IN THELABOUR COURT OF LESOTHO **LC/ENF/63/14**

HELD AT MASERU

In the matter between:

NTHABELENG MAKARA **APPLICANT**

and

ECLAT EVERGOOD TEXTILE (PTY) LTD **RESPONDENT**

JUDGMENT

DATE: ***01/04/16***

- ***Settlement agreements - Enforcement thereof where parties decided to settle before the determination of a review application filed by an employer against an arbitral award which had declared an employee's dismissal unfair and ordering reinstatement - The settlement agreement was made an order of Court - The employer having agreed to pay a specified sum in compensation in terms of the settlement agreement - Applicant contending that the amount only related to compensation in lieu of reinstatement rendering the employer still liable to pay her wage arrears, and the employer insisting to the contrary that the matter had been closed through the payment it made;***

- ***Secondly, the applicant argued that since the agreement did not stipulate that the compensation was in "full and final" settlement of any claims that she could have against the employer, she retained a right to claim wage arrears - The employer argued, to the contrary, that the settlement amount put the whole dispute to rest - The Court concluded that it could not enforce the arrears claim sought by the employee because the settlement agreement was not specific enough to indicate whether payment of arrears was part of the deal and again that by ordering payment of arrears in circumstances where the agreement was ambiguous would effectively lead the Court to enforce the original award which had now been superseded by the settlement agreement.***

1. This dispute centres on the enforcement of a settlement agreement entered into between the parties prior to the determination of a review application instituted by the respondent against an award handed down by the Directorate of Dispute Prevention and Resolution (DDPR) declaring applicant's dismissal unfair and ordering her reinstatement. The applicant contended that the

respondent had not fully complied with the terms of the settlement agreement and is herein seeking an order directing it to fully comply.

2. It is common cause that the applicant had been under the employ of the respondent from 18th April, 2008 and was dismissed on 12th June, 2012. Subsequent to this dismissal, she referred a dispute of unfair dismissal to the DDPR in A0623/14, wherein the latter found the dismissal to have been unfair and ordered her reinstatement and compensation for lost earnings.

3. Aggrieved by this award, the Respondent instituted review proceedings against the applicant in LC/REV/100/12 before this Court. On the day on which the matter was scheduled to be heard, parties approached the Court with an out of Court settlement which they requested that it be made an Order of Court on 17th October, 2013 wherein the applicant dropped the relief of reinstatement and the respondent in turn undertook to pay a sum of Seven Thousand Maloti (M7000.00) to the applicant as compensation. This agreement was duly made an Order of Court. It, however, did not spell out whether the compensation offered was only ***in lieu*** of reinstatement leaving arrears still outstanding or not, resulting in the current dispute.

4. The agreement was signed by Counsel for both parties and couched in the following terms (quoted ***verbatim***):-

1. ***That Respondent is not insistent on reinstatement***
2. ***That the applicant pay compensation in the sum of M7000.00 on or before the 30th November, 2013***
3. ***There is no order as to costs***

The stipulated amount was duly paid to the applicant but a dispute arose from a misunderstanding between the parties on whether the Seven Thousand Maloti (M7000.00) only related to compensation ***in lieu*** of reinstatement, and not to loss of earnings emanating from the dismissal on 12th June, 2012. Applicant's case was that salary arrears in the sum of Four Thousand, and Forty - Eight Maloti, Eighty - Eight Cents (M4 048. 88) were still outstanding representing four months' wages. She earned One Thousand and Twelve Maloti, Twenty - Two Cents (M1, 012.22) at the time of dismissal. As far as she was concerned, the DDPR award had not been fully complied with because salary arrears remained unpaid.

5. It was further her case that since the settlement agreement did not contain a clause indicating that the agreement was in ***"full and final"*** settlement of any other claims, it rendered the employer liable to any further claims that she could have against the employer. She claimed that she was entitled to earnings lost following her dismissal. Her Counsel submitted that by virtue of the settlement agreement not being ***"full and final"*** the applicant had not abandoned her right to claim arrears. This application came by way of an enforcement of the settlement agreement which had been made an Order of Court.

