IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

REPORTABLE
OF INTEREST TO OTHER JUDGES

CASE NUMBER: J739/04

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SA obo 59 MEMBERS ***Applicant***

and

NATIONAL HEALTH LABORATORY SERVICE ***Respondent***

JUDGMENT

KENNEDY AJ :

1] 1The applicant seeks an order in terms of s 158(1)(c) of the Labour Relations Act1 (" *the LRA*") to make a settlement agreement an order

1 Act 66 of 1995

of court.

2] The 59 employees who are represented in these proceedings by their union, the Public Servants Association of SA ("PSA"), are or were employed in the medical laboratories serving the needs of the GaRankuwa Hospital. Originally they were employed by the Gauteng Department of Health. With effect from 1 April 2002, all of the employees working in the GaRankuwa Hospital laboratories were transferred from the provincial department to the respondent, the National Health Laboratory Service ("NHLS"). The NHLS is an organ of state established in terms of the National Health Laboratory Service Act.[2] It provides *inter alia* medical laboratory services such as those performed at the GaRankuwa Hospital to various other state hospitals.

3] The transfer of the relevant employees from the employ of the Gauteng Department of Health to the NHLS took effect from 1 April 2002 and occurred in terms of s 197 of the LRA. This was because the health laboratory operations previously falling under the Gauteng Department of Health were transferred as a going concern to the NHLS. This transfer had the consequence that, in terms of s 197 of the LRA, the relevant employees could look to their new employer, the NHLS, for the satisfaction of all claims and liabilities which had

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2 Act 37 of 2000

accrued and were owing to those employees by their previous employer, the provincial department. This included any liability for overtime payments that may have been owing to them by the Gauteng Department of Health prior to the transfer.

4] The laboratories in which the relevant employees worked were required - due to the nature of the services that had to be performed for the hospital - to operate on a 24 hour per day basis. For some time, this was achieved by means of employees working overtime. The employer - at that stage the Gauteng Department of Health - was anxious to change this system to one in which employees would work differing shifts, to avoid or minimise the need for overtime work and the payment of overtime rates associated with it. Some progress was achieved in the negotiations between the relevant parties with a view to achieving a change over to a shift system, but consensus could not be reached on all outstanding issues. There was a dispute about the implementation of the new system. Employees were not willing to commence working in terms of the new shift arrangements that had been proposed and continued to work in accordance with the old system, which involved at times working on what they regarded as an "*overtime*" basis.

5] The parties were at loggerheads not only in relation to whether the shift system should be worked, but also in relation to whether

employees should be paid at overtime rates while they continued to work under the old system.

6] Ultimately, the PSA declared a dispute during 23 August 2001 with the Public Health and Welfare Sector Bargaining Council, describing their dispute as a refusal to bargain. This was followed by a number of meetings which did not yield agreement. The affected employees felt aggrieved by the failure by the Gauteng Department of Health to pay their claims for overtime during the year prior to 31 March 2002. As noted previously, they were transferred from 1 April 2002 to the service of the NHLS. It accordingly had to deal with their grievances and claims relating to overtime after it took over as their employer.

7] A dispute was declared on their behalf and referred to the CCMA. A conciliation meeting, facilitated by a commissioner of the CCMA, took place on 22 May 2003. It resulted in a settlement agreement being reached, signed on behalf of the PSA and its members and an official of the NHLS. The settlement agreement read as follows:

"***SETTLEMENT AGREEMENT***

WHEREAS the Applicant [PSA] *has filed a dispute with the CCMA against the Respondent* [NHLS] *for failure to pay benefits*

AND WHEREAS the Respondent has intimated that they are in a process of

auditing and validating the said claims before such claims if validated shall be paid

NOW THEREFORE the Applicant and Respondent agree as follows:

1 *The Respondent is hereby given until close of business on the 7th day of July 2003 to validate the said claims.*

2 *The Applicant undertakes to forward the said claims to the offices of Dr S Ndlangisa (Employee Relations Manager) by not later than close of business on Friday, 23 May 2003.*

3 *The Respondent hereby agrees and undertakes to advise the Applicant of those claims that had been validated and furnish detailed reasons for the claims that were not validated.*

4 *The Respondent hereby agrees and undertakes to ensure that payment of validated claims will be effected by no later than close of business on Friday, 29 August 2003.*

5 *If payment is not made by close of business by Friday, 29 August 2003, the Applicant will give the Respondent seven days notice to secure payment, failing which the*

parties hereto agree to the Applicant instituting civil action to recover the outstanding benefits.

