



IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Not Reportable

CASE NO: D 790/2012

D150-12

In the matter between:

BHEKIZITHA JAMES MTOLO

APPLICANT

And

MERRIVALE SPAR

RESPONDENT

Heard: 20 April 2016

Delivered: 16 November 2016

Summary: Section 158 (1) (c) application referred to oral evidence – whether an agreement was reached by parties for employee to work at alternate place - whether employee agreed to delay resumption of duty – whether employer complied with the settlement agreement – application granted.

JUDGMENT

CELE J

Introduction

[1] This is an application in terms of Section 158(1) (c) of the Labour Relations Act (the Act),¹ to make a Commission for Conciliation, Mediation and Arbitration, (the CCMA), settlement agreement an order of court. The Applicant initiated two applications one under case number D150/2012 and subsequently another under case number D790/2012. There arose a dispute of facts and at the request of the parties the matter was then referred to oral evidence on the disputed issues. The application is opposed by the Respondent on the basis that it complied with the settlement agreement.

Background Facts

[2] The Applicant was in the employment of the respondent, a shop owned by Mr Lee Nelson Parau (hereafter referred to as Lee) since August 2006. Lee and his brother, Mr Ricardo Parau (hereafter referred to as Ric), as he was known, were

¹Act Number 66 of 1995 hereafter referred to as the Act.

joint owners of both the Respondent, that is, Merrivale Spar and Greendale Spar, both of which are located in Howick. The Applicant worked as a Receiving staff in the receiving area of Merrivale Spar and he resided at the premises of the same shop. He earned R 4 700.00 per month. In terms of the Applicant's written contract of employment:

"The employee will work at 13 Zeederberg Road, Merrivale or any other places as the employer may from time to time direct".

return on 8 December 2011. He was dismissed on that day and he referred an unfair dismissal dispute for conciliation to the CCMA. The CCMA scheduled a hearing as a con/arb on notice to both parties for 19 January 2012. The Applicant attended the hearing in company of his attorney, Mr M Mathonsi. The Respondent was represented by Ms D Padayachee from an employers' organisation known as Neesa. The deliberations held culminated in the parties agreeing to settle the dismissal dispute. In the execution of their agreement they signed a document which is the standard agreement form of the CCMA with a number of clauses, giving various options to choose from. All options from clause 1 to 5 were cancelled off, leaving clause 6. Clause 1 had the option for reinstatement and Clause 2 was for re-employment. Corresponding to clause 6 there is a hand written entry made in the following terms:

"Applicant to return to work on Monday 23 January 2012 at 07h00 for duty."

- [4] What should be clause 7 has incorrectly been written as clause 4, followed by clauses 5 and 6, which is a clear error. This second clause 4 has the following typed entry:

“No variation of this agreement shall be legally binding unless reduced to writing and signed by the parties.”

- [5] The Applicant duly complied by presenting himself at the Respondent shop on 23 January 2012 as expected and he met Lee. The contents of the discussion which ensued between the Applicant and Lee are embroiled in the bone of contention. It remains common cause that on the same day the Applicant was paid some money, described in the answering affidavit as the full back pay. He was taken to Greendale Spar where on arrival he met Ric. A discussion took place between him and Ric. At that shop there was also Mr Rikesh Hansraj, referred to as Rikesh. He worked as a Receiving Manager. Yet again there is no agreement between the parties on what was said by Ric to the Applicant but the Applicant left those premises without working on that day. He has since never returned to either shop from that day. Instead he initiated the present application. At the hearing of this application the parties were in dispute as to what caused the Applicant not to resume work and the matter was referred to oral evidence.

The purported agreement

- [6] As already alluded to, the parties agrees that the Applicant was to return to work on Monday 23 January 2012 at 07h00. There is no dispute between the parties that the Applicant presented himself at the Respondent as agreed to. So he tendered his services. The Applicant had undertaken to return to work, meaning to go back to work. This can only mean a return to the *status quo ante* and a revival of the terms of the contract of employment. What is conspicuous though by its absence is a term dealing with whether that return was or was not with

retrospective effect. In the absence of any specific details about it, the intention of the parties on whether they contemplated a retrospective revival of the terms of the agreement of employment may be discerned from their subsequent unison behaviour, if any. The Applicant had last worked on 8 December 2011 and resumed work on 23 January 2012. He had been away from work for a period that was just more than six weeks. The Respondent paid him some money on 23 January 2012. The Applicant accepted that payment without questions.

- [7] The Applicant did not and could not resume work at Merrivale Spar but he was taken to Greendale Spar of Ric. It is also common cause that his failure to return to the workplace he usually worked at was because of what Lee had said to him. At this stage of the chronology of events therefore, the evidentiary onus has shifted from the Applicant to the Respondent, based on common cause facts.