6. The respondent argued, to the contrary, that the M7 000.00 was in full and final settlement of the whole dispute, and that the applicant could not be heard to make this claim one year after the agreement had been concluded and the money paid. Applicant's Counsel argued that the delay was due to the negotiations they were trying to pursue with the respondent. The issue regarding timing was never really pursued. The issue for determination by the Court is therefore solely whether by no longer seeking reinstatement as ordered by the DDPR, the settlement amount of Seven Thousand Maloti (M7 000.00) agreed upon by the parties constituted only compensation ***in lieu*** of reinstatement and left salary arrears still outstanding or it settled the dispute in its entirety. For the applicant to succeed in her claim she has to adduce sufficient evidence that the respondent failed to fully comply with the settlement agreement agreed to by the parties on 17th October, 2013.

THE COURT'S ANALYSIS

7. Settlement agreements are an extra judicial compromise and nothing precludes parties from reaching settlement before a matter is adjudicated upon by the Court. They are, however, not regulated by statute in Lesotho and resort will therefore be had to the common law. Be that as it may, Rules of this Court do envisage settlement agreements to the extent that they provide in ***Rule 24***[1] that:

> ***The Court may postpone the day or time fixed for or adjourn any hearing, particularly with a view to promoting conciliation and settlement or withdrawal*** (Emphasis added).

Settlement agreements are a quick, easy and cost effective way of settling disputes. Courts, therefore, strive to uphold bargains and not to destroy them. They must, however, clearly reflect the intention of the parties and be drafted in

[1] Labour Court Rules, 1994

very specific terms to avoid disputes. In the context of labour disputes, parties are encouraged to attempt to resolve disputes amicably in order to prevent any animosity that might ruin the employment relationship. As settlement is a compromise, parties are free to agree on any terms they deem appropriate despite a finding of this Court or that of the DDPR. In order to facilitate enforcement, should the need arise; the settlement agreement has to be made an Order of Court as was done in this case.

THE SETTLEMENT AGREEMENT AS A VALID AGREEMENT "IN FULL AND FINAL SETTLEMENT" OF THE DISPUTE BETWEEN THE PARTIES

8. Applicant's Counsel submitted that because the settlement agreement did not contain a clause to the effect that the agreement was in ***"full and final settlement"*** of the dispute between the parties, the applicant reserved a right to lay further claims against the respondent. Indeed, the agreement between the parties did not incorporate the said clause. According to the English case of ***Nasser Kazeminy v Kamal Siddiqi and Others***,[2] the phrase ***"in full and final settlement"*** does not necessarily entail giving up one's right to approach a Court on any other issue a party may feel aggrieved by despite the conclusion of a settlement agreement. The first rule of settlements is that despite the agreement being in ***"full and final settlement"*** of the claim, if one of the parties feels that certain aspects of his or her claim have not been properly addressed by the settlement agreement he or she retains the right to institute a further action in a Court of law. The case highlights the importance of ensuring that a settlement agreement contains a release clause which is wide enough to cover all possible future claims.

9. The Court had earlier held in ***Bank of Credit and Commerce International SA (BCCI) v Ali, Khan and Others (No.1)***[3] that a settlement agreement can be drafted so that it releases all claims whether or not known to the parties at the time of execution. It, however, observed that Courts will be slow to infer this interpretation, unless the wording of the agreement is very clear. The Court held in this case that a compromise agreement which claimed to settle all outstanding claims between the employer and the employee did not prevent the employee from later claiming for stigma losses. This was a case in which the employee and his former employers had agreed to settle the employee's claim for

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[2] (2012) EWCA Civ 416
[3] [2001] 1 ALL ER 961

damages, but the employee had later sought to claim stigma damages which had been awarded in a separate case.

