IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: P 147/17

In the matter between:

KHANYISO SIPANGO **Applicant**

and

CAPACITY OUTSOURCING (PTY) LTD **Respondent**

Heard: **30 November 2017**

Delivered: **13 February 2018**

JUDGMENT:

TLHOTLHALEMAJE, J.

Introduction:

[1] The sole purpose of concluding settlement agreements at the CCMA or Bargaining Councils is effectively to put an end to labour disputes, and not to create new ones. It is not uncommon for this court to be faced with applications in terms section 158(1)(c) of the Labour Relations Act (LRA)[1] to make settlement agreements an order of court, only to realise that those agreements have in fact created more disputes rather than resolving them. In effect some of these settlement agreements are not worth the paper they are written on.

[1] Act 66 of 1995, as amended

LABOUR COURT

[2] This application is in point. The applicant seeks to make the settlement agreement dated 12 May 2016 and concluded under the auspices of the National Bargaining Council for Road Freight Industry (NBCRFI) an order of this Court. The relevant terms of the agreement are as follows;

2.1 '*The Respondent agrees to re-employ the applicant with effect from Friday, 13 May 2016. On their database to begin with'*

2.2 *'The Applicant must report for duty on by the latest Mon 13 May 2016'*

2.3 *'The re-employment will be on the same terms and conditions of employment which governed the employment relationship prior to the dismissal unless specifically set out hereunder;*

1. *The Respondent shall communicate and the Applicant shall consider jobs/positions of which a minimum rate of R24 p/h or more is applicable*

2. *The parties shall endeavour to have the Applicant placed in a position at his previous applicable rate at R31.50'*

Background:

[3] The applicant, Khanyiso Sipango was employed by the respondent, Capacity Outsourcing (Pty) Limited, a temporary employment service provider (TES). The respondent has since merged with another employment service provider to form Adcorp Blu.

[4] Following the dismissal of the applicant by the respondent, he referred an unfair dismissal dispute to the NBCRFI on 12 May 2016. The end result of the conciliation hearing was a settlement agreement which is the subject of these proceedings. The terms of the settlement agreement as expected, are a subject of different interpretation by the parties.

[5] The applicant is his founding affidavit avers that in accordance with the terms of the agreement, he reported for duty on 13 May 2016 and was advised by a representative of the respondent that there were no suitable positions available in which he could be placed.

LABOUR COURT

[6] The applicant further averred that he had on numerous occasions telephonically contacted the respondent to enquire about compliance with the terms of the settlement agreement. It was common cause however that between 30 November and 31 December 2016, he was placed temporarily at the respondent's client, Distell. His contention is that although he was of the view that the respondent was in breach of its obligations in terms of the agreement, he had accepted the position at Distell with full reservation of his rights.

[7] The applicant further submitted that it was a tacit and/or implied term that the re-employment which was to be on the same terms and conditions amounted to 'permanent-casual position'. He had denied that the respondent had afforded him alternatives which he had failed to consider. Of further importance to him was that it was not indicated to him that he would be required to work on Saturdays, on which observes his religion.

[8] In opposing the application, the respondent contends the following:

8.1. The applicant was an employee of a temporary employment service provider for the purposes of being placed on a temporary and limited basis with a client(s) of the respondent, which required the services of a flexible labour.

8.2. The effect of the re-employment as stipulated in the agreement was to place the applicant back in its database for the purposes of being contacted and advised of any available position that may arise.

8.3. The terms *"reporting for duty"* and *"similar terms and conditions"* in the settlement agreement referred to the terms and conditions of the respondent and not those of a client (if and when placement is completed). The purpose of *"reporting for duty"* was to determine whether there were available positions at the respondent's client(s) that may be suitable for the applicant.

8.4. The applicant had declined a number of suitable positions that were made available to him. The respondent endeavoured to place the

LABOUR COURT

applicant at a suitable available position as where and when its clients would indicate a need for temporary labour. A total of 67 positions were considered where the applicant could be based, but he had either declined them for a variety of reasons, or they were found to be unsuitable for him.

