

[15] Further correspondence ensued resulting in the last email from Adv Le Roux to the Applicant’s attorneys on 26 May 2023 as follows:

> "Please be advised that following a response from the Respondent, there may have been a misunderstanding created by me. The Employer has not yet started with a request for a tax directive and expected the signed agreement beforehand. They have explained to me that we should avoid, at all cost, to get the directive before the signed agreement…"

[16] For a contract to exist, be it partly written and partly oral, there must be consensus between the parties as to the terms thereof. As was held in *Wasmuth v Jacobs*[1]*:*

> "It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror."

[17] In *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd*[2] the following was held*:*

> "The dispute thus arising is not novel. It frequently happens, particularly in complicated transactions, that the parties reach agreement by tender (or offer) and acceptance while there are clearly some outstanding issues that require further negotiation and agreement. Our case law recognises that in these situations there are two possibilities. The first is that the agreement reached by the acceptance of the offer lacked animus contrahendi because it was conditional upon consensus being reached, after further negotiation, on the outstanding issues. In that event the law will recognise no contractual relationship, the offer and acceptance notwithstanding, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer would give rise to a binding contract and that the outstanding issues would merely be left for later negotiation. If in this event the parties should fail to reach agreement on the outstanding issues, the original contract would prevail (see eg CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey

[1] 1987 (3) SA 629 (SWA) at 633 D.
[2] 2013 (2) SA 133 (SCA) at para 12 – 13.

(Pty) Ltd 1987 (1) SA 81 (A) at 92A-E; Namibian Minerals Corporation Ltd v Benguela Concessions Ltd [1996] ZASCA 140; 1997 (2) SA 548 (A) at 567A-C).

Illustrations of cases that were held by this court to be manifestations of the first possibility are to be found in Namibian Minerals Corporation and in Premier, Free State v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA) while the facts in Alsthom Equipment and in Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 (1) SA 508 (A) were held to demonstrate the second (see also Lewis v Oneanate (Pty) Ltd [1992] ZASCA 174; 1992 (4) SA 811 (A) at 820I-821E). The criterion as to whether the facts of a particular case indicate the one or the other was succinctly summarised thus by Corbett JA in Alsthom Equipments at 92E:

> 'Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances.'"

[18] The Applicant stated expressly that an amount of R550 000.00 "*will be accepted provided you apply for tax (sic) directive and see how much is due and payable after deductions".* Nothing in this statement evidences the final conclusion of an agreement; it was dependent on determining what amount the Applicant would receive after tax had been deducted. This is consistent with Advocate Serogole's statement in the email above that he "*still have to see after the tax directive, how much is payable to our client".*

[19] The Applicant was clear in his view, namely that he would consider a settlement of R550 000 which was dependent on understanding what he would have to pay in tax. This, in the view of the Court, is not an unequivocal acceptance of an offer previously made or an unequivocal offer made in response thereto. It is an invitation to continue negotiations which may lead to the conclusion of a contract. Put differently, the Applicant reserved his final decision based on what the tax implications would be.

[20] In paragraph 1.7 of the Heads of Argument filed on its behalf, the Respondent tendered payment of the amount it avers it agreed to pay the Applicant in paragraph 8.29 of the Answering Affidavit. It's saving grace is that the tender was not accepted.

[21] The Respondent was obliged to obtain a tax directive. It chose not to. In doing so it recorded that it was not prepared to obtain the tax directive before obtaining a signed settlement agreement. The parties were clearly not *ad* idem on a possible settlement. The Applicant was not prepared to agree on the figure proposed save and unless he was in a position to understand what tax would be payable. There was no meeting of the minds between the parties.

[22] The facts of this matter lead to only one conclusion, and that is that no agreement was in fact reached as suggested by the Respondent. As such this defence must fail.

The Covid-19 defence

[23] In the Answering Affidavit the Respondent sought to invoke the National State of Disaster, which came into effect on or about 26 March 2020, as a supervening act of impossibility of performance, absolving it of its duty to pay the Applicant. That is all that is said in Answer. No information is provided as to what happened with regards to the payment of other staff and for how long this might have gone on for. In the Heads of Argument filed on its behalf the submission is made at paragraph 4.1 and 4.2:

> "The Respondent on the other hand, has also defended this claim by raising a valid defence in law of contract, namely that Covid-19 pandemic constituted a supervening impossibility of performance in accordance with which the Respondent is excused from paying the Applicant's full salary.
>
> Regarding the issue of supervening impossibility of performance, The Covid-19 regulations themselves are well known, and the Court can take notice of same. They were instituted in March 2020, and were only finally repeated in 2022, after this application was lodged."

[24] Inventive as this defence is, this is an argument which cannot succeed given the failure of the Respondent to take this Court fully into its confidence as to how it dealt with all of its employees at that time. One can assume that the Respondent did not remain inoperative during the entirety of the period in which the relevant regulations were in place. It has therefore failed to meet the evidentiary burden required to prove such a defence.

The suggestion that the applicant did not tender services

[25] In the Heads of Argument filed on behalf of the Respondent it is submitted that the Applicant failed to tender his services. This submission has no basis in the papers before the Court. As recorded *supra* the Applicant made a specific averment that he did in fact tender his services on 6 January 2020, and the version was not disputed in Answer, but rather noted.

[26] The Court accepts, without reservation, that the Applicant in fact tendered his services. The Court further accepts without reservation that the tender of service by the Applicant was not accepted by the Respondent.

[27] The argument is then that the Applicant must have placed his labour at the disposal for the entire period in which the review was pending. This argument has no merit in law, common sense or our constitutional values.

