

SOUTH AFRICA / JUDGMENT

Naidoo v ICollege (Pty) Ltd (J 721 / 22) [2023] ZALCJHB 318; (2024) 45 ILJ 319 (LC) (26 October 2023)

[2023] ZALCJHB 318

COURT

Labour Court Johannesburg

BEFORE

S Snyman

CASE / FILE NUMBER

J 721 / 22

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FLYNOTES:

LABOUR – Settlement agreement – Order of court – Court empowered to make settlement agreement concluded outside ambit of CCMA an order of court – Must settle dispute where party had right to refer dispute to arbitration or adjudication – Meaning of “right to refer” – Settlement agreement in this case does not comply with such requirement – Material dispute between parties as to compliance with settlement agreement – Not appropriate to make current settlement agreement an order of court – Labour Relations Act 66 of 1995, s 158(1)(c).

THE
LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
Reportable
Case
no: J 721 / 22
In

the matter between:

LARUSHA
NAIDOO
Applicant
and
ICOLLEGE
(PTY) LTD
Respondent

Heard:	25 October 2023
Delivered:	26 October 2023 This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 26 October 2023.
Summary:	Settlement agreement – application to make settlement agreement an order of Court – s 158(1)(c) of LRA considered – Court is empowered to make settlement agreement concluded outside the ambit of the CCMA an order of Court – s 158(1)(c) must be read with s 158(1A) – requirements set out Settlement agreement – must settle dispute where party had right to refer dispute to arbitration / adjudication – meaning of ‘right to refer’ considered – settlement agreement does not comply with such requirement – current settlement agreement does not qualify to be made order of Court in terms of s 158(1)(c) Settlement agreement – even where requirements of s 158(1)(c) / 158(1A) satisfied – Court still has discretion to decide whether settlement agreement to be made order of Court – exercise of discretion considered – material dispute between parties as to compliance with settlement agreement – not appropriate to make current settlement agreement an order of Court S 158(1)(c) – not all requirements of section satisfied – no proper case made out by applicant for enforcement of settlement agreement – application dismissed

JUDGMENT

SNYMAN, AJ

Introduction

- [1] The applicant has brought an application in terms of section 158(1)(c) of the Labour Relations Act (LRA)[1], in terms of which the applicant seeks to make a settlement agreement concluded between the applicant and the respondent an order of Court. In section 158(1)(c), it is provided that: ‘The Labour Court may ... make any arbitration award

or any settlement agreement an order of the Court'. The applicant's application is opposed by the respondent who filed an answering affidavit. The applicant did not file a replying affidavit.

- [2] The matter came before me on 25 October 2023, and was argued by both parties. After hearing argument, I indicated to the parties that judgment will be handed down on 26 October 2023. I will now decide the matter on the basis as set out in this judgment, starting with the summarizing of the relevant background as it emerged from the

affidavits submitted by the parties.

The relevant background

- [3] The applicant has chosen to pursue this matter on the basis of motion proceedings, seeking final relief. As such, any factual dispute must be decided on the basis of the principles as set out in the well-known judgment of *Plascon Evans Paints v Van Riebeeck Paints*[2], and the facts as set out below are summarized based on these principles.
- [4] The applicant was an employee of the respondent. She was suspended by the respondent on 18 February 2020, pending disciplinary proceedings to be instituted against her for alleged misconduct. Also on 18 February 2020, the applicant was issued with a notice to attend a disciplinary hearing. The disciplinary hearing was scheduled for 27 February 2020, however that disciplinary hearing never took place as a result of the applicant's ill health. The hearing date was extended to 1 April 2020. But then, and before the disciplinary hearing could reconvene on 1 April 2020, the COVID-19 pandemic and the subsequent lockdown took place, scuppering that hearing date. Following the easing of lockdown restrictions, the applicant was informed on 11 May 2023 that the disciplinary hearing would take place on 14 May 2020.
- [5] Before any disciplinary hearing could even convene, the applicant approached the respondent with the view to rather negotiate an amicable termination of her employment. The parties then entered into settlement discussions.
- [6] A settlement agreement was concluded between the parties on 20 May 2020. In terms of clause 3 of this agreement, the applicant's employment with the respondent would terminate on 30 April 2020 based

on operational requirements. The agreement made no reference to any underlying dispute between the parties being settled. It was also agreed that the respondent would be entitled to fill her position, and she waived any rights she may have had pursuant to a termination of employment for operational requirements, to any re-employment. It was also agreed in clause 4 that the respondent would make four payments to the applicant in the sum of R54 166.00 each, classified as severance payments, subject to deduction of taxation in terms of a tax directive.

