



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

JUDGMENT

Not reportable

Case no. JR2090/12

In the matter between:

CUAN VAN ROOYEN

Applicant

and

RAINBOW FARMS (PTY) LTD

Respondent

Heard: 10 JANUARY 2014

Delivered: 20 June 2014

Summary: Application in terms of section 158(1)(c) for a settlement agreement to be made order of the court. Claim of breach of mutually terminated contract of employment not ground for cancellation of settlement agreement already concluded by the parties.

JUDGMENT

BALOYI AJ

Introduction

[1] In this application, the Applicant is primarily seeking an order making a settlement agreement an order of the court together with ancillary relief

and/or in the alternative judicial cancellation of the settlement agreement coupled with claim for damages. The settlement agreement in question came into existence as outcome of successful negotiations during retrenchment consultations between the parties. The application is opposed.

Background facts

- [2] Facts of this matter are by large common cause. The Applicant was the Respondent's Key Account Manager until when his employment was terminated following conclusion of retrenchment and settlement agreement (settlement agreement) on 10 February 2012. The salient points of the agreement were amongst others that;

Extensive consultations did take place between the parties in the light of the Respondent's restructuring process.

The Applicant was offered a retrenchment package which he accepted. The amount was in the sum of R367 244-08 made up of severance pay of R259 885-74, notice pay of R45 025-25 and R62 333-09 in respect of leave pay.

The Applicant's employment was to terminate by consent on 31 March 2012.

The Applicant was not required to report for duty for the month of March 2012.

The settlement payment was to be in full and final settlement of all claims the Applicant might have arising out of termination of employment contract, delict etc.

Any alteration, variation or deletion would not be binding unless reduced to writing and signed by all parties to the agreement.

- [3] The Applicant approached the court after the Respondent had expressed its intention not to pay the severance pay. The Respondent honoured part

of the agreement by paying out the notice pay and leave pay. In essence the relief sought by the Applicant is aimed at recovering the severance pay of R259 885-74 which the Respondent refused to pay. The Respondent's refusal to pay is premised on cancellation of the settlement agreement on reasons that the Applicant committed a breach of employment contract. Failure to disclose certain issues material to the conclusion of the agreement is the reason for Respondent's resistance. In other words, had the Respondent been aware of the Applicant's material non disclosures, it would not have concluded the settlement agreement.

- [4] The Respondent communicated the cancellation of settlement agreement by way of correspondence and the Applicant also replied thereto. Copies of such correspondence formed part of this application. What is apparent from the correspondence is that the Applicant allowed some discounts to one of its clients, Pick 'n Pay which discounts were not authorized, meaning that the Applicant had committed misconduct leading a financial loss of R1 279 581-60. Breach of contract of employment as the Respondent's correspondence suggested is rested on the Applicant's taking up of new employment with a different company before the expiry of notice period without obtaining permission from the Respondent. The Respondent intimated that the severance pay had to be offset from the amount of the said financial losses.
- [5] Before this Court, the Respondent's challenge to the Applicant's case is centered around cancellation of settlement agreement because of Applicant's misconduct which led to financial loss of R1 279 581-60. This is also seen from its claim of full amount which the Respondent said to have lost resultant from the Applicant's conduct. The action for recovery of such losses instituted by the Respondent was at the time of arguing of this matter pending before the North Gauteng High Court.
- [6] Since there is no longer a settlement agreement between the parties according to the Respondent by virtue of its cancellation, the Applicant would thus not be entitled to the relief sought. In short the cancellation created Applicant's indebtedness to the Respondent, which indebtedness

is subject of litigation in the North Gauteng High Court. On the other hand the Applicant is seeking an order as prayed for to enable him to enforce on the indebtedness created in terms of the settlement agreement.

