REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D998/10

In the matter between:

ROGER BURNETT Applicant

And

NAMPAK CARTONS AND LABELS KZN

A division of NAMPAK PRODUCTS LTD Respondent

Heard: 29 February and 1 March 2016

Delivered: 10 June 2016

Summary: Contractual claim for payment of agreed voluntary retrenchment package.

JUDGMENT

GUSH J

1. The applicant in this matter, an erstwhile employee of the respondent, applied by way of notice of motion for an order that the respondent pay him the amount of R466,796.55. The amount claimed is the balance of a voluntary retrenchment package the applicants avers the respondent agreed to pay him.
2. The application is opposed by the respondent. After the respondent had filed its opposing affidavit the parties agreed that the matter should be referred to trial.
3. In due course the bodies conducted a pre-trial conference and filed a pre-trial minute which minute records the background to the matter and in particular the following common cause facts:
    a. the respondent during December and January 2009/10 embarked on consultations regarding the contemplated retrenchment of a number of employees;
    b. that a total of 43 employees had applied for voluntary retrenchment and that the criteria to be applied to employees who had applied for voluntary retrenchment was that the value of their severance package would be "cost neutral". This meant that any employee who volunteered to be retrenched would receive severance package the value of which would not exceed the remuneration due to such volunteer for the balance of the financial year.
    c. On 28 January 2010 the applicant applied for voluntary retrenchment and on the 29 January 2010 met with the

respondents Aaron Ganesh (the applicant's general manager Pinetown) and Leon Selzer the then managing director of the applicant. At the conclusion of the meeting the applicant was advised that he would be notified of the outcome of his application on Monday, 1 February 2010.

d. On Saturday, 30 January 2010 in response to a telephonic query from the applicant, Ganesh left a message on the applicants phone advising the applicant "basically da deal is dat da retrenchment must be cost neutral in dis Fin Year, you me and Sinazo will resolved on Monday @ 8.00" (sic).

e. On Monday 1 February 2010 the applicant and Ganesh met and agreed the applicant's retrenchment package which was produced by and signed by both the applicant and Ganesh on 3 February 2010.

f. On 2 February 2010 the applicant was handed a certificate of service by the respondent's human resource manager in which the reason for the termination of the applicant services was recorded as "retrenchment".

g. On 4 February 2010 the applicants then human resources director Mr Ntshangase met with the applicant and handed him a restraint of trade agreement for him to sign. The applicant refused to sign the restraint of trade and advised Ntshangase that he had accepted an offer employment with Golden Era Packaging a competitor of the respondent.

4. The pre-trial minute records that the court was required to decide:

a. whether on 1 February 2010 or at all the respondent agreed to retrench the applicant;

b. if the respondent did agreed to retrench applicant on 1 February 2010 or at all was it entitled in law to resile from such agreement to retrench because applicant had failed to disclose the possibility of employment with Golden Era Packaging to the respondent, alternatively insist that such retrenchment be subject to the applicant signing a restraint of trade agreement in favour of the respondent;
c. if the respondent was entitled, in law, to resile from the retrenchment agreement (if any) whether it did in fact do so;
d. the circumstances under which the applicant left the employ of the respondent on 4 February 2010.

5. During the course of cross-examination of the applicant the respondent placed on record that it's defence to the applicants claim was:

> "The conclusion of the retrenchment or termination of the applicant would be subject to the parties entering into a mutual separation agreement which would include a restraint of trade provision"; and
>
> "There was no retrenchment agreement"

6. The applicant gave evidence in support of his application and the respondent led the evidence of Ntshangase and Selzer.

7. In his evidence the applicant was adamant that in response to his request for voluntary retrenchment he had met with the respondents Ganesh and Selzer. No mention had been made of any restraint of trade at this meeting or at any time prior to the agreement being concluded. After the meeting it had been agreed that he would be retrenched and a document setting out the retrenchment package

had been prepared by the respondent. The applicant had been given a certificate of service and the quantum of his retrenchment package had been agreed as had the date on which his employment would cease.

