

SOUTH AFRICA / JUDGMENT

Perumal v Clover SA (Pty) Ltd (J 2100/19)
[2021] ZALCJHB 244; [2021] 11 BLLR 1143
(LC); (2022) 43 ILJ 226 (LC) (16 August 2021)
[2021] ZALCJHB 244

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J 2100/19

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case no: J 2100/19

In

the matter between:

VIRGIL

PERUMAL Applicant

and

CLOVER

SA (PTY)

LTD Respondent

Enrolled: 22

July 2021

Delivered: 16

August 2021 (In view of the measures implemented as a result of the
Covid-19 outbreak, this judgment was handed down electronically
by

circulation to the parties' representatives by email. The date for
hand-down is deemed to be on 16 August 2021.

JUDGMENT

PRINSLOO J

Introduction

[1] The Applicant seeks an order to make an agreement (the agreement) concluded on 8 February 2019 an order of Court. The Respondent

opposed the application.

[2] The matter was enrolled for hearing on 22 July 2021 and in accordance with the provisions of the directive issued in respect of access to the Labour Court and the conduct of proceedings during the Covid-19 pandemic, the parties agreed to present arguments virtually via Zoom.

Background**facts**

[3] The background facts to this matter are disputed to a large extent. I will briefly deal with the facts that are common cause and where the facts are disputed, I will set out the parties' respective versions.

[4] It is common cause that the Respondent employed the Applicant from November 1989 in the capacity of a system support manager. On 31 January 2019 the Respondent issued a notice in terms of section 189 of the Labour Relations Act[1] (the LRA) to affected employees. They were notified that the Respondent was contemplating the restructuring of its operations,

which was necessitated by the termination of business by Unilever, one of the Respondent's major clients. The Respondent indicated that the implementation date of possible restructuring / retrenchments was no later than 31 March 2019 and that dates for consultation will be set aside.

[5] In pursuance of the section 189 process, the Respondent consulted with the Applicant on 1 February 2019, on which occasion the Applicant

requested a breakdown or value of a proposed severance package, he was informed that the Respondent would consider possible alternatives

to avoid retrenchment and that the consultation process would be conducted over a period of two months, being February and March 2019.

[6] The Respondent's case is that at this point (1 February 2019) no offer of voluntary retrenchment was made to the Applicant and that the understanding between the parties was that he would merely obtain a 'quotation' or value of a potential severance package. In the process of obtaining the quotation, Mr Muller, who was not part of the consultation

process had issued the Applicant with a letter. It is this letter (also the agreement) that the Applicant seeks to make an order of Court. The Respondent's case is that the letter was erroneously issued to the Applicant in that it was only the Respondent's intention to provide a quotation or value of a possible severance package, as requested by the Applicant, that Mr Muller had no authority to issue any letter of termination to the Applicant, that the Respondent intended to continue with the consultation process and to consider possible alternatives to retrenchment. Ultimately, there was no decision taken at any stage to retrench the Applicant or to offer him a voluntary retrenchment package.

- [7] On the other hand the Applicant's case is at this point the parties had passed the stage of establishing or requesting the

breakdown or value of a proposed severance package, as the retrenchment process was at an advanced stage and was to a large extent finalised. The letter so issued constitutes a complete, stand alone agreement, which terminated the employment relationship as of

31 March 2019. The letter was signed by the human resources manager, who had the authority to sign it, even if Mr Muller did not have the authority.

- [8] It is common cause that a second consultation was held with the Applicant on 12 February 2019. On 15 March 2019 the Applicant made

enquiries about the processing of his package, which processing was according to all indications not happening. On 20 March 2019 the Respondent sent an email to the Applicant to state that his employment was not terminated, as was indicated in the letter he had signed on 8 February 2019. The Respondent made it clear that there was no consensual agreement in place to justify the termination of his employment with effect from 31 March 2019 and for the payment of a severance package. It was reiterated that the Applicant had requested a quotation on 1 February 2019, that the Respondent would still consider alternatives to avoid retrenchment and that the process would be conducted over a period of two months.

