IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J2023/08

In the matter between:

S A TSOTETSI APPLICANT

AND

STALLION SECURITY (PTY) LTD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application for leave to appeal against the order which this Court issued on 21st October 2008. In terms of that order this Court set aside the writ of execution dated 20th February 2008. The Court further made the settlement agreement signed by the parties an order of Court.

[2] The applicant has also applied for condonation for the late filing of his leave to appeal which was 17 (seventeen) days late. The first respondent did not oppose the condonation application. The condonation application for the late filing of the application for leave to appeal is granted regard being had to the period of the lateness and the fact that it was not oppose.

[3] On the 13th August 2009 I granted the applicant leave to appeal to the Labour Appeal Court.

Background facts

[4] At the time of his dismissal on 29th June 2006 the applicant (the employee), had been in the employ of the first respondent for about 8 (eight) months. The employee was dismissed for gross negligence. Following his dismissal the employee referred a dispute concerning an alleged unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (the CCMA).

[5] The arbitrator found the dismissal of the employee to have been both procedurally and substantively unfair and ordered reinstatement with compensation in the amount of R12 000.00. The first respondent then instituted the review application against the arbitration award.

[6] It would appear in response to the review application the employee instituted contempt of Court proceedings against the first respondent. The employee had also filed an application with the CCMA in terms of section 143 of the Labour Relations Act 66 of 1995 (the LRA).

[7] Following the contempt of Court application the first respondent forwarded to the employee a settlement offer in the amount of R8000,00 which he accepted. Upon the acceptance of the offer the first respondent issued a cheque in that amount in compliance with the settlement agreement.

[8] However, despite the acceptance of the offer and signing for the receipt of the cheque of the settlement amount, the employee proceeded by default to have the award made an order of Court. Thereafter, the employee proceeded to have a writ of execution issued to enforce the Court order.

[9] Paragraph 3 of the settlement agreement provides that the settlement agreement is in full and final settlement of all claims that the parties may have against each other. It is further stated in paragraph 4 that the employee forfeits the right to proceeds with any legal action and has accepted the settlement in full and final settlement of all claims he may have against the first respondent.

[10] The application to have the writ of execution set aside came before the Court on the 14 October 2008 and the matter was postponed to 21 October 2008. In terms of the order granting the postponement the employee was ordered to file his opposing papers by the 17 October 2008.

[11] The employee failed to comply with the Court order of the 17 October 2008 in that he failed to file his opposing papers by the date set in the order. In this respect he also failed to show that he had served his opposing papers on the first respondent. He indicated during argument that he had handed his opposing papers to the respondent before Court on the morning of the 21 October 2008.

[12] It was for the above reasons that this Court set aside the writ of execution issue on the 20 February 2008 aside and made the settlement agreement an order of Court.

[13] The applicant's ground for leave to appeal are based on the contention that the Court erred in making the settlement agreement an order of Court when in fact the settlement amount was for payment of statutory amounts due to him being for, leave pay, provident fund and return of uniform. The employee further contended that Court erred in implying that "*by issuing the settlement agreement the applicant was signing what was due to give (sic) by arbitration away"* and

that he could not have "*signed the settlement agreement for R8000. 00 in favour of losing R12000, 00 stated in the arbitration award.*"

[14] It is trite that the test in considering leave to appeal is whether or not there is a reasonable prospect that another Court may come to a different conclusion to that of the Labour Court. In the present instance, I am of the view that there are reasonable prospects that the Labour Appeal Court is likely to arrive at a different conclusion to the one reached by myself.

[15] In exercising my discretion of making the settlement agreement an order of Court, I overlooked the interpretation of the law as concerning which agreement can be made an order of the Court.

[16] 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. 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. Section 142A (1) reads as follows:

> *"(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."

Subsection 2 which defines settlement agreements reads as follows:

"(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) and 75 (7)."

[17] In the case of *Tumelo Stephen Molaba v Emfuleni Local Municipality and Others unreported case number J1438/07,* 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. See, for example, SAMWU v Weclogo [2000]10 BALR 1160 (CCMA)."

[18] 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 discrimination dispute before it is referred to conciliation, such an agreement could be made an order of Court. Similarly, in the case of an arbitrable 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.

[19] In the present instance, at the time the agreement was concluded there existed no dispute between the parties. The dispute that had existed between the parties had already been resolved by way of the arbitration award that had been issued under case number GAJB 15127-06.

[20] It was for the above reason that I made an order granting leave to appeal against the order making the agreement an order of Court.

Molahlehi J

Date of Hearing : 13th August 2009

Date of Judgment : 28th August 2009

Appearances

For the Applicant : Mr S A Tsotetsi (in person)

For the Respondent: Mr B Netshisumbewa (IR for the company)