8. It is no coincidence that this evidence accords with the statement of agreed fact as set out in the pre-trial minute (see above).

9. It is common cause that the applicant's contract of employment did not include a restraint of trade.

10. The applicant was adamant that at no stage during the discussions with the respondent's representatives was the issue of a restraint raised with him until he was presented with the restraint by Ntshangase.

11. It was also his evidence that he had been considering joining a family business not connected with the respondent at the time of the discussions and agreement. He also gave evidence that he had not been offered a position with Golden Era Packaging until after the conclusion of his retrenchment.

12. The applicant gave his evidence clearly and was patently an honest witness. His confusion regarding the respondent's conduct and his position subsequent to the respondent's disingenuous efforts to have him sign a restraint of trade agreement, which became apparent during cross examination, was understandable given the respondents conduct.

13. An example of his credibility as opposed to that of the respondent's witnesses was the respondent's and in particular Ntshangase's denial that he Ntshangase had spoken to the applicant during the week after his meeting with the applicant regarding the restraint.

14. The applicant was adamant that he had telephoned Ntshangase to discuss with him issues relating to his insurance and medical aid. It transpired from the pleadings and the documents attached thereto that Ntshangase despite his denial of such telephone conversation had instructed the respondent's legal adviser that such telephone conversations had taken place.

15. Whilst the issue of the subsequent telephone conversations have little relevance to the overall merits of the matter it served to graphically to demonstrate the somewhat selective recall of the events by the respondent's witnesses and illustrate the veracity of the applicant's evidence.

16. Further evidence of the respondent's witness's selective recall of is to be found in the copies of the exchange of correspondence between the applicant's attorney and Ntshangase and the legal adviser included in the pleadings.

17. It is clear that Ntshangase was instructed to draft the restraint of trade by either Ganesh or Selzer that the respondent was uncertain as to who in fact had given the instruction. What is abundantly clear from the nature of the restraint drafted by Ntshangase was that it had little to do the respondents averment that it was connected to the applicant's application for voluntary retrenchment and the respondent's agreement to accede to his request. The so called restraint simply recorded that the payment, described by the respondent itself as a retrenchment package, was paid to the applicant as a consideration for agreeing to the restraint.

18. Seltzers evidence was equally unsatisfactory. It became apparent that having forgotten to raise the issue of a restraint Selzer

endeavoured variously, despite evidence and documentation to the contrary to suggest that it was common practice to require retrenched employees to sign restraints and that the applicant was never a candidate for retrenchment.

19. Selzer in his evidence dealt with what transpired at the meeting. He conceded that the applicant's contract of employment did not contain a restraint of any nature and at no stage during his meeting with the applicant was the issue of a restraint of trade discussed. Specifically Selzer agreed that it was never put to the applicant that his application for voluntary retrenchment would only be approved if he signed a restraint of trade.

20. For reasons best known to him, Selzer insisted, during his evidence, that the applicant had never been nor was he ever considered a candidate for retrenchment. This was despite the bundles of documents and pleading demonstrating otherwise. The minutes of the first retrenchment meeting between organised labour and the respondents records a summary of the positions the respondent contemplated retrenching including 13 non production employees. The applicant's bundle contained a schedule of in which 13 non production employees are identified and includes the applicant.

21. This document highlights the applicant as appearing the list but highlighting him due to his retrenchment package exceeding the amount related to the so-called cost neutral criteria. Selzer insisted that this document had nothing to do with the ongoing retrenchment process and was one of many cost exercises undertaken by the respondent at regular intervals. This was clearly and simply a fabrication.

22. It became apparent that Selzer believed that the respondent's case was best served by denying that the applicant had ever been considered for possible retrenchment.

23. What is abundantly clear from the evidence is that the applicant during the course of a retrenchment exercise initiated by the respondent made application to be considered for voluntary retrenchment.