- [9] In the email of 20 March 2019 the Respondent's position was stated as that the Applicant's services had not been terminated, that he was still an employee and still subject to the section 189 consultation process, that the section 189 process will continue and might be extended. Should the Respondent be in a position to offer him a reasonable alternative, the Applicant would not qualify for the payment of a severance package but should the Respondent not be able to offer a reasonable alternative at the end of the consultation process, he would qualify for a severance package.

- [10] On 29 March 2019 the Respondent had sent another email to the Applicant informing him that the consultation process was extended for two weeks to get clarity on potential alternatives that could be considered. The Applicant was also informed that the status quo would remain in as far as his reporting and place of work was concerned.

[11] A further consultation took place between the Applicant and the Respondent on 15 April 2019. The Respondent's version is that

during this consultation the Applicant was advised that his position would no longer be affected by the initial proposed restructuring and that there was no consensual agreement of termination of his services reached. The Applicant continued to work past 31 March 2019, and he continued to report for work in the normal course until 22 April 2019, where after he had refused to report for duty. The Applicant was paid his salary for April 2019.

[12] The Applicant's version on the other hand is that the aforesaid consultation was fabricated to create the impression that the section 189 process was bona fide and above board. He submitted that he was no longer employed by the Respondent after 31 March 2019. The Applicant disputed that he was working as normal, but rather that he was awaiting a result as to whether the Respondent would comply with the agreement. He tendered to pay back the salary that was paid to him for April 2019.

[13] On 17 April 2019 the Respondent had sent another email to the Applicant, recording what was discussed at the consultation that took place on 15 April 2019. It was confirmed that the Applicant's position was not affected by the business restructuring, as was contemplated in the section 189 notice of 31 January 2019. A new principal was identified, which would fill the gap left by the departure of Unilever and the Applicant was informed that as such, his services were still required by the Respondent. The section 189 notice was withdrawn and the Applicant was expected to continue with his normal duties.

[14] On 18 April 2019 the Respondent received a letter of demand from the Applicant's attorney of record, claiming compliance with the agreement concluded on 8 February 2019. On 23 April 2019 the Applicant sent an email to the Respondent, indicating that he did not accept the withdrawal of the section 189 notice and he gave the Respondent two options namely either to pay the package and to negotiate a contract as consultant with him, or to start legal proceedings. He also indicated that he was advised by his attorney not to be at work, not to respond to emails or to attend meetings or have dialogue with management in this regard and requested all correspondence to be addressed to his lawyer, Mr Goldberg.

[15] The Respondent's attorneys responded on 26 April 2019 and disputed that the Applicant's services had been terminated. The Applicant was requested to report for duty on 29 April 2019, failing which the Respondent reserved the right to commence with disciplinary action against him.

[16] The Applicant did not report for duty on 29 April 2019, as he was instructed and the Respondent initiated a disciplinary process

against him. The Applicant's attorney instead responded that the Applicant was no longer employed by the Respondent (since 31 March 2019) and that the agreement concluded was valid and had to be complied with.

[17] The Respondent proceeded with the disciplinary hearing and on 22 May 2019 the chairperson issued a finding and recommended dismissal as an appropriate sanction. This was accepted by the Respondent and the Applicant was dismissed on charges of misconduct.

[18] On 23 October 2019 the Applicant served the Respondent with this application, seeking relief in terms of section 158(1)(c) of the LRA for an order to make the agreement an order of Court.

The agreement and the relief sought

[19] The agreement is dated 5 January 2019 and had been signed by the Applicant and Mr Gey van Pittius, the Respondent's human

resources manager on 8 February 2019. The agreement reads as follows:

'Re: Termination of employment due to operational requirements: retrenchment

It is hereby confirmed that the consultation process regarding the employee's redundancy has been concluded and that the following

matters has been agreed to:

1. The employee's services will be terminated on: 31 March 2019

2. The employee's last day of work will be:

31 March 2019

3. The employee's leave balance as at date of termination will be paid out.

4. The employee's retirement fund value will be paid out.

5. The employee will qualify for the payment of a severance package which will consist of:

5.1. 2 weeks' severance for every completed year of service: R1 104 850

5.2. Pro-rata long service: R

46 257

[20] It was signed by the Applicant and he agreed with the conditions and values outlined and he confirmed it to be a final and binding

agreement between himself and the Respondent.

