

SOUTH AFRICA / JUDGMENT

# Mabaso v Discovery Life (J1155/20)

## [2024] ZALCJHB 280; (2024) 45 ILJ 2751 (LC) (2 August 2024)

[2024] ZALCJHB 280

## COURT

Labour Court Johannesburg

## BEFORE

Prinsloo

## CASE / FILE NUMBER

J1155/20

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## THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1155/20

## In the matter between:

AARON  
MABASO Applicant  
and  
DISCOVERY  
LIFE Respondent

## Heard:

30 July 2024

## Delivered:

2 August 2024

This

judgment was handed down electronically by consent of the parties by circulation to them via email. The date for hand-down is deemed to be 2 August 2024.

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**JUDGMENT**

PRINSLOO, J

**Introduction**

[1] The Applicant seeks an order to make a separation agreement (agreement) signed on 20 April 2020 an order of Court. The Respondent opposed the application.

**Background facts**

[2] The background facts to this matter are briefly as follows: the Applicant was employed by the Respondent in October 2009 as an administrator

and in 2014 he became a team leader. The Respondent initiated a retrenchment process, as contemplated in section 189 of the Labour

Relations Act[1] (the LRA) and the Applicant was among the potentially affected employees. The potentially affected employees were afforded an opportunity to accept voluntary separation packages (VSP).

[3] On 30 March 2020, the Applicant was given a VSP agreement, but he did not sign the agreement at the time. The agreement provided for an ex gratia and other payments to be made to the Applicant and it contained a full and final settlement clause.

[4] On 20 April 2020, the Applicant signed the agreement. This is the same day he admitted that he committed a significant and elaborate fraud against the Respondent and that he had stolen GBP 500 000 from the Respondent.

[5] In terms of the agreement, the Respondent was to pay specific amounts to the Applicant and when payment was not made in accordance with the agreement, the Applicant approached this Court on 20 October 2020 for an order to make the agreement an order of Court.

[6] The application is opposed and in the opposing papers, the Respondent provided a background to this application and submitted that the application is fundamentally defective and ill-conceived mainly because the agreement is not a settlement agreement as contemplated in section 158(1)(c) read with section 158(1A) of the LRA and because the validity and enforceability of the agreement is disputed. It is evident that the Respondent's defence to the Applicant's application is inter alia that he failed to disclose material facts at the time when the agreement was entered into, which facts, if they were known at the time, would have caused the Respondent not to enter into the agreement. The Respondent entered into the agreement after it was induced to do so by a material misrepresentation and it subsequently elected to resile from the agreement, which was therefore rendered non-existent, invalid and unenforceable.

**Applicable legal principles and analysis**

- [7] Section 158(1)(c) of the LRA empowers the Court to make any arbitration award or settlement agreement an order of the court. This section must be read with section 158(1A), which defines the settlement agreement for purposes of section 158(1)(c) as a written agreement in settlement of a dispute that the party has the right to refer to arbitration or the Labour Court.
- [8] Section 191(1) and (5) of the LRA provide that a dispute about an unfair labour practice or the fairness of a dismissal relating to the employee's conduct or capacity may be referred to the CCMA or bargaining council for arbitration and disputes where the reason for dismissal relates to an automatically unfair dismissal, operational requirements, participation in unprotected strike action or specified issues regarding trade union membership may be referred to the Labour Court.
- [9] In *Fleet Africa (Pty) Ltd v Nijs*[2], the Labour Appeal Court (LAC) relied on the earlier LAC decision in *Greeff v Consol Glass (Pty) Ltd*[3] (Greeff) and reiterated that section 158(1)(c) must be read with and subject to section 158(1A). Properly interpreted, the Labour Court may make any arbitration award an order

of court and may only make settlement agreements which comply with the criteria stated in section 158(1A) orders of court.

- [10] In *Greeff*[4], the LAC held that:

[19] It is thus clear from a reading of s 158(1A) that s 158(1)(c) must be read with and subject to s 158(1A). Even though s 158(1)(c) refers to 'any settlement agreement' this cannot be taken to mean, literally, 'any' settlement agreement. Section 158(1A) describes what settlement agreements are being referred to in s 158(1)(c). So properly interpreted, in terms of s 158(1)(c), read with s 158(1A), the Labour Court may make any arbitration award an order of court and may only make settlement agreements, which comply with the criteria stated in s 158(1A), orders of court. 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 (ie it must have as its genesis a dispute); (iii) the dispute must be one that the party has a 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 s75(7). Those kinds of dispute [sic] are excluded.