Evaluation

- [7] Certainly a number of questions are raised in this matter. It is worth mentioning that after the dispute had escalated to litigation and/or at least after involvement of attorneys, the issues of offset and Applicant's employment elsewhere during notice period did not form part of the Respondent's case. This seems to be a wise selection of issues to be placed before the court. It is not in dispute that the parties entered into a valid settlement agreement that was preceded by retrenchment processes which took place in terms of the law, Labour Relations Act and Basic Conditions of Employment Act being on the forefront. Since the existence of settlement agreement is not in dispute and that it has not been complied with, it is therefore of paramount importance to scrutinize the reasons why it should not be made an order of the court. The only notable issue pleaded by the Respondent is that the settlement agreement was cancelled due to the Applicant's misconduct which was discovered after the signing of the agreement.
- [8] It appears to this court that the Applicant filed this application on the understanding that the reasons for the Respondent's refusal were based on the offset of the loss against the monies due to him and the Applicant's breach of contract of employment by taking up employment elsewhere during notice period. This understanding can clearly be drawn from the correspondence addressed to the Applicant by the Respondent on 22 and 28 March 2012. The Respondent emphasized cancellation of the settlement agreement which cancellation was conveyed in the aforesaid letters. Before this Court, it appears that the Respondent only aligned itself with contents of the letters in so far as they convey cancellation of the settlement agreement.

- [9] In the Respondent's heads of argument, the Applicant was attacked for bringing irrelevant material into this application. In the circumstances, I am unable to find the reason why the Applicant should be faulted for bringing issues based on the Respondent's own initiated reasons for cancellation of the settlement agreement. These issues are relevant and I agree with the Applicant's submissions that offset cannot find application in this matter in the light of those elements set out in *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd*¹. The facts of this matter as they stand do not suggest that parties were mutually indebted to each other with both debts liquidated and fully due.
- [10] Furthermore, acceptance of new employment during the notice period where the Applicant was exempted from reporting for duty has been clearly dealt with the *Lottering and Others v Stellenbosch Municipality*². The Respondent's direction that it did not require the services of the Applicant's services during notice period is without hesitation a waiver and had to live with it.
- [11] What follows from the facts of this case as placed before me there was no evidence to suggest that the Applicant breached the terms of the settlement agreement in question. The settlement agreement came as a result of retrenchment consultation within the prescripts of the law. The process was initiated by the Respondent. I have not been afforded with content of the retrenchment discussions leading to the conclusion of a settlement agreement. This should have probably assisted in ascertaining whether during such consultations there was a platform for which the Applicant was required to discharge a duty to disclose relevant material information and the Applicant elected not to. Consequently a cancellation of settlement agreement based on breach of contract of employment which was no longer in existence due to mutual termination cannot be sustained.

¹ 1962 (1) SA 736 (T).

² [2010] 12 BLLR 1306 (LC).

- [12] The Respondent made leave and notice payments to the Applicant. These payments were part of the settlement agreement. This definitely points that the Respondent made some form of selective compliance. If indeed misconduct was the issue, payment of notice pay should have also been withheld.
- [13] The Respondent did not claim the notice pay from the Applicant in its action in the North Gauteng High Court. The Respondent in its own correspondence pointed that the amount of indebtedness would be set off from the monies due to the Applicant. This is indicative of the fact that the Respondent was from the onset fully aware of its obligations towards the Applicant in terms of the settlement. In conclusion, I have not found any reason why the settlement agreement should not be made an order of the court. The determination on whether the Applicant is indebted to the Respondent is in the capable hands of the North Gauteng High Court and has no bearing in making the settlement agreement an order of the court. The Applicant has demonstrated the existence of the agreement and that the Respondent had not complied with it. The Applicant's claim stands to succeed on the main prayers. Regarding costs, I did not find any reason why costs should not follow the order. There is no longer any relationship to be maintained between the parties

Order

- [14] In the premises the following order is made;

- 14.1 The retrenchment and settlement agreement is made an order of the court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995.
- 14.2 The Respondent is ordered to pay R259 885-74 to Applicant within 14 days of receipt of this order plus interest at the rate of 15.5% per annum calculated from 31 March 2012 to the date of final payment.
- 14.3 The Respondent is ordered to pay the Applicant's costs.

Baloyi AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Advocate HJA Boswel

Instructed by:

Daan Beukes Attorneys

For the Respondent:

Mr G.M Kirby-Hirst of Magregor Erasmus Attorneys

LABOUR COURT