REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number : J2025-2010

In the matter between:

ANNA GOUSHEVA BREET **Applicant**

and

MAXAM DANTEX SOUTH AFRICA (Pty) Ltd **Respondent**

JUDGMENT

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1. This matter was initially referred to the Labour Court on an urgent basis. However, on 18 November 2010 it was struck from the roll due to a lack of urgency.

2. In its answering affidavit the Respondent raised a preliminary point that this Court lacked jurisdiction to hear and determine the dispute on the basis that the Court does not have jurisdiction to determine disputes relating to contracts other than contracts of employment. However, by the time that the matter came before me this point *in limine* had been withdrawn.

Background

3. The Applicant was employed in the position of Finance Manager – Africa with effect from 1 February 2009.

4. While it is not necessary to go into all the details for purposes of this judgment, it appears that the parties reached a stage where the continuation of the Applicant's employment with the Respondent was in question. This is apparent from a meeting that was held between the parties on 14 September 2010. While there is a dispute about exactly what transpired at this meeting, what is clear is that the Respondent intended to proceed with disciplinary action against the Applicant. The parties, however, opted to "settle" the matter as opposed to proceeding with the disciplinary hearing.

5. The Applicant's version as to what happened at the meeting is that a final and binding separation agreement was reached in terms of which she would resign, not return to the Respondent's premises, be paid until the end of October 2010 and be paid a further amount equal to six months remuneration.

6. The Respondent's version is that an agreement was reached in principal that the parties would negotiate the terms of a separation agreement. The broad terms which were discussed were that the Applicant would resign and be paid until the end of October 2010. The Applicant proposed that in addition to this she would be paid a package equivalent to six months remuneration. The Acting Managing Director of the Respondent, Tjaart Louw (Louw), required an undertaking from the Applicant that she would not access any of the Respondent's systems, which undertaking was given by the Applicant. It is further the Respondent's version that Louw first needed to get approval from the Respondent's parent company in Spain before any final agreement could be reached.

7. Following on this meeting, and at about 21h15 that evening, Louw sent an

email to the Respondent's directors in Spain. In this email he indicated that he had discussions with the Applicant and that the matter could be disposed of in two ways. Either the Respondent could suspend the Applicant and hold a disciplinary hearing, or they could agree with her to resign and offer her compensation. He also stated that the Applicant indicated that she may accept six month's salary. He accordingly recommended that the Respondent negotiate a maximum payment of six months with the Applicant. In the event that she decides not to accept this she would be suspended on full pay pending a disciplinary hearing.

8. On 15 September 2010, Louw went to the Respondent's offices in order to collect her personal belongings and vacate her office. She was informed that the separation agreement would be available later. To this end the Respondent's Human Resources Manager, a Mr de Jager, arranged to meet the Applicant at a shopping mall at 16h30 that afternoon.

9. According to the Applicant, at this meeting she was handed the separation agreement which was in an envelope. She did not read it at this stage. She, however, asked for an opportunity to take advice on the separation agreement, which De Jager agreed to.

10. When the Applicant arrived at home she noticed that the agreement was already signed on behalf of the Respondent. She also noticed that the separation agreement included a clause 8 dealing with the company's property.[1] There is a dispute between the parties as to whether or not this provision had been discussed with, or mentioned to, the Applicant during the meeting which they had on 14 September 2011.

1 This clause is set out in full below.

11. In the meantime the Respondent discovered on the evening of 15 September 2010, that the Applicant had accessed the work email system and had intercepted the email sent to Spain the night before. It is common cause that she did this and sent a copy of the intercepted email to her consultant, Adrian Thomas (Thomas). As a result Louw made arrangements to meet with the Respondent's attorneys to discuss the matter.

12. According to the Applicant, the following day on 16 September 2010, she requested that the company attach to the agreement a payment schedule setting out a summary of the payment terms contained in the agreement. She did not, however, receive any response to this request and therefore attempted to contact De Jager on his cell phone. When he did not answer his cell phone she left a message. De Jager responded shortly afterwards to say that he was in a meeting but that he had sent the payment schedule to the company's lawyers. As she did not wish to delay matters further she signed the separation agreement at about 18h00 on 16 September 2010 and emailed it to the Respondent.