Evidence

Respondent's version

- [8] Three witnesses of the Respondent testified and they are Lee, Ric and Rikesh. Lee said that on 23 January 2011 he told the Applicant that he had to juggle his staff around by moving one Teller to the receiving area left by the Applicant on 8 December 2011. Because January 2012 was still a pretty busy period he did not want to change the working plan and could therefore not be able to accommodate the Applicant at Merrivale Spar. As a result, he had then arranged with his brother Ric who promised that the Applicant could come over as Rikesh was to go on leave. He explained this arrangement to the Applicant and the Applicant agreed with the change. It was common cause that from time to time, employees from one Spar would work at the other Spar, if they were needed to fill in or if there was any staff shortage at the other Spar. He then telephoned Ric to confirm the arrangement. Upon Ric agreeing with the plan, he then sent the

Applicant over to work at Greendale Spar just for a little while as he would sort out things at his shop. According to Lee the monetary payment made to the Applicant on that day was a leave payment. He only became aware of what transpired at the Greendale Spar when he received a call from Ric on 30 January 2012, enquiring as to why the Applicant had not turned up for work. He said that on and after 30 January 2012, he attempted to contact the Applicant to return to work but he simply got into voice mail. He said that the box number on the contract of employment of the Applicant was old and no longer operative.

- [9] Ric testified that he received a call from Lee on the morning of Monday, 23 January 2012, confirming that the Applicant was on his way to Greendale Spar. He met with the Applicant and Rikesh and it was agreed that Rikesh would take his leave on 30 January 2012 and that the Applicant would come to work at Greendale Spar on 30 January 2012 to replace him. The Applicant agreed to this suggestion. On 30 January 2012, Rikesh went on leave but the Applicant did not turn up for work. He telephoned Lee enquiring as to the whereabouts of the Applicant. The failure of the Applicant to attend work on 30 January 2012 caused a great deal of problems in that he did not have a receiving manager for the week.
- [10] Rikesh testified that he applied for a leave for 3 January 2012 to 18 January 2012, but Ric declined to grant him leave at that time. He then applied for leave from 23 January 2012 to 29 January 2012 and Ric tentatively agreed to it but he asked Rikesh to come in on Monday, 23 January 2012, because there was no certainty that the Applicant would turn up for work on that day. He was present at the meeting between Ric and the Applicant. He said that he indicated that as he had started to work for the week, he preferred to take his leave from 30 January 2012. It was then agreed by all three that the Applicant would come back to work on 30 January 2012 to fill in for him.

- [11] During the trial, Rikesh produced the application for leave form he said he had completed. It shows the deletion of leave applied for, from 3 January 2012 to 18 January 2012 and from 23 January 2012 to 29 January 2012. It depicts the leave taken to be from 30 January 2012 to 6 February 2012. It purports to have been signed on 26 August 2011, in respect of both the leave from 26 October 2011 to 30 October 2011 and the leave from 3 January 2012 to 18 January 2012. The same form suggests that it was used for the replacement periods of leave for those cancelled periods.

Applicant's version

- [12] In his evidence, the Applicant said that he met with Lee at the commencement of work on 23 January 2012, whereupon he was not allowed to enter into the shop. He was stopped by Lee and instructed to jump into a van that was heading for Greendale Spar owned by his brother, Ric. He said that he did not know why he was told that as he had never worked there. He stated that he simply jumped into the car as requested even as he was shocked as to what was happening. The Applicant denied that he was told that there was no vacancy for him at Merrivale Spar, stating that such information was never communicated to him. He confirmed that he was aware that Lee had called Ric to inform him of the Applicant's arrival at Greendale Spar but he said that Ric had said to him that he did not know why Lee had telephoned him because he did not have a position for him.
- [13] The Applicant testified that he had given Ric his cellular telephone number so that Ric could call him if there was a vacancy. He then stated that his cellular telephone number changed after four days from 23 January 2012 and that the telephone was in his wife's possession. He said that after being told on 23 January 2012 that there was no vacancy at either Spar shop, he did not return to either shop. He said that he did not attempt to contact either shop. He realized

that he was being ill-treated and he immediately approached his attorneys who represented him at the CCMA and informed them of the situation.

