



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: YES/NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED NO DATE:.....23 November 2023.. SIGNATURE: [REDACTED]
--

Case No. 52365/2020

In the matter between:

RABOTHATHA, ISHMAEL

FIRST PLAINTIFF

MOTSEPE, RACHEL MMAKETLO

SECOND PLAINTIFF

TLHABADIRA, KGOTHATSO PETUNIA

THIRD PLAINTIFF

RAPHOLO, GOMOLEMO

FOURTH PLAINTIFF

MOGALE, DUDZILE

FIFTH PLAINTIFF

NETSHIFEFE, THABISO LUCAS

SIXTH PLAINTIFF

MMAMATSHENYA, FRANK SELLO

SEVENTH PLAINTIFF

And

SUN INTERNATIONAL LIMITED

FIRST DEFENDANT

SUN TIMES SQUARE (PTY) LTD

SECOND DEFENDANT

Coram: Millar J

Heard on: 15 November 2023

Delivered: 23 November 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 13H00 on 23 November 2023.

JUDGMENT

MILLAR J

- [1] The plaintiffs are all employed by the second defendant at its Sun Times Square Casino in Pretoria. By the time the matter was called, the parties had narrowed the issues for determination significantly. A statement of agreed facts and issues

was placed before the Court and this obviated the calling of any witnesses and the leading of any *viva voce* evidence.

- [2] The parties also sought by agreement, an order separating the issues of liability and quantum. I granted the order and so the matter proceeded for the determination of liability.

BACKGROUND

- [3] The following were common cause:-

- [3.1] that each of the plaintiffs were employed of the second defendant on 1 April 2018.
- [3.2] that the first defendant, second defendant and employer organizations representing the plaintiffs had entered into a collective agreement with regards to remuneration of the employees of the second defendant.
- [3.3] that the collective agreement governed the period 1 March 2018 to 28 February 2021 and all the plaintiffs had received increases in remuneration in terms thereof.
- [3.4] that on 16 April 2018, the general manager together with the head of the human resources department had notified the plaintiffs of further increases to their respective remuneration (subject to conditions).
- [3.5] that the increases had been implemented until January 2019 when they had been revoked.
- [3.6] that the revocation of the increases had been in consequence of an investigation into the way in which the performance evaluations of each of the plaintiffs had been conducted.

- [4] The plaintiffs, dissatisfied with the revocation of the increases, then instituted the present action for damages arising out of what they contended was a unilateral change to the remuneration component of their terms and conditions of employment.
- [5] The defendants raised 3 defences. The first was *iustus error*, the second lack of authority on the part of the general manager and head of human resources and thirdly, public policy. I intend to deal with each of these in turn.

IUSTUS ERROR AND LACK OF AUTHORITY

- [6] The plaintiffs argued that the performance increases which were in addition to the increases that had been collectively negotiated, were separate and distinct.
- [7] It was argued for the defendants that once both the parties had all subordinated themselves to the collective bargaining process, it was only in terms of this process that changes to remuneration could be negotiated and affected.
- [8] The plaintiffs argued that the performance increases were given in consequence of individual performance and were beyond the scope of the collective agreement and that any such increase was in addition to that which had been negotiated collectively.
- [9] The defendants for their part argued that the collective bargaining process and acceptance of its benefits, which the plaintiffs had done, precluded either the plaintiffs or the defendants from concluding any agreement, unless it was done through the collective bargaining process.
- [10] *"The entire ambit of collective agreements are matters of "mutual interest." Axiomatically, such matters of mutual interest are matters that arise during and in consequence of the existence of the employment relationship between the employers and employees. This has been interpreted to mean:*

*'It brings the complete array of employment and labour relations matters within the scope of collective agreements. Almost anything in which the parties have an interest – shared or opposing – **and which is capable of joint and autonomous regulation.** is fit for inclusion in a collective agreement.'* [My emphasis]."¹

[11] The collective agreement was entered into in respect of “wage negotiations” and provided *inter alia*, that:-

[11.1] in terms of clause 2 that: “[t]he agreement shall be applicable to all employees.”

[11.2] in terms of clause 13 that “[a]ll other terms and/or conditions of employment are not altered by this agreement [and][sic] shall prevail.”