[7] The payment of the aforesaid amounts was subject to the fulfilment of specific conditions, as defined in clause 7 of the settlement agreement. The first condition was that the applicant returns all the company property and documents to the respondent, as described in the settlement agreement. The applicant was further required to assist with the providing of passwords to access the laptop computer the applicant had been using. In terms of clause 15.3, should the applicant breach any of the obligations under clause 7, the respondent would have no further obligation towards the applicant for making any payment under the settlement agreement.

[8] According to the respondent, the applicant has failed to comply with clause 7 of the settlement agreement. In particular, it was contended that the applicant wiped all the files on her laptop on to an external backup, to which the respondent was not provided access. It was also contended that she did not return a number of the critical

documents as identified in the settlement agreement. As a result, the respondent refused to make payment to the applicant by virtue of the provisions of clause 15.3 of the settlement agreement.

[9] The applicant has disputed that she has any of the documents referred to by the respondent in her possession. She indicated that everything of the respondent that she had, she had returned to the respondent.

She also stated that she actually explained to the respondent where some of the documents it was looking for could be found, and she had returned the laptop with its password. She pertinently stated that that she had complied in full with all her obligations in terms of clause 7 of the settlement agreement.

[10] It is patently apparent that there is a material factual dispute between the applicant and the respondent concerning whether she had indeed complied with clause 7 of the settlement agreement. Strictly speaking, and in terms of Plascon Evans, the respondent's version should prevail. However, and for the reasons set out in this judgment below, I do not deem it necessary to become embroiled in resolving this factual dispute, because resolving this factual is best suited to be determined at another time in the appropriate process.

[11] Suffice it say that the aforesaid dispute between the applicant and the respondent regarding compliance with clause 7 of the settlement agreement and non-payment to the applicant as a result led to the current application in terms of section 158(1)(c) brought by the applicant, which was brought by her with the view to enforce the payments obligations of the respondent towards her in terms of clause 4 the settlement agreement.

Analysis

[12] As touched on above, and in terms of section 158(1)(c) of the LRA, the Labour Court does have the power to make what is termed 'any settlement agreement' an order of Court. The purpose of exercising this power is to enable the applicant party to enforce such a settlement agreement, in instances where it has not been complied with.

[13] The LAC has had occasion to interpret the phrase 'any settlement agreement' in terms of section 158(1)(c). In *Greeff v Consol Glass (Pty) Ltd*[3], the Court dealt with a situation where the employer had initiated a section 189 consultation process which process was ongoing.[4] The employee in that case had indicated to the employer that she wished to accept the severance package proposed by the respondent and that she was agreeable to the termination of her services with the respondent. A settlement agreement was concluded in terms of which the employee then agreed to her termination of employment against an agreed severance package. The question was whether this settlement agreement could be made an order of Court in terms of section 158(1)(c). The LAC answered this question as follows:[5]

'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 s 75(7). Those kinds of dispute are excluded.

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 ...'

[14] The Court in *Greeff supra* went further,[6] determined what was meant by the phrase 'right to refer' as contemplated by section 158(1A)[7], and had the following to say in this regard:

'... It needs only to be established, for the purposes of compliance with that section, that the dispute is of a kind, if unresolved and once all the procedural requirements have been met, which may be referred to arbitration, or to the Labour Court for adjudication. It does not have to be established that there is a 'right of referral', in the strict sense of a legal right capable of immediate exercise ...'

[15] Applying the aforesaid principles to the facts of the case then before it, the Court in *Greeff* concluded:[8]

‘Turning to the facts of the present case. The letter of 8 October 2010 contains a written settlement agreement of the kind that is envisaged in s 158(1A), read with s 158(1)(c) of the LRA, and meets the stated criteria. It is not in issue that it was in settlement of a dispute relating to the appellant's retrenchment from her employment with the respondent. It is the kind of dispute that the appellant would have been entitled to refer to arbitration, or to the Labour Court if it was unresolved and once all the procedural steps had been taken. In my view, the only issue which ought to have detained the court a quo was whether it should, in the exercise of its discretion, make the settlement an order of court, given the facts and circumstances described in the papers ...’