Evaluation

- [14] As alluded to earlier, it remained common cause between the parties that the Applicant tendered his services on 23 January 2012, in terms of his undertaking to return to work. When it was agreed that the Applicant would return to work, the Applicant was undertaking to tender his services and the Respondent was making an undertaking that it would receive him back. While he was paid back what the Respondent referred to as the back pay, he was not taken back on that day to execute his duties, either at Merrivale or Greendale because of the exigencies of the Respondent. It has to be determined whether those exigencies are exculpatory or not. The real dispute between the parties is about the explanation proffered by the Respondent on why it could not take the Applicant back on that day. On common cause facts therefore, the Applicant demonstrated that the Respondent failed to allow him to return to his work on 23 January 2012.
- [15] The explanation of the Respondent why it could not take the Applicant back to his job at Merrivale was that, at the time of the dismissal of the Applicant on 8 December 2011, it was extremely busy over the Christmas period. Lee reshuffled his business such that one of the cashiers was moved to the receiving Department, where the Applicant had worked. This explanation does not make any commercial sense. The return of the Applicant would have had the effect of increasing the Respondent's manpower. The Applicant would go back to the receiving department and the Respondent would have a free cashier to utilise as it wished. It has to be remembered the Applicant had five years of experience with the Respondent. He last worked about six weeks ago when he returned and would therefore not need any training. There was never any evidence that he was replaced by any new recruit whose fate had to be taken care of. In other

words, the vacancy created by the dismissal of the Applicant was still in existence on 23 January 2012. The Respondent has therefore utterly failed to give a plausible explanation why it did not take the Applicant back as it undertook to. The circumstances under which an employee would be transferred to go and work at Greendale did not exist. There is one probable inference left to draw from the Respondent's behaviour, namely that it did not really want the Applicant back. Lee alluded to this when he said that he was sort of forced by Ms Padayachee to stream along with the settlement agreement.

- [16] There is yet another pointer to the probability that the Respondent did not want the Applicant back. Rikesh was in truth not waiting to see if the Applicant turned up for work on 23 January 2012. Early in the morning of the day, Lee confirmed that the Applicant had arrived and would be brought to Greendale Spar. Rikesh should have started his leave on 23 January 2012 as the Respondent had no reason to doubt that the Applicant would not peach up for work. The Applicant is the one who had taken a number of steps to get his job back. From this fact alone, the Respondent had no reason to think that he would not return to work.
- [17] Finally, a return to work is in sharp contrast to being sent back home on 23 January 2012, whatever the circumstances. Clearly therefore, if the Applicant agreed to it, this is a development that the parties were expected to reduce to writing, so as to obviate any subsequent dispute of facts. If the Applicant agreed to it, he would have been more than willing to append his signature to that variation of the agreement. To suggest, as Lee did, that the Applicant took the back pay and decided never to come back is an oversight to the reality that he had been without an income during the festive season when the Respondent was very busy.
- [18] I conclude that the version of the Respondent was very well orchestrated to frustrate the course taken by the Applicant, to get his job back. Probabilities

weight heavily against the version of the Respondent as the preponderance thereof favours the acceptance of the version of the Applicant. It cannot therefore be reasonably said that an agreement was reached between Applicant and Respondent for him to work temporarily at Greendale Spar and then return to the respondent. He simply accepted an instruction given to him by Lee, who was in apposition to issue such an instruction. That the Applicant the applicant agreed to commence employment at Greendale Spar on 30 January 2012 makes no sense at all. The Respondent failed to comply with the settlement agreement. I have discretion to exercise and in this respect I am guided by a number of cases of this Court and of the Labour Appeal Court. One such case is *Banking Insurance Finance & Assurance Workers Union v Zurich Insurance Co Ltd* ² where the following of relevance was said:

“An order in terms of s 158(1)(c) is not, however, there for the taking and the court confirmed that it retains a discretion to make a settlement agreement an order of court even if it meets the criteria provided for in s 158(1A). The purpose of making a settlement agreement an order of court is to enforce compliance with the agreement. The court will refuse to make a settlement agreement that is ambiguous or equivocal an order of court. At the very least the agreement has to meet the criteria set out in s 158(1)(c) read with s 158(1A); it has to be sufficiently clear to enable the defaulting party to know exactly what it is required to do and there has to be non-compliance by the defaulting party. Even if all those criteria are met, the court will still take into account relevant facts and circumstances as are necessary to satisfy the demands of law and fairness.”

- [19] The Applicant is entitled to the order prayed for. While two prayers were sought in the two notices of motion filed in the two cases amalgamated here, the pre-trial minute refers to only one relief sought. I will allow myself to be guided by the pre-trial minute, even though on evidence, the Applicant is entitled to both reliefs sought in each notice of motion. He is also entitled to the costs of this application

² (2014) 35 ILJ 2146 (LC).

but not at a punitive scale, as prayed for, due to the fact that he wants his job back. I proceed to issue the following order:

19.1 The settlement agreement dated 19 January 2012, under CCMA case number DN3498-11, is made an order of court.

19.2 The Respondent is ordered to pay the costs hereof.

Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANT: MR K MUNSAMY

INSTRUCTED BY HARKOO, BRIJLAL & REDDY.

FOR THE RESPONDENT: MR FORSTER

INSTRUCTED BY FORSTER ATTORNEYS.