[11.3] in terms of clause 15 that the “agreement constituted the entire agreement between the parties in respect of the substantive issues.”

[12] It was argued for the defendants that the substantive issue dealt with the collective agreement was “the sole provision of increases” and that “anything outside of the agreement, including purported performance related increases” was not permissible. The only way in which the plaintiffs could ever obtain any increase in their remuneration, so the argument went, was in terms of the collective agreement.

[13] Since both the plaintiffs and defendants had subordinated themselves to the collective bargaining process and had accepted the benefits of the collective agreement in question, neither (or any of their agents) had any authority to negotiate or agree for anything outside of that agreement.

¹ *Municipal Workers Retirement Fund v South African Local Government Bargaining Council and Others and Other Related Matters* [2023] ZAGPPHC 98; 2905/2022; 4580/2022; 30396/2022 at para 17.

- [14] In the making of the offer to pay increased remuneration based on performance, the general manager and human resources manager had been mistaken in believing that they had the authority² to do so, and in respect of the plaintiffs, in accepting the increased remuneration, they also had been mistaken in their entitlement to do so.
- [15] The defendants furthermore relied on 2 passages that appeared in all the letters of 16 April 2018.
- [16] The first was of the nature of a reservation on the part of the defendants in which it was stated *"Any unilateral errors or commissions which may arise during implementation of the revised remuneration and other terms and conditions will need to be respected and rectified."* This passage spoke to clause 13 of the collective agreement.
- [17] The second was of the nature of a notification which provided that *"You are reminded that the next annual remuneration review will be 1 March 2019."* This clause spoke to clause 2 read together with clause 15 of the agreement.
- [18] Since neither party discovered nor included in the bundle of documents which were placed before me, any of the individual plaintiff's employment contracts, I am left with no other choice but to conclude that those contracts do not contain any provision that would bring them within the scope of clause 13 and in so doing, the additional increases, whatever their nature, outside the scope of the collective agreement.
- [19] For this reason, I find that both the plaintiff's and the second defendant erred when the offer of a further increase was made, and when it was accepted.³

² *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC).

³ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A). Christie's *The Law of Contract in South Africa* 8 ed (LexisNexis, South Africa) 2022 at pg. 400 - *"When the parties expressly or tacitly make the contract depend on a past or present fact or state of affairs it is usual to say it is dependent on a common assumption or supposition, and if their assumption turns out to be mistaken the contract is unenforceable."*

PUBLIC POLICY

- [20] This defence was predicated upon the public policy considerations and benefits arising and deriving from the collective bargaining process between not only the defendants and the plaintiffs, but the defendants and all their employees and for that matter also between all employers and employees.
- [21] It was argued for the defendants that besides the decision to authorize the performance increases to the plaintiffs, which fell afoul of the collective agreement, the process by which those increases had been determined was found to be fundamentally flawed and in this respect, was an unreliable measure of the performance of the plaintiffs and also prejudicial to all the other employees doing the same or substantially the same work who were neither evaluated for nor offered any performance based increase.
- [22] The argument was essentially that the very purpose for which collective bargaining was undertaken, and the efficacy of collective agreements would be undermined if the present collective agreement was not applied. I agree – particularly in the circumstances of the present case where the collective agreement does not seek to exclude any other benefits which the plaintiffs are entitled to in terms of their contracts of employment.⁴

COSTS

- [23] The usual order made in litigation is that costs are to follow the result. On consideration of the matter as a whole, I am of the view that this is an appropriate case in which there is to be no order as to costs.

ORDER

⁴ *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) at para [87]. *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA) at para [27].

[24] In the circumstances, I make the following order:

[24.1] The action is dismissed.

[24.2] There is no order as to costs.



A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:

15 NOVEMBER 2023

JUDGMENT DELIVERED ON:

23 NOVEMBER 2023

COUNSEL FOR THE APPLICANT:

ADV. J MORAKA

INSTRUCTED BY:

TK BALOYI ATTORNEYS

REFERENCE:

MR. T BALOYI

COUNSEL FOR THE DEFENDANTS:

ADV. Y PEER

INSTRUCTED BY:

CLIFFE DEKKER HOFMEYR INC.

REFERENCE:

MS. D DURAND