[16] The reasoning adopted in Greeff was re-affirmed by the LAC in *Fleet Africa (Pty) Ltd v Nijs*[9], which case was once again concerned with a settlement agreement having been concluded between an employee and an employer in the

context of an ongoing section 189 consultation process, and was concluded on the basis of the employee having accepted a voluntary retrenchment package. The Court referred with approval to the reasoning in *Greeff supra*,[10] and concluded that:[11]

‘... The settlement agreement was the product of long and protracted consultation and negotiation between the appellant and the respondent, aimed at fulfilling the objections laid out in s 189. However, this process did not just pop up without there being any dispute between the parties which had not been resolved. There was a long-outstanding dispute between the parties in respect of which the appellant ultimately decided to engage a two-pronged strategy in desperately trying to resolve the dispute. It is common cause that the s 189 consultation process started at the time when there were arbitration appeal proceedings underway and which had reached a stage where the parties were only awaiting the issuance of an arbitration appeal award from the arbitrator. The s 189 consultation process and the arbitration appeal process had one common objective, namely, the attainment of a resolution of exactly the same dispute between the appellant and the respondent. This was the kind of dispute which either party was entitled to refer to the CCMA (or accredited council) for arbitration or to the Labour Court for adjudication, as the case may be, unless otherwise by agreement of settlement between the parties in terms of s 158(1)(c), read with s 158(1A) ...’

The Court ultimately concluded that the settlement agreement complied with all of the requirements of section 158(1)(c) read with section 158(1A) of the LRA, and was thus susceptible to being made an order of Court.[12]

[17] It is therefore clear from the judgments in both *Greeff* and *Nijs* that a settlement agreement concluded in a workplace, so to speak, and before there is any dispute referral to the CCMA or a bargaining

council (where all dispute resolution under the LRA starts), would nonetheless qualify to be made an order of Court under section 158(1)(c) provided the following requirements are met: (1) the settlement agreement must be concluded in writing; (2) the settlement agreement must finally dispose of or resolve the underlying issue in dispute between the parties;[13] and (3) the

underlying issue in dispute must be one where the party in the ordinary course would have had the right to refer that dispute to arbitration, or to the Labour Court for adjudication, subject to the exclusions specified in section 158(1A). The concept of right to refer must be broadly interpreted and would mean any case where there existed a dispute susceptible to being referred to the CCMA or bargaining council for conciliation, which is where all dispute resolution under the LRA starts, which would ultimately end up at arbitration or adjudication (depending on the nature of the issue in dispute) once all the procedural pre-requisites relating to conciliation proceedings have been satisfied. In simple terms, this means that was it not for the settlement agreement, this entire arbitration / adjudication process could have competently happened if the employee party elected to pursue it further.

[18] Despite the aforesaid, and also as contemplated by the judgments in Greeff and Nijs, this Court nonetheless retains a discretion whether or not to make the settlement agreement an order of Court, even if it qualifies to be made an order of Court. In short, qualification to be made an order of Court does not create an automatic entitlement on the part of the applicant party to such an order, and it always remains subject to the exercise of this Court's discretion. As to how this discretion is to be exercised, this would of course be a case by case determination based on the specific facts of the specific case, having due consideration to satisfying the demands of law and fairness.

[19] As a point of departure, it must always be considered that the very purpose of making a settlement agreement an order of Court is so that it can be enforced. That being so, considering examples of instances where it may be appropriate to exercise a discretion against making the settlement agreement an order of Court would be of assistance. One example would be where there exists a dispute concerning the validity, interpretation or application of the settlement agreement itself, and making the agreement an order of Court will not resolve this, and may well lead to further litigation.[14] Another example would be where it is clear that there exists a material factual dispute as to whether the settlement agreement has been complied with, which equally may just lead to further litigation if the settlement agreement is made an order of Court.[15] A third example would be if making the settlement agreement an order of Court serves no practical purpose.[16] A fourth example is where making the settlement agreement an order of Court would be contrary to or offend public policy / contra bones mores.[17] A final example is where there is an inordinate and undue delay in the bringing of the section 158(1)(c) application,[18] and this would include instances where the liability created by the settlement agreement has become prescribed. [19] As held in *SA Post Office Ltd v Communication Workers Union on behalf of Permanent Part-Time Employees*[20]:

'Section 158(1)(c) of the LRA provides that the Labour Court has the jurisdiction to make any settlement agreement, concluded in respect of a matter arising within the scope of the LRA, an order of court. This does not mean that the order is there for the taking. The Labour Court has a discretion to make it an order of court even if it otherwise meets the criteria provided in s 158(1A), read with s 158(1)(c) of the LRA. [7] Hence, where a settlement agreement provides for

an employer to pay an employee R5,000 by a particular date and the employer pays this amount on or before the due date the employee would be foolhardy to approach the Labour Court to make the settlement agreement an order of court, as no purpose would be served by doing so and the court would refuse to make it an order of court. By the same token, where the settlement agreement provides that the employer 'will re-employ a dismissed employee if he feels like doing so', and the employer does not re-employ the employee, the employee would be ill advised to approach the Labour Court and seek to make that agreement an order of court, because no purpose can be served by making such an agreement an order of court. It is an agreement that leaves the discretion to employ entirely within the discretion of the employer and he may employ 'if he feels like doing so'. He cannot be forced by a court's order to be in the mood to employ and there is no enforceable obligation to employ. The purpose of making a settlement agreement or an arbitration award an order of court is to enforce compliance with the agreement or the award. The agreement or the award must therefore be unambiguous and unequivocal and not open to any dispute. This does not mean that an award or agreement that provides for payment of salary or wages for a certain period is not clear and precise. The parties could know or easily ascertain by having regard to documentation like payslips or an independent accounting exercise what the amount is (although ideally the amount should be clearly set out to avoid unnecessary delays and expensive exercise to ascertain the exact amount due). What all this means is that before the Labour Court will grant an order sought in terms of s 158(1)(c) of the LRA it must be satisfied that, at the very least: (i) the agreement is one which meets the criteria set in s 158(1)(c) read with s 158(1A) of the LRA, and if it is an award, that it satisfies the criteria set in s 142A of the LRA; (ii) that the agreement or award is sufficiently clear to have enabled the defaulting party to know exactly what it is required to do in order to comply with the agreement or award; and (iii) there has not been compliance by the defaulting party with the terms of the agreement or the award.'

[20] It is perhaps prudent to mention another example of section 158(1)(c) applications brought by applicants in this Court where such applications are simply not appropriate. In these cases, the employee

has been reinstated, either in terms of a settlement agreement or an arbitration award. Even though the employee is indeed later

reinstated in terms of the arbitration award or settlement agreement, a dispute then arises concerning the so-called back pay an employee would be entitled to from the date of reinstatement as determined in the settlement agreement / arbitration award, and until the date when the employee is actually reinstated. The employee then brings an application in terms of section 158(1)(c) to make the settlement agreement / arbitration award an order of Court to obtain payment of such amount. This application is not competent, because the settlement agreement / arbitration award would have been complied with as a result of the reinstatement itself being made, and there is simply no point to make it an order of Court. The claim of payment of the so-called backpay in these instances would be a contract claim,[21] and not one arising from the settlement agreement, or its enforcement.

[21] So where does all these principles and considerations leave the application by the applicant in terms of section 158(1)(c) to enforce the settlement agreement in casu? First, it is a written document, signed by the parties. Second, it does finally resolve the issue the issue in dispute between the parties, which issue, in this case, is the continued employment relationship between the parties. One question remains, namely

whether the dispute is one that the applicant would have the right (entitlement) to refer to arbitration or adjudication. In my view, this question must however be answered in the negative, for the reasons to follow.

[22] First, it must be pointed out that the case in casu is distinguishable from the judgments in Greeff and Nijs, considering certain essential facts. In both Greeff and Nijs, there was a retrenchment process in terms of section 189 of the LRA that had been embarked upon by the employer, which process was ongoing. In the context of such process, the issue of voluntary retrenchment of the employee parties came up. In both instances, and following negotiation, voluntary retrenchment was agreed to. It is trite that voluntary retrenchment in such context is seen as an alternative to forced retrenchment pursuant to the process of retrenchment. It thus follows, on those facts, that was it not for the settlement agreements encompassing voluntary retrenchment, the employees would be entitled, if they were retrenched at the conclusion of the retrenchment process, to refer the dispute to conciliation and then ultimately adjudication. That is why, according to both these judgments, the third requirement to make the settlement agreement an order of Court was fulfilled.