8.5. The respondent avers that in consideration that a majority of client's requirements are in respect of forklift or motorised pallet-jack operators, it had at its own costs, sent the applicant for training in that field. The applicant successfully completed the prerequisite training for such a course and was found to be competent.

8.6. The respondent confirmed that the applicant was offered and accepted a position at its client, Distell between 30 November 2016 and 31 December 2016.

[9] The applicant nonetheless maintained that the respondent had failed to comply with the terms of the settlement agreement on the grounds that;

9.1. Prior to his dismissal, he was provided with work on a continuous basis. He was previously employed on a 'permanent casual' basis, continuously and with a provident fund. He further contends that when he was initially engaged by the respondent, he was in a "pool" but later his status was elevated to that of a "permanent casual".

9.2. The applicant avers that the terms of the settlement agreement provides for two dates, firstly being the 13 May 2016, the date on which he was to be reinstated into the respondent's database and secondly, 13 June 2016, the last day in which he was to report for duty. His interpretation of these conditions was that the respondent had a duty to make available a suitable position not later than 13 June 2016. Any other interpretation, the applicant contends, would have led to an unenforceable agreement, in that, if the respondent's duty was only to place him back in its books for purposes of being advised of available suitable positions, he would

LABOUR COURT

not be re-employed if no client(s) of the respondent required his skills.

9.3. He further contends that the reinstatement into the database on 13 May 2016, was an administrative step which would have facilitated his re-employment by no later than 13 June 2016. He denied that he had declined 67 employment opportunities offered to him by the respondent.

Evaluation:

[10] This Court is enjoined with wide powers in terms of the provisions of section 158(1)(c)[2] of the LRA to make arbitrations awards and/ or settlement agreements orders of the Court. The Labour Appeal Court in *South African Post Office Ltd v CWU obo Permanent Part-Time Employees*[3] outlined the principles that Courts must take into consideration when exercising its discretion under section 158(1)(c) and held the following:

> '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 section 158(1A), read with section 158(1)(c) of the LRA. 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

[2] Section 158**: Powers of Labour Court**
(1) The Labour Court may –
(a)…
(b)
(c) make any arbitration award or any settlement agreement an order of the Court.
…

[3] *[2013] ZALAC 20; (2014) 35 ILJ 455 (LAC); [2013] 12 BLLR 1203 (LAC)* at para [21]

LABOUR COURT

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 payment of salary or wages of a certain period is not clear and precise. The parties would know or easily ascertain by having regard to documentation like pay slips 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 section 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 section 158(1A) of the LRA, and if it is an award, that it satisfies the criteria set in section 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."[My underlining]

[11] In line with the three requirements set out as above, it cannot be doubted that there are glaring difficulties with the terms and conditions of the settlement agreement concluded between the parties in this case. First, it provides that the applicant is to be re-employed with effect from 13 May 2016 (*On their database to begin with*), and yet he is required to report for

LABOUR COURT

duty *on by the latest 13 June 2016.* This resulted in a problem of interpretation.

[12] It was nonetheless not in dispute that the applicant had reported at the respondent on 13 June 2016. The respondent's contention was that the purpose of reporting was merely to place the applicant in its client database to determine whether or not at the time there were any clients who required a particular temporary service for which the applicant was suitably qualified. The respondent further conceded that at the time, the applicant was informed that there were no suitable vacancies from any of its clients at the time.

[13] The parties appear to be in agreement in respect of the first step of the agreement, i.e., that the purposes of reporting on 13 May 2016 was merely administrative, in that the applicant was to be placed on the database as a preliminary step. The applicant nonetheless takes these provisions further and alleged that they meant that he would have been informed of a suitable position at the time. This cannot be correct as he first had to be placed on the client database. Thus, for what it is worth, the first condition of the agreement was to place the applicant on the database, and I am satisfied that the respondent had complied with that condition.