24. The applicant aware of the criteria applied by the respondent namely that the amount of the package should not exceed the balance of the applicant's salary to the end of the financial year agreed to limit the value of his severance package so as to fall within this criteria.

25. The respondent elected to entertain the applicant's application and at the conclusion of a meeting with the applicant decided to accept the applicant's application for voluntary retrenchment.

26. The amount payable to the respondent was calculated by the respondent and agreed as was the date of his departure and the reason for the termination of his services.

27. The respondent conceded that at no stage during negotiations or prior to the agreement being reached was the acceptance of his application for voluntary retrenchment made subject to him signing a restraint of trade nor was the issue of a restraint of trade ever discussed.

28. The applicant's contract of employment did not include a restraint clause and as the issue of a restraint did form part of the discussions and subsequent agreement I am not persuaded that the applicant was in any way obliged to disclose where he was to be

employed after leaving the respondents employ. There is no evidence to suggest that the respondent only accepted the voluntary retrenchment as a result of any representation made to the respondent.

29. I am satisfied that the evidence of the applicant that at the time the negotiations took place the applicant had not agreed to take up employment with Golden Era Packaging. In any event I am not persuaded that the applicant was under any contractual obligation whatsoever to disclose where he was intending to be employed after his dismissal. He was not subject to a restraint of trade and had no reason to believe that an agreed voluntary severance package payable in response to the responded acceptance of his request for voluntary retrenchment would be made subject to restraint.

30. What is abundantly clear is that the issue of the restraint was an afterthought by the respondent after the retrenchment agreement had been concluded and the circumstances surrounding the retraint agreement was simply an attempt to claso the stable door after the horse had bolted.

31. This is evidenced by the respondents obfuscation of the circumstances surrounding the production and contents of the restraint. Selzer was unsure of the nature of the so called agreement presented to the applicant and equally unsure as to who had instructed Ntshangase to draft it. Ntshangase said Selzer instructed him and Selzer denied he had given the instruction.

32. The respondents had simply attempted to impose a restraint on the applicant after the agreement had been reached that the applicant would be voluntarily retrenched. The specific nature of the restraint presented to the applicant namely that the amount of the retrenchment package to be paid to the applicant was a consideration for the restraint was no more than a thinly disguised attempt by the respondent to introduce into the agreement a clause that had never been discussed and was not part thereof.

33. As set out above the court was asked to decide:

a. whether on 1 February 2010 or at all the respondent agreed to retrench the applicant;
b. if the respondent did agreed to retrench applicant on 1 February 2010 or at all was it entitled in law to resile from such agreement to retrench because applicant had failed to disclose the possibility of employment with Golden Era Packaging to the respondent, alternatively insist that such retrenchment be subject to the applicant signing a restraint of trade agreement in favour of the respondent;
c. if the respondent was entitled, in law, to resile from the retrenchment agreement (if any) whether it did in fact do so;
d. the circumstances under which the applicant left the employ of the respondent on 4 February 2010.

34. I am satisfied that the answers to the above question are:

a. Yes the respondent did agree to retrench the applicant.

b. The respondent was not entitled to resile from the agreement or insist on the applicant signing the restraint agreement and its failure to abide by the retrenchment agreement is a breach thereof.

c. That the applicant's employment was terminated in accordance with the agreement reached with the respondent.

35. There is no reason why costs should not follow the result.

36. Accordingly and for the reasons set out above I make the following order:

a. The respondent is ordered to pay the applicant the sum of R466,796.55 together with interest thereon from 5 February 2010;

b. The respondent is ordered to pay the applicant's costs

D H Gush

Judge of the Labour Court of South Africa Durban

APPEARANCES:

FOR THE APPLICANT: Adv P Schumann

Instructed by Hamilton Attorneys

FOR THE RESPONDENT: Adv Van As

Instructed by Cliffe Dekker Hofmeyr Inc