13. The Applicant then immediately went to the Respondent's offices, and pursuant to clause 8 of the agreement, handed the Respondent's property to the security officer. According to her she also deleted the electronic data stored on the computer in her possession. She says that she returned the company information and property shortly after emailing the signed agreement as she understood that she had to do so upon signature of the agreement.

14. The Respondent's version is that the Applicant phoned De Jager on the

morning of 16 September 2010 and explicitly indicated to him that she was not prepared to sign the separation agreement in its current form and that she required that an addendum be made to the agreement. The Applicant, thereafter, sent an email to De Jager in which she states that *"I've no problem signing the contract provided that we finalise and sign off on the schedule as part of this agreement"*.

15. The Respondent does not agree that what the Applicant was seeking to do was simply to provide a quantification of what was set out in the agreement. According to the Respondent, the schedule which the Applicant provided was incomplete, and she required that it be finalised between the parties. Furthermore, it sets out the Applicant's view that she should be remunerated until the end of October, whereas the agreement provided that her remuneration would be until 15 October. In addition to this the schedule also dealt with the payment of her cell phone account until the end of September, payment of car insurance until end of October and payment of pension fund contributions until end of October. These issues according to the Respondent were not part of the original agreement. The Respondent views this as a counter offer.

16. At the meeting which Louw had with the attorneys on 16 September 2010 he instructed them to draft a letter to the Applicant stating that the discussions around the separation agreement were terminated, that the Applicant was suspended with immediate effect and that a disciplinary hearing would be convened in due course. This letter was sent by the attorneys to the Respondent via email at 16h07 on 16 September. According to the Respondent it intended sending the letter to the Applicant on the same day

but did not do so due to the fact that Louw was assisting forensic investigators who had been appointed to determine how the email was intercepted.

17. On 20 September 2010 the Respondent's attorney sent an email to the Applicant requesting a meeting with her at 10h00 the following day to discuss the alleged breach of the warranty contained in clause 8 of the agreement, as well as the alleged interception of private email communications between the Respondent's management.

18. The Applicant replied to the letter when she saw the mail on 21 September 2010, indicating that she was not available for the proposed meeting due to prior commitments and that she would revert to the attorneys.

19. While she was in the process of setting up a consultation with her attorneys, she received a further letter in terms of which the Respondent purported to cancel the agreement and suspend her pending the outcome of a disciplinary hearing. According to this letter, pursuant to the Respondent's investigations into the Applicant's unlawful conduct it had decided to cancel the separation agreement with immediate effect on the basis that she had breached the agreement and that her conduct in entering into the agreement was dishonest and intended to mislead the Respondent with regard to the nature of her violation of the company's IT systems. The letter goes on further to state that the agreement is accordingly terminated with immediate effect and as a consequence "the *status quo ante* has been restored". Working from the basis that the Applicant was still an employee, the Respondent then set out the complaint against her and suspended her.

20. Following on this, the disciplinary hearing was held. The Applicant did not

attend this hearing as she did not accept that the purported cancellation of the separation agreement revived her employment contract.

21. On Wednesday 6 October 2010 the employee was notified of her summary dismissal.

Did a binding agreement come into existence?

22. The first question to be answered is whether or not a binding agreement came into existence between the parties. There are, however, other issues linked to this question. They include whether or not an oral agreement was reached on 14 September in respect of the terms of the separation between the parties. There is also the question as to whether or not the Applicant's email containing a schedule of payments amounted to a counter-offer, as well as whether or not the Respondent was induced into signing the separation agreement by a fraudulent misrepresentation on the part of the Applicant. Much time is taken up in the affidavits of both parties, as well as in their heads of argument, putting forward their respective versions in this regard. Given the view that I take in this matter, it is not necessary for me to deal with all these issues.

23. From the available evidence it appears that a binding agreement was in place. On 20 September 2010 the Respondent's attorneys wrote to the Applicant and advised her as follows –

> *"We act for Maxam Dantex South Africa (Pty) Ltd which has forwarded to us a separation agreement signed by our client on 15 September 2010 and by you on 16 September 2010. In terms of clause 8 of the*

separation agreement, you warranted and undertook that as of the close of business on 15 September 2010 you had no property in your possession which belongs to our client. You warranted further that you had not reproduced or copied any property in your possession which is the property of our client.