[14] There is uncertainty about when the Respondent is expected to *communicate* with the Applicant. Immediately a settlement agreement contains phrases such as *'latest'*, *'consider'* and *'endeavour'*, it is doomed to encounter problems of interpretation. These phrases are often than not, ambiguous if not meaningless within the context of settlement agreements. They create more disputes once the agreement has to be implemented or complied with. Commissioners can only take heed from what was stated in *South African Post Office Ltd v CWU obo Permanent Part-Time Employees* and avoid the use of such terms when concluding settlement agreements, as they do not guarantee certainty.

[15] The issue of whether the respondent failed to comply with the terms of the settlement agreement for it to be made an order of court has to be

LABOUR COURT

determined against the nature and content of those terms and conditions despite the problems pointed out, and the subsequent conduct of the parties. In this regard;

a) Once the applicant was placed on the database, and despite there being an agreement for him to report for duty *'on the latest by Mon 13 June 2016',* and the respondent having undertaken to *'communicate with him to consider jobs/positions'*, this can only imply that between 13 May 2016 and 13 June 2016, endeavours were to be made to find a suitable position for him as offered by the clients. This is the nature of the business of a TES. The respondent's ability to re-employ the applicant is a matter out of its control. It is dependent on the requirements of the clients and the positions that are available. There are no guarantees within the business of a TES that an employee would be re-employed after a dismissal on the same terms and conditions as applicable before dismissal. It is accepted that there may be exceptions where an employee is placed at a client by a TES on a permanent basis. If any such arrangements are guaranteed at the time of the resolution of the dispute, they must then be specifically stated in the agreement. The applicant's contention therefore that the respondent should have secured him a permanent or continuous position even if it meant that other employees had to be retrenched in order for it comply with the agreement is clearly unsustainable.

b) All that the respondent could do was to liaise with clients and for the applicant to consider the positions available. If despite such endeavours positions were found, but were not suitable for the applicant, it cannot be said that the respondent had failed to comply with the terms and conditions of the settlement agreement. Similarly, if positions were secured and the applicant had found them to be unsuitable for a variety of reasons, it can again not be said that the respondent failed to comply with its obligations.

c) It was further common cause that between 30 November 2016 and 31 December 2016, the applicant was placed at a client, Distell. There is

LABOUR COURT

nothing in the settlement agreement that indicated the nature of the re-employment, i.e., whether it would be permanent, casual, or semi-permanent. These are terms and conditions that cannot in my view be imputed into the agreement, specifically given the nature of the respondent's business and needs of its clients.

d) Furthermore, on the applicant's own version in his replying affidavit, he conceded that there was a merger between his old employer and Adcorp Blu. As at the time that the settlement agreement took place, the merger had taken place, and in the light of the concession that the respondent continued to operate as a TES, it is inexplicable that the applicant would have expected to be provided or guaranteed continuous work. If that was the case, these terms and conditions would have been stipulated in the agreement as already stated.

e) The applicant further conceded that he was sent for training subsequent to the signing of the settlement agreement. On the respondent's own version, this was with an attempt to uplift his skills in line with the requirements of its clients. In my view, and in the light of these endeavours, these cannot be said to be actions of an employer that is not interested in securing a suitable position for the applicant in compliance with the terms and conditions of the settlement agreement.

[16] To conclude then, the settlement agreement as already stated, and further in the light of the respondent's business did not create certainties. Compliance with its the terms, more particularly the re-employment of the applicant was dependent on a variety of factors, some of which were outside of the control of the respondent. In this case therefore, I am satisfied that despite the difficulties pointed out with the terms of the agreement, the respondent sufficiently complied with them, and no purpose would be served in making the settlement agreement an order of court. I have further had regard to the requirements of law and fairness and conclude that a cost order is not warranted in this case.

LABOUR COURT

Order:

[17] In the premises, the following order is made:

1. The Applicant's application is dismissed.

2. There is no order as to costs

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicant:	Ms. E van Staden of Legal-Aid South Africa, Port Elizabeth Justice Centre
For the Third Respondent:	Adv. M. Grobler
Instructed by:	Kirchmanns Incorporated

LABOUR COURT