10. A release clause may be couched in the following terms: -

> ***"the agreement is in full and final settlement of all and any claims, actions, liabilities, costs or demands that the claimant has or may have against the defendant … whether past, present or future and whether or not known or contemplated at the date of this settlement agreement arising under or in any way connected with … the proceedings."***[4]

11. It was not disputed in ***casu*** that the settlement agreement concluded between the parties did not contain a release clause, which as enunciated in the ***Nassir Kezeminy's***[5] case could not automatically absolve the respondent from liability. The existence or non - existence of a release clause aside, the validity of a settlement agreement may be attacked on a number of grounds which include misrepresentation, duress, vagueness and deception. The case of ***Levenstein v Levenstein***[6] sets out grounds upon which a settlement agreement may be attacked. For instance, where the vague and uncertain language used in the settlement agreement justifies the implication that the parties were never ***ad idem***, the agreement may be declared unenforceable. The uncertainty is fatal in that parties are not able to agree on what was acknowledged as their obligations towards each other.

12. In order to be enforceable, a settlement agreement must reflect the complete agreement between the parties and be specific enough to be enforceable - See ***Engen Basson's Service Station v Vanqa***.[7] The facts of this case are similar to those of the case before us. In it, the parties had concluded a settlement agreement in May, 2010, in terms of which the employer agreed to re-employ the employee from 31st May, 2010. The employer, however, failed to comply with the agreement and in August, 2013, the Labour Court ordered it to re-employ the employee from 02nd September, 2013 and ordered that the issue of arrear payment be dealt with by way of a separate process. The employee approached the Registrar of the Court to issue a writ of execution in the amount of R119 944.00. Soon after that the employer's goods were attached to satisfy the employee's claim of arrear payments.

[4] Note 2 above
[5] Note 2 above
[6] 1955 (3) SA 65 (SR)
[7] (2014) 35 ILJ 1568 (LC)

13. The employer subsequently launched an urgent application for an order to set aside the writ. The Court noted that a writ of execution will be set aside as incompetent if the judgment is not definite and certain, where the amount payable can be ascertained only after deciding a further legal problem, particularly if the debt is not quantified. In this matter the applicant had agreed to re-employ the employee from 31st May, 2010, but he was re-employed more than two years later. His entitlement to back pay for the entire period from May, 2010 to date of re-employment was disputed, as was the rate at which it had to be calculated. The writ of execution was considered incompetent and it was set aside. In ***casu***, as in this case, entitlement to wage arrears claimed by the applicant was disputable and the Court could not ascertain from the wording of the agreement whether parties had intended the arrears to be payable or not.

14. In ***Bank of Credit and Commerce International SA***,[8] the Court held that in construing the provisions of a settlement agreement, as any contractual provision, the object of the Court is to give effect to what the contracting parties intended. The Court pointed out that settlement agreements are to be construed in the same manner as other contracts by interpreting the words used in the way in which they would be understood by any reasonable person aware of the factual background known to both parties. It held that ***"to ascertain the intention of the parties, the Court reads the terms of the contract as a whole giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as is known to the parties and the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage."*** It noted further that ***"the relevant circumstances were those which a reasonable man would have regarded as relevant…"***

15. In ***casu***, the terms of the settlement agreement were clear only to the extent that the applicant had abandoned the relief of reinstatement, but it was not spelled out whether the M7 000. 00 was only in ***lieu*** of reinstatement or covered arrears as well. The Court could only deduce such an intention from the four corners of the agreement. The latter did not prove helpful as the parties were at loggerheads with the applicant insisting on payment of arrears and the respondent contending, on the other hand, that it had fully complied with the

[8] Note 3 above

settlement agreement. The intention of the parties was therefore not discernible from the words used either expressly or by implication.