Subsequent to its signature of the separation agreement, our client ascertained that not only were you in breach of the warranties set out above but that you have also intercepted private email communication among senior management members of our client. In doing so, you were acting not only in breach of your employment duties and in breach of the warranties given by you in separation agreement, but your conduct was unlawful and in breach of the provisions of the Regulation of Interception of Communications and Provision of Communication-related Information Act No 70 of 2002.

In light of the above, we have advised our client that it is entitled to cancel the agreement on the basis of your breach."

24. It is clear that the Respondent accepted that a valid and binding agreement was in place, hence the reference to its right to cancel the agreement for alleged breach on the part of the Applicant. There is no mention in this letter that no agreement came into existence because of a counter offer made by the Applicant, nor is there reference to the possibility of cancelling the agreement on the basis of fraudulent misrepresentation on the part of the Applicant.

25. The letter of 20 September 2010 was followed up by a further letter sent by

the Respondent itself to the Applicant. In this letter the Respondent states that *"pursuant to the company's investigation into your unlawful conduct, the company has decided to cancel the separation agreement with immediate effect on the basis that you have breached the agreement and that your conduct in entering into the agreement was dishonest and intended to mislead the company as regards the nature of your violation of the company's IT systems.*" The letter then proceeds as follows – *"The separation agreement is accordingly terminated with immediate effect as a consequence of which the status quo ante has been restored. The company therefore accepts that you remain in its employ*."

26. The fact that the company now elected to cancel the agreement also clearly indicates that an agreement was in existence. In the circumstances I accept that a valid agreement came into existence between the parties.

Was there fraudulent misrepresentation?

27. In the above letter from the Respondent, it is however suggested that the agreement was being cancelled because the Applicant's conduct in entering into the agreement was dishonest and intended to mislead the company regarding the nature of her violation of the company's IT systems.

28. Even if the Applicant had undertaken at the meeting of 14 September that she would not access the Respondent's IT systems, her failure to observe this undertaking cannot amount to a fraudulent misrepresentation when she concluded the settlement agreement. Any such agreement would be distinct from the settlement agreement, and if indeed concluded would probably have been on the basis that pending the finalisation of the settlement of the dispute

between the parties, the Applicant would not access the Respondent's IT system. Any breach of that agreement would be exactly that – a breach of that agreement and not a breach of the settlement agreement. Further, the settlement agreement itself does not have any provision which refers to an undertaking of this nature.

29. If the complaint is that the Applicant concluded the settlement agreement knowing full well that she was already in breach of clause 8 of the settlement agreement, and that this somehow amounted to a fraudulent misrepresentation, then this argument is also rejected in light of the view that I take below when dealing with clause 8.

30. I am therefore of the view that the Applicant was not entitled to cancel the separation agreement as a result of fraudulent misrepresentation.

Was there a breach of the agreement?

31. The Respondent argues that it was entitled to cancel the agreement on the basis that the Applicant breached clause 8 of the agreement. According to the Respondent, when the Applicant signed the separation agreement on 16 September she warranted that as of 15 September she was not in possession of information belonging to the Respondent, nor had she copied such information to anyone. This according to the Respondent was done by the Applicant knowing full well that she was in possession of an email which she had no entitlement to be in possession of and that she had copied this email to her advisor.

32. Clause 8 provides as follows-

"8.1 The employee warrants that as of close of business on 15 September 2010, she has no property in her possession which is the property of the company. This includes, without limitation, computer equipment, and any and all documentation relating to the business of the company or its customers, notes, records, in whatever form such exist, including hard copies and electronically stored data, office keys and electronic equipment provided to her by the company during her employment.

8.2 The employee warrants further that she has not reproduced or copied any property in her possession which is the property of the company nor has she committed or procured any other person to do so."

8.3 The employee undertakes not to disclose any information and documentation acquired during her employment by the company to any third party."

33. The Respondent argues that the Applicant breached clause 8.1 by accessing the Respondent's computer system on 14 and 16 September 2010. As far as 14 September is concerned, the evidence is that she accessed this email and then forwarded a copy to Thomas. It may well be that she breached clause 8.1. However, it is also arguable that the act of accessing the email in question does not fall within the scope of clause 8.1 which deals specifically with the possession of the Respondent's property. It also does not extend to a third a party such as Thomas.