[23] But the case in casu is different. Although the applicant had been suspended, no disciplinary hearing had ever been instituted at the time when the

settlement agreement was ultimately concluded. Or, in other words, a disciplinary hearing was yet to be convened. It was the applicant

that sought to avoid having to go through the disciplinary hearing, and approached the respondent with a proposal of an agreed

termination of employment, despite it not being a given that she would be found guilty of misconduct, let alone dismissed. It may be added that the disciplinary hearing, should it ultimately have convened, would have taken place before an independent third party chairperson. In short, the applicant did not want to participate in any process where she could be dismissed, and wanted to leave employment of her own accord and on agreed terms. The settlement agreement was concluded in that context. Viewed without all the peripherals, it is nothing else but an agreed resignation on terms satisfactory to the applicant.

[24] Would the applicant have the right / entitlement to refer such a dispute as contemplated by the settlement agreement to the CCMA for conciliation? I do not think so. What happened in this case was an agreed termination of employment and as such would not be a dismissal. In any circumstance where the applicant left employment of her own accord, she would not be

able to pursue a dispute to the CCMA, unless she relied on section 186(1)(e).[22] But there is no such case in this instance. The settlement agreement was not concluded as an alternative to a dismissal the applicant was facing in terms of a process being conducted under or by virtue of the LRA. The agreement itself simply records the employment of the applicant will terminate for operational requirements, which is clearly not the reality and is a design to extract maximum taxation relief in respect of the agreed settlement payment. The agreement does not make any reference to any underlying dispute between the parties which is settled by way of the agreement. It is also recorded in the agreement that it contains the entire memorandum of the settlement concluded between the parties, and supersedes any prior negotiations / processes. In my view, all these factors can only lead the conclusion that the third requirement for the settlement agreement to be made an order of Court was not satisfied, as it simply does not concern a dispute where the employee would have the right to refer that dispute to arbitration / adjudication.

[25] The judgment in *Balsdon v Valley Macadamias Group (Pty) Ltd*[23] is in point in this regard. Similar to the case in *casu*, the employee in that case was placed on suspension, pending a disciplinary hearing on misconduct charges. The employee decided to approach the employer's

managing director and proposed a mutually agreed termination of employment. The parties then concluded what was termed a mutual

separation and settlement agreement. In this agreement, it was recorded that the employee's employment would terminate with

effect from 30 June 2019 by way of retrenchment, due to the operational requirements of the employer, and that the employee would

be paid an agreed severance package equivalent of four months' gross remuneration, to be paid in three equal instalments. Just like the case in *casu*, the payment of these amounts was however subject to a condition, namely that the employee comply with restraint of trade undertakings

for a period of 24 months. A dispute then arose whether the employee was complying with these restraint undertakings, and payment under the agreement to the employee was stopped by the employer. Of importance, the Court had particular regard to the following, in deciding whether the settlement agreement concerned a dispute the employee had the right to refer to arbitration / adjudication:[24]

'... 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. ...'

[26] The Court in *Balsdon supra* also had specific regard to the dispute that had arisen after the settlement agreement has been concluded, namely whether the employee

had indeed breached the restraint undertakings and the employer was as a result entitled to stop payments to the employee. The Court referred to the judgment in *SA Post Office supra*, and reasoned as follows:[25]

'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. ...'

[27] The aforesaid reasoning in *Balsdon supra* indicates, in circumstances virtually identical to the case in *casu*, how the Court would exercise its overriding discretion to decline to make the settlement agreement an order of Court, even if all the requirements under section 158(1)(c) as read with section 158(1A) have been met. The current case, in my view, is no different. It is clear that there is a substantial and material dispute between the parties as to whether the applicant has complied with clause 7 of the settlement agreement. It is also clear that in terms of the settlement agreement itself, if she did not comply with this clause, the respondent is absolved from making any payment to her. Accordingly, and before it can be said that the respondent has failed to comply with the settlement agreement, it must first be determined if it obliged to make payment in terms of the settlement agreement the first place. That determination can only be made by way of deciding whether the applicant has indeed complied with clause 7 of the settlement agreement. In my view, any enforcement, which is what is sought to be achieved by way of the section 158(1)(c) application, would not be competent until this dispute has been resolved. The application for enforcement must thus fail.