16. The Court reaffirmed the trite principle in respect of settlement agreements in ***South African Municipal Workers Union and Others v City of Johannesburg Metropolitan Municipality*** [9] that:

> ***An agreement is more often a product of compromise between two or more parties. In most cases, it is embodied in a written document which records the compromise made and is held to be an enforceable deal. The written agreement is therefore conclusive as to the rights and obligations of the parties. Where the rights and obligations set out in the agreement are clear and unambiguous, the rule is that no external factors can play any role in interpreting the terms of the agreement, nor will any evidence be entertained to impose additional or different rights and obligations different to what is clearly understood by a plain reading of the agreement. A written agreement that is clear and unambiguous stands as an agreement cast in stone which can neither be moved nor can any inroads made into it. Likewise, the fluidity of changing conditions and evidence cannot dilute the rights and obligations embodied in a written agreement.***[10]
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> ***There are, however, circumstances where the written agreement, clear and unambiguous as it is, does not record and reflect the true agreement between the parties. Where this is the case the parties are entitled to rectification of the agreement. Generally, where the terms that are agreed upon are omitted or, terms not agreed upon are added to the written agreement, then a party to the agreement can seek rectification of the written document so that it records and reflects the true and proper agreement that was concluded between the parties.***[11]

17. This was a case in which the Labour Appeal Court of South Africa had refused to rectify the terms of a settlement agreement over the employees' continued right to payment of a ***'locomotive allowance'*** after they had been promoted and placed on an all-inclusive remuneration package. The employees contended that the agreement did not reflect the true agreement between the parties, which was that the payments of the allowance should still continue. The Labour Appeal Court observed that a party seeking rectification must show the facts entitling it to relief in the clearest and most satisfactory manner, and found that in this case the employees had failed on a balance of probabilities to show that it was the common intention of the parties that the allowance continue to be paid.

[9] (2013) 34 ILJ 1944 (LAC)
[10] Supra para. 20
[11] Supra para. 21

18. Likewise, parties in ***casu*** are not in agreement on whether over and above the payment of an amount of M7 000.00, the applicant was still entitled to arrears with the applicant insisting that it only related to compensation in ***lieu*** of reinstatement and the employer contending, on the other hand, that the matter was closed. The agreement was not specific enough to reflect the actual intention of the parties.

THE ORIGINAL AWARD VERSUS THE SETTLEMENT AGREEMENT

19. Applicant's Counsel contended that because the settlement agreement did not contain the clause that the agreement was in ***"in full and final settlement"*** of any further claims against the respondent, the applicant had a right to claim wage arrears as a consequential relief to reinstatement. Indeed, the agreement did not include the standard term normally found in settlement agreements that the agreement was to be ***"in full and final settlement"*** of all claims arising from the dispute. Where concluded, a settlement agreement normally supersedes any existing judgment or award.

20. In the case before us, the DDPR having found the applicant to have been unfairly dismissed ordered her reinstatement. The relief of reinstatement is regulated by ***Section 73 of the Labour Code Order, 1992*** (as amended). It provides in ***Subsection (1)*** thereof that:-

> ***If the Court or the arbitrator holds the dismissal to be unfair, it shall if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal...***

Payment of arrears is therefore a consequential relief flowing from an order of reinstatement. Thus the applicant was fully entitled to her lost earnings as a result of her dismissal from respondent's employ in terms of the DDPR award. Parties, however, entered into a settlement agreement which reflected in no uncertain terms that the applicant abandoned the relief of reinstatement ordered by the DDPR. The applicant thereby substituted the DDPR award with the settlement agreement. She now became confined to her remedies as stipulated in the settlement agreement. It therefore follows that unless the agreement clearly stipulated that the applicant would be entitled to arrears, the Court cannot order that they be paid. If it were to order that arrears be paid, despite the uncertain terms, it would effectively be enforcing the DDPR award, and undermining the settlement agreement concluded between the parties.