[21] The Applicant submitted that the agreement is valid, it is final and binding, it is clear and needs no interpretation or external

explanation or document to explain it, it is not conditional and can be implemented and complied with in its current form.

- [22] The Applicant's case is that he was retrenched on 31 March 2019 and he only attended at the workplace after the retrenchment date to establish what the Respondent intended to do concerning the letter of 29 March 2019 and to establish when the Respondent was going to pay his severance package as per the agreement. By 18 April 2019 he realised that the Respondent was not going to comply with the agreement and he served a letter to demand compliance with the agreement reached on 8 February 2019.
- [23] The Applicant submitted that the agreement should be made an order of Court as it covers a matter that is capable of being arbitrated as it concerns a retrenchment. Furthermore, it will finalise the matter and avoid further delay.

Applicable legal principles and analysis

- [24] Section 158(1)(c) of the LRA empowers the Court to make any arbitration award or any 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 a party has the right to refer to arbitration or to the Labour Court.
- [25] 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 Commission for Conciliation, Mediation and Arbitration (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.
- [26] 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. A settlement agreement that may be made an order of court in terms of section 158(1)(c) must
- (i) be in writing, (ii) be in settlement of 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 sections 22(4), 74(4) or 75(7).

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

'It is thus clear from a reading of s158(1A) that s158 (1)(c) must be read with and subject to s158(1A). Even though s158(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 s158(1)(c). So properly interpreted, in terms of s158(1)(c), read with s158(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 s158(1A), orders of

court. A settlement agreement that may be made an order of court by the Labour Court in terms of s158(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) 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 s22(4), or s74(4) or s75(7). Those kinds of dispute are excluded.

It is noteworthy that s158(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's stated in s158(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.

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 s158(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 s158(1A), an order of court.'

- [28] The obvious question that leaps out is whether the agreement signed on 8 February 2019 satisfies the criteria stated in section 158 (1A) of the LRA and should be made an order of Court.
- [29] The Applicant submitted that the agreement should be made an order of Court as it covers a matter that is capable of being arbitrated as it concerns a retrenchment.
- [30] The Respondent agrees that the main dispute pertains to retrenchment, but rather the dispute in question is whether the Applicant was retrenched in the first place. The Respondent submitted that retrenchment is a pre-condition for any entitlement to severance pay and as the Applicant was not retrenched, he is not entitled to severance pay. In short the Respondent's case is that the Applicant was not retrenched, the agreement the Applicant seeks to make an order of Court, does not constitute any form of settlement agreement and it does not settle any dispute.

- [31] The Respondent submitted that there was not any dispute worthy of arbitration or referral to the Labour Court to settle, as the purpose of the document was merely to provide the Applicant with a value of a potential severance package in the event that he stood to be retrenched. The intention was to provide him with a value of a possible severance package, there was no intention to provide him with a termination letter as the Respondent at that stage was still consulting with the Applicant and considering alternatives to retrenchment.
- [32] The Respondent submitted that the Applicant was at no stage retrenched and he in fact reported for work until 22 April 2019, where after he had absented himself notwithstanding a clear and reasonable instruction to report for duty. It is surprising that the Applicant still reported at work until April 2019, if he was indeed of the view that he was retrenched with effect from 31 March 2019.
- [33] 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.
- [34] I will consider the criteria in turn. A settlement agreement that may be made an order of court must firstly be in writing. The Applicant presented a written document, signed by the parties as an agreement to be made an order of Court.
- [35] 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.
- [36] The Applicant's case is that the agreement covers a matter that is capable of being arbitrated as it concerns a retrenchment. The facts placed before this Court do not support this contention.
- [37] It is evident that the Respondent initiated a section 189 retrenchment process on 31 January 2019 and anticipated the process to be concluded by 31 March 2019. A consultation meeting was held with the Applicant on 1 February 2019 and again on 12 February 2019. It is highly improbable that the Respondent would have continued with a consultation process on 12 February 2019, had it agreed to retrench the Applicant on 8 February 2019. Further consultation would have served no purpose, after a final and binding agreement to the effect that the Applicant's services be terminated on 31 March 2019 had indeed been reached. The facts show that the Respondent consulted the Applicant after the alleged agreement to terminate his employment was concluded on 8 February 2019 and stated throughout that it was looking at alternatives to avoid the Applicant's retrenchment. Prior to the arrival of the Applicant's 'termination date' of 31 March 2019, the Respondent made it clear on 20 March 2019 and in writing to the Applicant that his employment was not terminated with effect from 31 March 2019 and that he was still employed and that the section 189 process was still ongoing.