[28] In argument before me the Respondent argued that the claim of the Applicant could not be quantified as the Constitutional Court had in *Maroveke v Talane NO and Others*[3] applied. The Constitutional Court held as follows:

> "I am satisfied that the Labour Court was correct when it held that the award of 12 months' back pay was unreasonable and not in keeping with the established principle that reinstatement ought to neither impoverish nor enrich the employee beyond the extent to which he would have been but for the dismissal."

[3] 2021 (10) BCLR 1120 (CC) at para 25.

[29] *Maroveke* deals with the award of compensation. It did not consider directly the present facts, namely that an employee was reinstated and yet was instructed to stay at home and not tender his services for as long as the review application was pending. The Court in *HOSPERSA and Another v MEC for Health: Gauteng Provincial Government*[4], held in relation to failure to pay the salary of the employee, that:

> "[17] An employee has a common law right to be paid her salary. If through the default on the part of the employee his or her services are not rendered, the wage must be diminished in proportion to the time during which the services where not rendered (see Boyd v Stuttaford **1910 AD 101**, 104-105). The position is, however, different where the employee's inability to perform her duties is her employer's doing. See in this regard Myers v SA Railways & Harbours **1924 AD 85** where the Court held as follows at 90C:
>
> "If however, it was due to his employer that he had been unable to perform his work, then he would be entitled to be paid notwithstanding that no service had been rendered by him."
>
> In terms of the common law, the unilateral suspension of an employee also does not relieve the employer of the duty to pay the employee. It is also accepted in our labour law that an employer may not suspend an employee without pay and may only do so it they have contracted to that effect, either when the contract was first entered into or if a collective agreement provides for such penalty, or when the employee is faced with dismissal and agrees to unpaid suspension as an alternative penalty (see Grogan Workplace Law 2007 at p. 103)."

[30] Whilst the Court in *HOSPERSA* dealt with the consequences of a suspension, the principle applies equally to a refusal to accept the tender of services which may be seen as a suspension of the services of the employee in another form. After all, if it swims, waddles and quacks like a duck, it will likely be a duck.

[4] [2008] ZALCJHB 87 at para 17.

[31] The Applicant is not required to starve or exist in a state of perpetual poverty or remain destitute in the face of the rejection of his tender of services. He, and others in his position, must do what they can to exist. The Respondent elected to review the arbitration award and to set in place a course of litigation which it had to foresee could result in it being indebted to the Applicant. It is a risk that any employer seeking to review on order of reinstatement takes. The Respondent, after all, turned the Applicant away on 6 January 2020 and did not call on him to tender his services until 1 September 2022.

[32] It would be perverse should the Respondent be able to reject a tender of services and then snatch at a bargain of the Applicant having to earn an income by other means. The Court does not interpret *Maroveke* to intend this as a consequence of its findings.

[33] Even if the Court is wrong in this finding, it is of no assistance to the Respondent who, in the absence of proof that the Applicant in fact had other employment, the Court must accept the version under oath of the Applicant that he did not.

Interest

[34] The Applicant further claims interest in the amount of R195 997.80. The following was submitted in the Heads filed on behalf of the Applicant:

> "It is submitted that interest is due on each claim starting as the end date of each period. The interest is due as per the BCOEA (as quoted above) as of seven (7) days after the last day of each period or on a date prior thereto should the last day fall on a Saturday or a Sunday. Interest is to be calculated at the prevailing rate of interest when each claim became due."[5]

[5] Paragraph 24 thereof.

[35] In answer to the claim for interest the calculation was not challenged save to suggest that the claim was not liquidated or the amount was not settled and further that the tender was repudiated.

[36] Thus, the actual calculation based on the full amount claimed is not challenged.

Costs

[37] This Court does not follow the principle that costs follow the result. That said, the conduct of the Respondent has compelled the Applicant to seek the assistance of the Court to ensure that his right to be paid his salary is enforced.

[38] In argument Mr Serogole pressed for costs. Both parties sought costs in their respective heads of argument.

[39] The Court initially considered that costs may not be appropriate as the dispute emerged from arbitration and review proceedings, and that there was an ongoing employment relationship between the parties, all of which mitigate against an order of costs.

[40] What is apparent from this Judgment is that the Respondent has raised defences which are without merit and which simply appear to have been raised to frustrate the payment of what was due to the Applicant.

[41] Equity and fairness cannot be interpreted to mean that a litigant must forego a large portion of their claim to legal fees as a matter of course.

[42] In exercising the discretion to award costs, the Court accepts that the parties engaged in *bona fide* but ultimately unsuccessful attempts to resolve the matter. The dispute in respect of that aspect of the matter before the Court was *bona fide* and not frivolous.

[43] As such an appropriate order in respect of costs would be to award the Applicant 50% of the costs on the party and party scale.

[44] Accordingly, the following order is made:

Order

1. The Respondent is ordered to pay an amount of R931 997-80 (nine hundred and thirty one thousand nine hundred and ninety seven rands and eight cents) made up of R736 000.00 (seven hundred and thirty six rands) to the Applicant being outstanding remuneration owed to the Applicant and a further amount of R195 997-80 (one hundred and ninety five thousand nine hundred and ninety seven rands and eighty cents) in respect of interest;
2. Interest on the above amount from the date of this Order to the date of payment in terms of the Prescribed Rate of Interest Act No 55 of 1975;
3. The Respondent is to pay 50% of the costs of the Applicant including the cost of one counsel.

M. Lennox
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv Serogole
Instructed by :	Mashifane Moswane Attorneys
For the Respondent:	Adv Diamond
Instructed by :	Jansen van Vuuren Attorneys