

EMPLOYMENT ALERT

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COLLECTIVE AGREEMENTS, COURT ORDERS CONTEMPT OF COURT AND VARIATION OF CONTRACTS OF EMPLOYMENT

The Labour Court (Court) recently considered whether a party to a collective agreement that had been made an order of court could unilaterally terminate the agreement.

It also considered whether a consequent refusal to comply with the cancelled agreement constituted contempt of court by the party cancelling the agreement.

The Department of Rural Development and Land Reform entered into a collective agreement that settled a strike by employees in the office of the Registrar of Deeds and regulated the payment of an incentive bonus going forward.

The collective agreement further provided that "... this agreement may be made an order of court in terms of s158(1) of the Labour Relations Act ...".

The employees that had the collective agreement made an order of court to settle the pending urgent application by their employer to interdict their strike.

Some three years later the Department cancelled the collective agreement and to the ire of the beneficiaries of the incentive bonus refused to make any further payments.

They approached the Court in *The Public Servants Association of South Africa v T.T. Gwanta and Others, Case J439-2101*. In the application to court, they asked for the relevant Director of the Department to be declared in contempt of court for cancelling the agreement and refusing to make any further payments and to compel the Department to comply with the previous 'court order' in continuing with the incentive scheme. They argued that once the collective agreement had been made an order of court it could not be amended or terminated unless by order of court.

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Conradie AJ took the view that a settlement agreement that is made an order of court does not necessarily mean that all the terms of the settlement agreement automatically become terms of the court order. With reference to *Thutha v Thutha 2008(3) SA 494TkH at 499*, the court held that in this particular case when the court made the settlement agreement an order of court, all that it was doing was acknowledging that the matter before it was withdrawn and that the parties had reached an agreement as to how they would address the underlying dispute going forward: "... in other words the specific terms of the settlement agreement does not necessarily form part of the court order" (paragraph 17).

The court applied the dicta in *Thutha at 506C-E*: "I believe with respect that a court should distinguish clearly between orders of court and their enforcement on the one hand, and deeds of settlement, on the other hand. The former is concerned with procedural principles and the protection of the court's dignity and honour: and the latter with the law of contract".

The court held that the settlement agreement having been made an order of court was not a court order as such and the officials of the department in cancelling the collective agreement acted in accordance with the law. They could not be held to be in contempt of court. The department quite correctly in terms of s23(4) of the Labour Relations Act, No 66 of 1995 (LRA) terminated the agreement as the collective agreement was concluded for an indefinite period without a termination provision.

The employees further relied on s23(3) of the LRA providing that, where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement. The argument goes further to state that the provisions of the collective agreement outlived the collective agreement as the provisions have become part of the conditions of employment of the employees.

The court dealt with this argument in one sentence: "Given the nature of the right, they only enjoyed it for as long as the Collective Agreement was in force."

The court had an opportunity to interpret s23(3). There is an argument that this section may be interpreted to mean that once the collective agreement is cancelled those provisions constituting conditions of employment outlive the collective agreement in the

form of provisions of the contracts of employment. An increase in remuneration in terms of a collective agreement, for instance (unless the agreement provides otherwise) does not fall away when the agreement expires.

The effect of this judgment is that it is possible "... given the nature of the right ..." contained in the collective agreement, that the variation of the contract of employment by the collective agreement may outlive the collective agreement. The nature of the right will determine this aspect.

Parties to a collective agreement are well advised, if that is the intention of the parties, to make provision in the collective agreement for the termination of all rights and conditions of employment contained in the agreement if it is cancelled.

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