- [38] Once again and on 29 March 2019 the Respondent made it clear to the Applicant that the consultation process was extended by a further two weeks as there were potential alternatives to be considered. He was informed that the status quo would remain as far as reporting and place of work was concerned. It was made clear that a consultation meeting would be set up as soon as the Respondent was in a position to engage the Applicant further.
- [39] A consultation meeting was then held with the Applicant on 15 April 2019 and he was informed that an alternative became available, that his position was no longer affected by the restructuring process, that his services were still required and he was expected to continue with his normal duties. In fact the Respondent went as far as to withdraw the section 189 notice. The Respondent made it clear that there was no agreement to justify the termination of his employment, that the letter he had signed on 8 February 2019 was issued erroneously and the Respondent mentioned that the Applicant had been employed by Clover for a very long period and expressed the hope that they could continue with the relationship on amicable grounds.
- [40] It is further evident from the facts placed before me that the Applicant reported at work until April 2019 and that he was paid his salary for April 2019.
- [41] None of the aforesaid facts indicate that the Respondent had retrenched the Applicant. In fact, quite the opposite. It was made clear to him that his services were not terminated, the section 189 notice was withdrawn and he was instructed to report for work, which he had done until 22 April 2019. It escapes this Court as to how the Applicant could have understood or interpreted the factual position as one where he was retrenched. The context within which the letter he had signed on 8 February 2019 was issued, was explained by the Respondent, but even if he had doubt about the termination of his services, the subsequent letters and conduct of the Respondent could not have caused him to believe that he was indeed retrenched and that his services were terminated with effect from 31 March 2019.
- [42] In my view the Applicant cannot show that there was a dispute that was settled, which related to retrenchment. At the time he was provided with the letter he had signed on 8 February 2019, the section 189 process just started and was ongoing, with the Respondent consulting with him and looking for alternatives to avoid his retrenchment. When an alternative was found, the Applicant's position was no longer affected and the section 189 notice was withdrawn.
- [43] Absent a retrenchment, there can be no dispute to be settled, let alone one that the Applicant was entitled to refer to arbitration or adjudication by this Court.
- [44] This Court has to take into consideration all the relevant facts and circumstances and in doing so, it cannot consider the content of the agreement in isolation. I have to consider the context within which it was issued as well as the conduct of the Respondent, following the initiation of the retrenchment process until the conclusion of the process.

[45] In casu, considering all the facts and circumstances, 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 has to fail.

[46] The attitude adopted by the Applicant is unfortunate, so is the fact that he had ignored the clear message from his employer to the effect that his services were still needed and the hope the Respondent expressed to continue with the employment relationship, fell on deaf ears. I have no doubt that the manner in which the Applicant chose to deal with the Respondent, which ultimately resulted in his dismissal for misconduct, had caused him great hardship.

[47] This Court cannot but observe the disastrous consequences of the Respondent's persistence that a settlement agreement was

concluded and that he was retrenched which was in fact not the case. The Applicant had a lot to lose and he indeed lost it because of his own conduct and his stubborn belief that a settlement agreement was concluded to the effect that he was retrenched and he had to be paid severance pay when that was not the case. Evidently, the outcome could have been much different and much brighter for the Applicant, had he paid attention to what the Respondent said to him.

Costs

[48] 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. In my view, considering the facts of this case, the interests of justice will be best served by making no order as to costs.

[49] 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: Mr Goldberg of Goldberg Attorneys

For the Respondent: Advocate P Kirstein

Instructed by: Johanette

Rheeder Attorneys

- [1] Act 66 of 1995, as amended.
- [2] (2017) 38 ILJ 1059 (LAC).
- [3] (2013) 34 ILJ 2835 (LAC).
- [4] At para 19 – 21.
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