

SOUTH AFRICA / JUDGMENT

Balsdon v Valley Macadamias Group (Pty) Ltd (J 2258/2019) [2021] ZALCJHB 65 (28 May 2021) [2021] ZALCJHB 65

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J 2258/2019

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The Labour Court of
South Africa
(Held at Johannesburg)
Not
reportable
Case
No: J 2258/2019

In the matter between:

BRETT
BALSDON
Applicant
and
VALLEY
MACADAMIAS GROUP (PTY LTD)
First
Respondent
Hearing: 27 May 2021
Date
of judgment: 28 May 2021. Judgment delivered by email.

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks to have a settlement agreement concluded between the parties made an order of court in terms of section 158 (1) (c) of the Labour Relations Act, 1995.
- [2] The material facts are not in dispute. The applicant was employed by the respondent on 7 January 2019. During June 2019, the applicant was placed on suspension, pending a disciplinary hearing on charges of insubordination and a breach of good faith. On 1 July 2019, the applicant wrote to the respondent's managing director. He stated that after having thought about the matter, 'I think it would be best for all concerned if agreement is reached on my leaving the company.' He proposed that he be paid an amount equivalent to 4 month's remuneration with full benefits and that he be released from his restraint undertakings. Further, the applicant requested that the termination of his employment be reflected as a retrenchment.
- [3] On 2 July 2019 the applicant and the respondent entered into what is termed a mutual separation and settlement agreement. The agreement records the parties' agreement that the applicant's employment would terminate with effect from 30 June 2019 by way of retrenchment, due to the operational requirements of the respondent. The agreement further records that the parties entered into the agreement of their own devices and without any form of undue influence to race. The parties agreed further that the applicant would receive a severance package of R 460 000, being the equivalent of four months' gross remuneration, subject to deductions for tax, to be paid in three equal instalments the first to be paid on the last day of July 2019 and the balance of the last day of each successive month. Clauses 5 and 6 of the settlement agreement record certain confidentiality and restraint undertakings by the applicant, including an undertaking not to solicit competing business from a customer or supplier of the respondent, and not to solicit encourage or call other employees of the respondent from terminating their employment with the respondent. The restraints were tender for a period of 24 months, and applied throughout the Republic of South Africa.
- [4] Subsequent to the conclusion of the settlement agreement, a dispute has arisen between the parties concerning what the respondent alleges to be a breach of the applicant's restraint undertakings. The respondent refers that information came to its attention during July 2019 that the applicant had commenced employment with Green Farm Nut Co, one of its competitor processing plants. The informant is said to have disclosed to the respondent that the applicant had stated that the processing facility at Green Farm Nut was superior to that operated by the respondent, thus implying that the client should

purchase processed nuts from Green and not the respondent. On the same day, the respondent was scheduled to receive deliveries from two growers. The deliveries did not arrive and when the grazing question were contacted, they advised that they would be selling the nut crops to green and not to the respondent. What followed was an exchange of correspondence between the parties' respective attorneys. On 26 July 2019, the respondent's attorneys addressed a letter to Greens drawing attention to the restraint undertakings given in its favour by the applicant. On 30 July 2019, Green's attorney (who is also the applicant's attorney of record in these proceedings) replied confirming that the applicant had commenced employment with Green but denying that he had any responsibility for or involvement with procurement and recording that growers were free to approach any processor they choose. On the same date, a similar response was addressed to the respondent on behalf of the applicant. The respondent avers that in total, five growers with whom it had commercial relationships and relied on to obtain its quota of nuts have been lost to Green. The respondent has computed its damages in the sum of some R 2.6 million and has instituted proceedings against the applicant to recover this amount. The respondent has filed a statement of case in which it claims the above amount. I was advised in the course of the hearing that a statement of response had been filed, but that neither party had convened a pre-trial conference within 10 days of the delivery of the response is required by Rule 6 (4).

[5] The respondent submits that in the circumstances, given that payment of the settlement amount was reciprocal to the applicant's obligations in terms of clauses 5 and 6 of the settlement agreement, that it is not obliged to make payment of the settlement amount to the applicant.

[6] The applicant brings these proceedings to have the settlement agreement made an order of court in terms of section 158 (1) (c). That section reads as follows:

(1) The Labour Court may-

(c) make any arbitration award or any settlement agreement an order of the court.

Section 158 (1) (c) is qualified by section 158 (1A) which states:

For the purposes of subsection (1) (c), 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 only entitled to refer to arbitration in terms of section 22 (4), 74 (4) or 75 (7).

[7] In *Maryka Greef v Consol Glass (Pty) Ltd* (2013) 34 ILJ 2835 (LAC), the Labour Appeal Court held that the correct approach to be followed when considering applications such as the present is this:

...A settlement agreement that may be made an order of court by the Labour Court in terms of s 158 (1) (c) must (i) be in writing, (ii) be in settlement of a dispute (i.e. it must have as its genesis a dispute); (iii) of the dispute must be one that the party has the right to refer to arbitration, or to the Labour Court for adjudication, in terms of the LRA; and (iv) the dispute must not be of the kind that a party is only entitled to refer to arbitration in terms of s 22 (4) or s 74 (4) or s 75 (7). Those kinds of disputes are excluded...