6 *The representatives present here confirm that they are in law competent to bind their respective organisations and by so signing the Applicant and the Respondent are bound by this agreement.*"

8] It is this settlement agreement that the applicant seeks in the present proceedings to have made an order of court.

9] It is common cause that no payments were made for overtime during the relevant period (the year ending 31 March 2002). A letter from the Employee Relations Manager of NHLS dated 23 September 2003 states that:

"*Pursuant to the CCMA agreement dated 22 May 2003, the NHLS wishes to advise that due to lack of prior authorisation of the overtime these claims can unfortunately not be paid.*

Your demonstrated patience is appreciated."

10] The answering affidavit filed on behalf of the NHLS is to the effect that overtime payments could only be paid if they were verified as having been approved by the relevant authority within the previous

employer (the Gauteng Department of Health). The NHLS contends that it was established, after investigation, that no such authorisation had been approved by the Gauteng departmental officials. Accordingly no claims for overtime were verified as being valid and payable pursuant to the settlement agreement.

11] The applicant, on the other hand, contends that verification as contemplated in the settlement agreement was, according to the common intention of the parties to that settlement, aimed at determining whether in a particular claim for overtime, the overtime work was in fact done. It is contended that it was never the intention of the parties that there would be a wholesale rejection of all claims for overtime on the basis of a lack of authorisation.

12] It is not necessary for purposes of this application to determine that question, for the relief sought is merely that the settlement agreement - whatever its contents and legal effect may be - should be made an order of court.

13] Nor does the applicant seek relief aimed at determining the dispute between the parties as to whether or not the settlement agreement has been honoured. On the version of the NHLS, it has fulfilled its obligations under the settlement agreement by undertaking an exercise to verify the various overtime claims and it was concluded

that none of those claims was valid and payable.

14] The NHLS contends further that if the PSA and its members believe that the NHLS is in default under the settlement agreement, the PSA and its members have a remedy available to them as contemplated in clause 5 of the settlement agreement in that they are entitled to institute "*civil action to recover the outstanding benefits*".

15] It is common cause that - apart from the present proceedings - no civil action has been instituted. The PSA contends that the present application is a form of civil action aimed at recovering the outstanding overtime benefits alleged to be payable. But the relief claimed in the notice of motion does not contain any prayer claiming payment of particular amounts to particular individual employees. All that the notice of motion seeks is an order making the settlement agreement an order of court. The settlement agreement is not an agreement sounding in money but requires :

- a verification exercise by the NHLS;

- payment by the NHLS by the specified date of amounts payable in respect of those claims which it verifies as being valid; and

- civil action to be instituted by the PSA or its members in the event of failure by the NHLS to pay amounts found to be payable at the conclusion of the verification exercise.

16] Ordinarily this court is inclined to grant orders which make settlement agreements orders of court under s 158(1)(c) of the LRA - and frequently does so. That normally arises in the situation where a settlement agreement specifically provides for payment of quantified sums. Once the settlement agreement is made an order of court, the order can be executed by the Sheriff by attaching assets to realise and satisfy the money claim which the court order aims to enforce.

17] In this matter however, there is no sum quantified by the settlement agreement, nor does it determine whether and what amounts would be payable at the conclusion of the verification exercise. It is left to the NHLS, in its verification exercise, to determine which claims are payable. It is only in the event of such a positive determination that amounts must then be paid by the NHLS by the specified date. If those amounts are not paid, the next step is for the PSA or its members to institute civil action to enforce payment.

18] The settlement agreement is silent on the possibility that has materialised in the present matter, being that the NHLS, in its

verification exercise, determines that no claim whatsoever is valid and no payments at all are payable. In my opinion, the effect of the settlement agreement is that in such event, the PSA and its members have to pursue remedies other than having the settlement agreement made an order of court. For making the settlement agreement an order of court does not achieve an order which translates the claim into a money amount which is capable of being executed. They are left still with the dilemma that there has to be litigation - distinct from a mere application for making the settlement agreement an order of court - to determine the true liability, if any, of the NHLS. That further litigation no doubt would have to determine whether the NHLS was legally justified in determining, in its verification exercise, that no claims were authorised or payable. If the applicants were successful in showing that the NHLS was not justified in that regard, they would also have to satisfy a court that individual claims are valid and that they are properly quantified.