- [20] It is noteworthy that s 158(1)(c) does not provide that the Labour Court is obliged to make a settlement agreement an order of court. So that even if a settlement agreement complies with the criteria stated in s 158(1A), the court may, nevertheless, in the exercise of its overarching discretion decide not to make it an order of court. Section 158(1)(c) provides that the Labour Court 'may' make it an order of court. This means that the Labour Court has a discretion in that regard, which it would have to exercise in a judicial manner, taking into account all the relevant facts and circumstances.

[21] Accordingly, in deciding whether to make a particular settlement agreement an order of court, it would first have to be established

whether the settlement agreement satisfies the criteria stated in s 158(1A). If it does not, then the court does not even have a discretion. It cannot make such an agreement an order of court. On the other hand, if the agreement does satisfy the criteria, the court, nevertheless, would have to consider all the relevant facts and circumstances and in the exercise of its discretion decide whether to make the agreement an order of court. There may be facts or circumstances that militate against making a settlement agreement, which otherwise meets all the criteria stated in s 158(1A), an order of court.’

[11] The obvious question that leaps out is whether the agreement signed on 20 April 2020 satisfies the criteria stated in section 158 (1A) of the LRA and should be made an order of court.

[12] As the LAC held in Greeff, the Labour Court may only make settlement agreements, which comply with the criteria stated in section 158(1A), orders of court.

[13] I will consider the criteria in turn. A settlement agreement that may be made an order of court must first be in writing. The Applicant presented a written document, signed by the parties as an agreement to be made an order of court.

[14] It must secondly be in settlement of a dispute, thus it must have as its genesis a dispute, and thirdly must it be one that the party has a right to refer to arbitration or to the Labour Court for adjudication in terms of the LRA.

[15] It is evident from the agreement that it is a voluntary separation agreement and that the Applicant’s services were terminated by way of a voluntary retrenchment. There is a clause recording that the agreement is made in full and final settlement of any claims, howsoever arising whether in contract, delict statute or any other source.

[16] I canvassed the aspect regarding the existence of a dispute with the Applicant during his argument in Court and he submitted that the dispute is the fact that the Respondent is not paying him in accordance with the terms of the agreement. However, that is not the kind of dispute contemplated in section 158(1A) of the LRA.

[17] The agreement of 20 April 2020 was not an agreement in settlement of a dispute that the Applicant has the right to refer to arbitration or to the Labour Court, as there was no dispute prior to the conclusion of the agreement.

[18] The voluntary termination of an employment contract by agreement does not constitute a dismissal unless a case is made out that the employee was forced to enter into the agreement, which is not the Applicant’s case. On the contrary, he seeks to enforce the voluntary separation agreement concluded. A termination of employment in circumstances where an employer and employee agreed

to terminate a contract of employment by mutual consent, does not constitute a dismissal as the contract terminated as a consequence of the parties' own agreement. In the absence of a dismissal or any other cause of action in terms of the LRA, there is not a dispute that the Applicant has the right to refer for arbitration or to this Court.

[19] Not every termination of an employment relationship gives rise to the right to refer a dispute for arbitration or adjudication by this Court as not every termination constitutes a dismissal.

[20] In casu, considering all the facts, I am not satisfied that the settlement agreement the Applicant seeks to make an order of Court complies with the criteria and the statutory requirements set out in section 158 (1A) of the LRA. As the settlement agreement does not satisfy the criteria stated in section 158(1A), this Court does not have a discretion and cannot make such an agreement an order of court. The application must fail.

[21] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of law and fairness. Mr Itzkin for the Respondent did not press for a cost order and in my view, the interests of justice will be best served by making no order as to costs.

[22] In the premises, I make the following order:

#### Order

1. The application is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

#### Appearances:

For the Applicant: In person

For the Respondent: Advocate R Itzkin

#### Instructed by:

Keith Sutcliffe and Associates Attorneys

[1] Act 66 of 1995, as amended.

[2] [2017] ZALAC 8; (2017) 38 ILJ 1059 (LAC).

[3] [2013] ZALAC 7; (2013) 34 ILJ 2835 (LAC).

[4] Ibid at para 19 – 21.

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Prepared on 11 October 2026 · Esheria