[8] This approach was more recently affirmed by the Labour appeal Court in *Fleet Africa (Pty) Ltd v Nijs* (2017) 38 ILJ 1059 (LAC). In that matter, on the facts, the court found that the settlement agreement concerned was the product of a long and

protracted consultation and negotiation between the parties, aimed at fulfilling the objectives set out in section 189 of the LRA. In particular, they had been a long outstanding dispute between the parties regarding the terms of the retrenchment. The appellant's submission that the settlement agreement did not arise from any dispute between the parties and came about only from a desire on the part of the respondent to take a voluntary retrenchment package, was rejected.

[9] The present instance, the agreement says no more than that the parties have agreed to terminate the relationship between them. The agreement says nothing about any dispute between the parties. A mutually agreed termination of employment is not a dismissal. Consequently, the agreement between the parties could not conceivably relate to any unfair dismissal claim that might be arbitrated or adjudicated in terms of the LRA. In particular, the papers reveal no dispute between the parties at the time the settlement agreement was concluded, certainly not any dispute that the applicant had the right

to refer to arbitration or to this court in terms of the LRA. The fact of the matter is that it was the applicant that made a proposal

that he be paid a sum of money in the face of a request that he attend a disciplinary enquiry. The only dispute, to the extent that there may have been one, was that the applicant denied that he was guilty of the allegations levelled against him in the notice to attend a disciplinary enquiry. However, on account of the settlement, the matter went no further. There was no disciplinary hearing, and the applicant was not dismissed. On the applicant's own version, even in reply, he makes no averment that any conduct on the respondent's part in regard either to his suspension or any other conduct by the respondent was unfair, or would otherwise have entitled him to invoke any provisions in the LRA. The applicant's speculative assertion that there was no doubt in his mind that the outcome of the disciplinary hearing would have afforded either party the right to refer the matter to arbitration or this court is not an answer to the question that must be answered in the affirmative in order for section 158 (1A) to be applicable, i.e. whether at the time the settlement agreement was concluded, there was a dispute that either party had the right to refer to arbitration or to this court. To the extent that the applicant submits in the heads of argument filed on his behalf that the settlement agreement was concluded in order to avoid a protracted disciplinary enquiry, this is not the case made in the founding or even replying affidavit. Similarly, it is not enough, as was submitted in argument, that the applicant denies that

he was guilty of the misconduct alleged. An allegation of misconduct and a denial of that allegation by an employee does not constitute a dispute capable of referral to arbitration or to this court. Consequently, in my view, the applicant has not made out the basis on affidavit that the dispute between them satisfies the third requirement identified in Greef. It follows that the court is not empowered to make the settlement agreement an order of court.

- [10] Even if I am wrong in coming to this conclusion, what is significant about the wording of section 158 (1) (c) is that it does not oblige this court to make any settlement agreement an order of court. In other words, even if the agreement satisfies the criteria set out in the subsection, the court retains a discretion to determine whether to make the agreement an order of court. In other words, there may well be facts or circumstances that militate against making a settlement agreement an order of court.
- [11] In *SA Post Office Ltd v Communication Workers Union* on behalf of Permanent Part-time Employees (2014) 35 ILJ 455 (LAC), the Labour Appeal Court held that the purpose of making a settlement agreement an order of court is to enforce compliance with the agreement. The agreement must therefore be unambiguous and unequivocal and not open to any dispute. The overriding principle is that each case must be decided on its own facts, so as to satisfy the demands of the law and fairness. I do not understand the court to mean, when it sees that the purpose of an order in terms of section 158 (1) (c) is enforcement, that the court must grant orders for the sake of enforcement. This is particularly so when the terms of the settlement agreement contested or is in the present case, there is an underlying dispute that materially affects the terms of the settlement. To grant an order of enforcement in these circumstances is simply to generate further litigation, since the inevitable response of the successful applicant will be to file an application to hold the respondent in contempt. Given the threshold to be met to hold a party in contempt of court, it is unlikely that a mala fide intention to refuse to comply with the order will be discerned where the dispute between the parties concerning the settlement agreement is a genuine dispute about its terms or is in this case, what would appear to be a cancellation of the agreement on account of an alleged material breach.
- [12] In the present instance, it is not disputed that hot on the heels of the applicant's departure from the respondent, five growers of nuts have been lost to Green, the two growers of nuts did not deliver the crops in circumstances where they advised the respondent that they intended to sell their crops to Green instead of the respondent. As I have indicated, an action remains pending in this court in which the court will necessarily have to determine whether the applicant acted in breach of the settlement agreement, and the consequences of any breach found to exist. Given the rule to be applied in motion proceedings, I must necessarily, for present purposes, accept the respondent's version and accept too that the claim it has instituted is genuine and not merely a ruse to avoid paying the applicant his due.

- [13] Finally, the refusal to make the settlement agreement an order of court does not leave the applicant without a remedy. He remains at liberty to institute proceedings against the respondent in a civil court to enforce the terms of the settlement agreement.
- [14] In so far as costs are concerned, this court ordinarily applies the convention that individual employees who approach this court misguidedly but in good faith to address legitimately felt grievances, ought not to be ordered to pay the costs of proceedings. While I accept that the applicant, prior to the filing of the present application, was fully aware from the correspondence exchanged between the respective attorneys of the respondent's attitude and was able to anticipate precisely what the defence to the application would be, I will afford the applicant the benefit of the doubt and apply the general rule.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv E Sithole, instructed by WDT Attorneys

For the respondent: Adv L Hollander, instructed by Faber Goetz Attorneys

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