19] It was common cause during argument that the court is not compelled to grant an order making a settlement agreement an order of court. This stance was rightly adopted, for s 158 (1)(c) of the LRA is couched in discretionary rather than peremptory terms.

20] There is in my view merit in the submission advanced during argument on behalf of the NHLS by its counsel, Mr *Ram*, that in the exercise of the court's discretion, an application to make a settlement

agreement an order of court should be declined where "*it would not serve any purpose, inter alia, it cannot cut out the necessity for instituting action, neither can it be enforced nor can it proceed direct to execution".*[3]

21] For the reasons given earlier, such an order in the present matter would not be capable of being executed. It simply leaves hanging in the air the question in dispute between the parties, namely whether the NHLS was justified in declining all overtime claims. Even if it is assumed - without deciding - that the PSA is right in its contentions, the NHLS cannot comply with the time periods specified in the settlement agreement - for the various deadlines have long since passed. In any event, it would still be incumbent upon the PSA and its members to bring civil action for the amounts claimed - in addition to the limited relief claimed in these proceedings. Even if the latter relief is granted, such civil action would still have to be instituted, for that is what clause 5 of the settlement agreement envisages and requires.

22] If this court were to grant an order making the settlement agreement a court order, the PSA and its members could not realistically challenge the NHLS by way of contempt proceedings, in circumstances where :

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3 In this regard Mr Ram relied on *Mansell v Mansell* 1953 (3) SA 716 (N) at 721 D

- there is a *bona fide* dispute between the parties as to whether the NHLS has complied with or is in breach of the settlement agreement;

- it would be difficult if not impossible to establish that the NHLS is in wilful contempt of the court order; and

- the PSA and its members would in any event still have to bring civil action in terms of clause 5 of the settlement agreement - making that agreement an order of court would not detract from this obligation.

23] I therefore conclude that making the settlement agreement an order of court would serve no practical purpose. On the contrary, it would inevitably lead to further litigation and therefore brings the parties no closer to a final resolution of the real issues. If there is merit in the claim of the PSA and its members, they must seek those remedies pursuant to clause 5 of the settlement agreement, and that requires that civil action be instituted for the claims. That action can and should test the correctness of the stance adopted by the NHLS in concluding, in its validation exercise, that no claims were valid and no amount is payable. My remarks in this regard must however be seen in the context of the discussion above, and should not be regarded as expressing any view as to the merits or prospects of the

PSA and its members (or, for that matter, the NHLS) in that regard.

24] In conclusion, it is appropriate to comment on certain preliminary matters that arose, as well as costs.

25] Both the answering affidavit and the replying affidavit were filed late. In my view the delays were adequately explained and were accordingly condoned. The other preliminary objection raised by the NHLS sought the striking out of various paragraphs in the replying and condonation affidavits filed on behalf of the PSA. While I have some doubt as to the basis of the objection, it is not necessary to make any decision in that regard for the conclusions which I have reached on the merits do not turn on any of the paragraphs in the affidavits which are sought to be struck out.

26] The final issue for consideration relates to costs. In my view, and in the exercise of the court's discretion, it would not be in the interests of justice for costs to follow the result. There is an ongoing relationship between the parties and there will almost certainly be further litigation in this matter (although this has as yet not been instituted and it is therefore not appropriate to make the costs of this application costs in the cause of any subsequent litigation). I consider it appropriate in the circumstances that there should be no order as to costs.

27] In the result, I make the following order:

(a) Condonation is granted for the late filing of the answering affidavit and the replying affidavit;

(b) The application is dismissed;

(c) There is no order as to costs.

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KENNEDY AJ
ACTING

JUDGE OF THE

LABOUR

COURT

APPLICANT'S COUNSEL: ADV F J VAN DER

MERWE

RESPONDENT'S COUNSEL: ***ADV R RAM - INSTRUCTED BY HOFMEYR HERBSTEIN AND GILHWALA INC***

Date of hearing: 9 November 2005

Date of Judgment: 21 December 2006