34. There is also no evidence that shows that the Applicant breached clause 8.1

on 16 September 2010. The Respondent's argument in this regard is that the Applicant accessed the Respondent's computer system by intercepting and viewing an email sent by its attorney at 16h07 and received by De Jager at 16h11. They based this submission on a report prepared by a computer forensic company. However, this submission is not borne out by the report. Nowhere in the report does it indicate that the email from the attorney sent at 16h07 was intercepted by the Applicant. In its report the forensic company states that they were tasked with investigating the leaking/intercepting of an email message that was sent from a Mr Juan Moleres Vidal to Louw on 14 September 2010 at 21h32. There is no reference to the email from the attorney sent at 16h07 on the 16th of September. In fact, the report also states that representatives of the forenscis company collected the Applicant's laptop, in order for it to be forensically imaged, on 16 September 2010. Unless they collected the laptop after 16h07, the breach would not have even occurred at the time that they collected the laptop. In the conclusion of the report, mention is also only made of the email message of 14 September 2010. No mention is made of the email of 16 September 2010. There is therefore no evidence before me that the Applicant accessed the email system after 15 September 2010.

35. As far as clauses 8.2 and 8.3 are concerned, these types of clauses are generally inserted into a contract in order to protect the propriety interests of a company. The aim is to ensure that such information is not copied and passed on to competitors. It appears to be common cause between the parties that the Applicant had access to the email system as part of her duties. Her viewing of the emails in itself would therefore not be questionable. There can,

however, be no question that her advisor to whom she sent the email had no right to view that email.

36. As unacceptable as the Applicant's conduct was, the question is whether or not this amounted to a breach of clauses 8.2 and 8.3. The contents of the email had a bearing on the relationship between the Applicant and the Respondent, and more particularly on the termination of that the relationship. I can see no basis on which this information, however obtained, falls within the ambit of what clauses 8.2 and 8.3 would normally cover.

37. In any event, although there may be some debate in respect of clause 8.2, it appears that clause 8.3 is prospective in that it requires the Applicant, going forward, not to disclose any information and documentation which she may have acquired during her employment with the company to any third party.

38. Even if any breach of clause 8 has taken place, I do not believe that such a breach would be material in light of what the parties were trying to achieve through the settlement discussions, and the nature of the possible breaches.

39. In the circumstances I am of the view that it was not open to the Respondent to terminate the separation agreement.

The revival of the employment contract

40. Even if there was a basis for terminating the agreement, this did not revive the underlying employment contract. The separation agreement was a compromise that terminated the employment contract. A compromise is a settlement by agreement of disputable obligations. It is an absolute bar to an action on the underlying agreement that is the subject matter of the

compromise. Repudiation or breach of a compromise agreement that is not subject to a suspensive or resolutive condition precludes reliance on the original or underlying compromise agreement[2]

41. The Respondent argued that the settlement agreement cannot be a compromise agreement because there are no disputed obligations. I reject this argument on the basis that the parties were in dispute in respect of the Applicant's obligations in terms of her employment contract, hence the intention to conduct a disciplinary hearing.

42. The separation agreement is not subject to a suspensive or resolutive condition. It does not contain a provision providing for the reversion to the employment contract in the event of repudiation or breach. It follows that the employment contract could not revive upon repudiation or breach of the separation agreement.

In the circumstances I make the following order -

1. The Applicant did not breach the separation agreement concluded between the Applicant and the Respondent on 16 September 2010.

2. The purported cancellation of the separation agreement is invalid and unlawful.

3. The Applicant's purported dismissal is incompetent in law.

4. The Respondent is directed to delete or cause to delete any reference in its employment records to its dismissal of the Applicant on or about 6 October 2010.

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2 RH Christie, The Law of Contract in South Africa, 5th ed, page 455-461.

5. The Respondent is directed to comply with the terms of the separation agreement within 5 (five) days of the date of this court order.

6. The Respondent is to pay the Applicant's costs.

Conradie AJ

For the Applicant

Adv PJ Pretorius SC, instructed by Brink Cohen Le roux INC

For the Respondent

Adv C Orr, instructed by Webber Wentzel

Date of Judgment: 20 December 2011