[28] But as alluded to in *Balsdon supra*, [26] the applicant is not left without a remedy. There clearly exists a contractual dispute about whether or not the applicant has complied with clause 7 of the settlement agreement. That dispute must be resolved in ordinary civil proceedings brought for the purposes of the Court making a decision in this regard, after considering proper evidence from the parties. [27] Having due regard to the extensive factual disputes that exist in this case, as clearly evident just from what has been brought up in this matter now before me, I doubt that motion proceedings would be the appropriate course of action to determine this dispute. But the point remains, it is not for this Court to determine this dispute in enforcement proceedings under section 158(1)(c) of the LRA.

Conclusion

[29] It is therefore my conclusion that the applicant has failed to make out a proper case for the relief sought by her. The applicant is not entitled to approach this Court, in this particular instance, under section 158(1)(c), to make the settlement agreement an order of Court. But even if the applicant is entitled to approach this Court, I would nonetheless exercise my discretion and decline to make it an order of Court. The settlement agreement is however nonetheless a civil contract, and if the applicant believes it has been breached, the applicant can pursue civil proceedings in this regard.

[30] The applicant has suggested that instead of dismissing the application, I should grant absolution from the instance. The applicant has relied on the judgment in *Ntuli and Others v Luxor Paints (Pty) Ltd and Another* [28] in this regard. In my view, this judgment is distinguishable from the case in *casu*. Importantly, it did not concern an instance where it was not competent to have brought the application in terms of section 158(1)(c) in the first place because all the requirements to do so had not been satisfied. The judgment also did not concern an instance where the Court exercised a discretion to decline making the settlement agreement an order of Court. In such instances, an order

for absolution cannot be granted, because these considerations finally dispose of the application. In *Luxor Paints*, the Court expressed concern that the applicants failed to make out a case, on the facts in the founding affidavit, as to how the

respondent had failed to comply with the settlement agreement. In granting absolution, the Court said: [29]

‘The applicants should, not only have set out these facts, but should also have explained the factual basis of their allegations and should, where possible have attached documentary evidence to support them. ...’

[31] None of these considerations in *Luxor Paints supra* apply in *casu*. The facts were fully ventilated. The applicant failed on the merits of her claim, and not because she failed to provide sufficient *prima facie* evidence to substantiate her case. This being so, the only outcome that can follow is that the applicant’s application be dismissed.

Costs

[32] This then only leaves the issue of costs. The respondent, especially, sought costs. I however have a wide discretion in terms of section 162(1) of the LRA where it comes to the issue of costs. The applicant's claim has been brought in terms of section 158(1)(c) of the LRA, and is thus an LRA claim, and not a contract claim. It follows that the principles in *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*[30] applies, where it was held as follows:

'In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in s 162, and the constitutional and statutory imperatives that underpin it ...'

[33] Overall considered, and in my view, even though the applicant was not successful, it therefore does not follow that she must be visited with a costs order. I have understanding why she did what she did. She believed that she was not in breach of the settlement agreement and thus the respondent had to pay her. She simply used the wrong and / or inappropriate process to get the respondent to do this. There is no indication that she acted mala fide and simply intended to harass the respondent. The case she brought was genuine. These factors mitigate against the granting of a costs order against her. On the other hand, I accept that the applicant is indeed open to some criticism because of the manner in which she prosecuted her case. She did not comply with the Practice Manual, and it was the respondent that took charge and ensured that the necessary steps were taken for this matter to be set down. The applicant also did not file heads of argument. These factors justify the granting of a costs order against her.

[34] But in the balance, I believe the factors in favour of granting costs as opposed the factors justifying the granting of no costs order, are equal. Consequently, the general principle that costs do not follow the result in employment law disputes must prevail, as there can no fair reason to depart from it. The granting of costs order may well make matters worse, as it is clear that the underlying dispute concerning whether the settlement agreement has been breached still remains live. I therefore exercise my discretion in this matter by making no order as to costs.

[35] For all of the reasons as set out above, I make the following order:

Order

1. The applicant's application in terms of section 158(1)(c) to make the settlement agreement dated 20 May 2020 an order of Court, is dismissed.
2. There is no order as to costs.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Ms C Hamman Lancaster Kungoane Attorneys

For the Respondent:

Mr J Nysschens of Johan Nysschens Attorneys

[1] Act 66 of 1995 (as amended).