21. In ***Ford v Austen Safe Co., Ltd***,[12] the Court held that the effect of repudiation (breach) of the settlement agreement was not the revival of the employer/employee relationship which existed before the settlement agreement was concluded as had been submitted by the applicant. It reaffirmed the principle that settlement agreements constituted an extra-judicial compromise of the respective claims of the parties. It concluded that such a compromise has the effect of ***res judicata*** and is an absolute defence to an action on the original contract or cause of action except where the settlement agreement expressly or by clear implication provides that, on non-compliance thereof, a party can fall back upon the original right of action. This principle was reiterated in ***Food Workers' Council of SA & Others v Sabatino Italian Restaurant***[13] where it held that a settlement agreement is a compromise which had the effect of ***res judicata*** and is an absolute defence to an action on the original cause of action.

22. As it were, by insisting on salary arrears the applicant is enforcing the original relief issued by the DDPR because arrears are a consequential relief to reinstatement. Arguably, by entering into a settlement agreement, she waived her rights under the DDPR award unless it was clearly stated otherwise. The offer was made by the employer and duly accepted by the applicant through her Counsel but it is apparent that parties were not clear on what they were agreeing to. The assumption is that in reaching a settlement, parties negotiated in good faith. The intention of the parties must be clear, and in this case parties appeared to speak at different wave lengths.

23. In determining whether an order sought by the applicant can be granted, the Court has to ascertain whether the respondent has refused to fully comply with the terms of the settlement agreement as alleged by the applicant. The answer lies in the wording of the settlement agreement. The Court can only grant this Order if it is satisfied that the agreement is sufficiently clear to enable the party said to be defaulting to know exactly what was required of it in order to fully comply with the agreement.

24. Having read and interpreted the settlement agreement, and having heard Counsels' submissions, we find the terms of the settlement agreement to be ambiguous to the extent that they are not clear whether the Seven Thousand Maloti agreed upon by the parties only related to compensation in ***lieu*** of reinstatement or settled the whole dispute. We, therefore, find respondent's

[12] (1993) 14 ILJ, 751
[13] (1996)17, ILJ, 197

obligations in respect of whether it was to pay arrears lacking in clarity, thereby rendering applicant's prayer for arrears unenforceable. This case underscores the importance of knowing exactly what one is agreeing to before getting into a settlement agreement.

CONCLUSION

25. Indeed the words ***"full and final"*** do not necessarily entail giving up one's rights to claim any other rights that one may feel have not been addressed by the settlement agreement. However, in the circumstances of applicant's case it would not make any difference whether such a clause had been incorporated into the settlement agreement or not because of the ambiguity in its terms. Due to the lack of clarity in the terms of the settlement agreement the Court comes to the following conclusion that:-

i) It is not able to ascertain the common intention of the parties from the agreement as it stands;

ii) In the circumstances, finds applicant's claim for arrears unenforceable; and lastly

iii) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 01st DAY OF APRIL, 2016.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

S. KAO — I CONCUR
ASSESSOR

R. MOTHEPU — I CONCUR
ASSESSOR

For the applicant : Adv., P.J. Lebakeng
For the respondent : Adv., M.M. Klaas

ANNOTATIONS

CITED CASES

Nasser Kazeminy v Kamal Siddiqi and Others (2012) EWCA Civ 416
Bank of Credit and Commerce International SA (BCCI) v Ali, Khan and Others (No.1) [2001] 1 ALL ER 961
Levenstein v Levenstein 1955 (3) SA 65 (SR)
Engen Basson's Service Station v Vanqa (2014) 35 ILJ 1568 (LC)
South African Municipal Workers Union and Others v City of Johannesburg Metropolitan Municipality (2013) 34 ILJ 1944 (LAC)
Ford v Austen Safe Co., Ltd (1993) 14 ILJ, 751
Food Workers' Council of SA & Others v Sabatino Italian Restaurant (1996)17, ILJ, 197

STATUTES

The Labour Code Order, 1992
Labour Court Rules, 1994