[2]

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E 635C. These principles are that the facts as stated by the respondent together with the admitted or facts that are not denied in the applicant's founding affidavit would serve as the factual basis for the determination, unless the dispute of fact is not real or genuine or the denials in the respondent's version are bald or not creditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable, that the Court is justified in rejecting that version on the basis that it obviously stands to be rejected. See also *Jooste v Staatspresident en Andere* 1988

(4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009

(2) SA 277 (SCA) paras 26 – 27; *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another* 2009

(3) SA 187 (W) para 19; *Molapo Technology (Pty) Ltd v Schreuder and Others*

(2002) 23 ILJ 2031 (LAC) para 38; *SA Football Association v Mangope* (2013) 34 ILJ 311 (LAC) at para 12.

[3] (2013) 34 ILJ 2835 (LAC).

[4] Section 189 of the LRA relates to the prescribed process that must be followed in the case where an employer envisages (contemplates)

dismissal of employees for operational requirements.

[5] *Id* at paras 19 – 20.

[6] *Id* at para 25.

[7] The section reads: '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)'.

- [8] Id at para 26.
- [9] (2017) 38 ILJ 1059 (LAC).
- [10] Id at paras 25 – 26. See also Independent Municipal and Allied Trade Union on Behalf of Nathan v Polokwane Local Municipality (2020) 41 ILJ 937 (LC) at para 56.
- [11] Id at para 28.
- [12] Id at para 41.
- [13] See Perumal v Clover SA (Pty) Ltd
(2022) 43 ILJ 226 (LC) at paras 41 – 42, as an example where the applicant party was unable to show that there was an underlying dispute in existence that was capable of being settled by the settlement agreement.
- [14] See Minister of Justice and Constitutional Development v Myburgh and Others
(2018) 39 ILJ 553 (LAC) at paras 19 – 24.
- [15] See Machabe v Ekurhuleni Metropolitan Municipality
(2018) 39 ILJ 638 (LC) at para 20; Mathosi and Others v Kintetsu World Express (Pty) Ltd and Another
(2008) 29 ILJ 2785 (LC) at para 18.
- [16] Compare Banking Insurance Finance and Assurance Workers Union v Zurich Insurance Co Ltd
(2014) 35 ILJ 2146 (LC) at para 18; Public Servants Association of SA on Behalf of Members v National Health Laboratory Service
(2007) 28 ILJ 930 (LC) at para 20.
- [17] In Ephraim Mogale Local Municipality v Hlongwane NO and Another
(2023) 44 ILJ 1944 (LC) at para 75, it was said: ‘In view of the facts of this case, it would not serve the interest of justice to make the settlement agreement an order of court as the payment of one year’s salary to the respondent, in circumstances where she acted unlawfully and in brazen disregard of the provisions of the MFMA, would offend public policy ...’.
- [18] See Machabe (supra) at para 22.
- [19] The application of the principle of prescription to all claims under the LRA has been settled by the judgment of the Constitutional Court in Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman’s Pantry (Pty) Ltd (2018) 39 ILJ 1213 (CC) at para 40. in National Union of Metalworkers of SA on behalf of Masana v Gili Pipe Irrigation (Pty) Ltd (2019) 40 ILJ 813 (LAC) at para 9, the LAC said: ‘In my view, once it accepted that the PA applies to all litigation under the aegis of the LRA, there can be no rational basis to conclude that any

aspect or stage of such litigation, including an award, is not subject to prescription ...’

[20] (2014) 35 ILJ 455 (LAC) at para 21.

[21] See Coca Cola Sabco (Pty) Ltd v Van Wyk (2015) 36 ILJ 2013 (LAC) at paras 22 – 24; Themba v Mintroad Sawmills (Pty) Ltd (2015) 36 ILJ 1355 (LC) at para 31.

[22] The section reads: 'Dismissal' means that ... an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee ...’

[23] (J 2258/2019) [2021] ZALCJHB 65 (28 May 2021).

[24] Id at para 9.

[25] Id at para 11.

[26] Id at para 13.

[27] In terms of section 77(3) of the BCEA, this Court would enjoy concurrent jurisdiction with the ordinary civil Courts to decide

such a case.

[28] (J775/19)

[2021] ZALCJHB 247 (16 August 2021).

[29] Id at para 18.

[30] (2021) 42 ILJ 2371 (CC) at para 35.

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