IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 539/17

In the matter between:

JOHANNES PIETER PANSEGROUW **Applicant**

And

RENDEALS FOUR CONSULTING (PTY) LTD **Respondent**

Heard: 19 November 2018

Delivered: 23 January 2019

Summary: Special Plea

JUDGMENT

MABASO, AJ

Introduction:

[1] There was an employment relationship between JOHANNES PIETER PANSEGROUW (the applicant) and RENDEALS FOUR CONSULTING (PTY) LTD (the respondent) which was terminated by notice in July 2016 based on operational requirements. Applicant has cause to institute a civil claim against

the respondent claiming “contractual notice pay”, “contractual vehicle expenses”, and “contractual leave pay”. The respondent delivered a statement of response incorporated therein a twofold plea in abatement, namely *res judicata/Compromise* and lack of jurisdiction.

Res judicata/Compromise

[2] In the statement of case, the applicant avers that the respondent is in breach of the employment agreement that was entered into by the parties in that the respondent made payments of four weeks' notice pay whereas contractually it is obliged to make a payment equivalent to eight weeks’ notice pay. Therefore he claims the difference. In respect of contractual leave pay the applicant states that on termination of the employment agreement the respondent will make payment to him in respect of accrued annual leave, however, it subtracted seventeen (17) annual leave days accrued by the applicant as the applicant did not take leave at the relevant time. Therefore, he suffered damages for the "non-payment of non-statutory, contractual leave”.

[3] The respondent contends that the contractual notice pay and contractual leave claims cannot be adjudicated in this court because:

> *“2. A validly executed CCMA settlement agreement was executed between the parties on 23 January 2017.*
> *3. Clause 3.2 of the agreement referred to supra set out, “the amount in paragraph 3.1. is* ***inclusive of all statutory payments due to the applicant unless*** *specifically excluded in terms of paragraph 4 below*
> *4. The parties to the settlement agreement did not exclude any statutory payments in clause 4 of the CCMA settlement agreement.*
> *5.* ***It is submitted as a result of the above issues dealing with outstanding notice and if pay have become settled*** *and are as a result res judicata.”* ***(Own emphasis)***

[4] These kinds of special pleas are pleas in bar as their nature is to destroy the cause of action.

[5] A party relying on special pleas of this nature has an onus to prove the allegations relied upon. Compromise involves a waiver of existing rights, for example in an employment relationship when parties decide to terminate such agreement they enter into a separation agreement which among other things specifies the amount of money that would be paid to such employee and states that he would not take the matter further such as referring a dispute to the CCMA. In respect of res judicata doctrine, in *Molaudzi v S*[1] the Constitutional Court said,

> *"The underlying rationale of the doctrine of res judicata is to give effect to the finality of judgments. Where* ***a cause of action*** *has been* ***litigated to finality*** *between* ***the same parties*** ***on a previous occasion****, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts"*[2] *(own emphasis)*

[6] What is required for the respondent to succeed herein is to show that these issues (the contractual notice pay and contractual leave) were referred to the CCMA against the applicant and were subsequently finalised there. *In casu*, there is no averment that the same *"cause of action"* had been referred to the CCMA and under those circumstances, the res judicata special plea fails.

[7] In respect of doctrine of compromise, I must take into account what is before me. The existence of the agreement is not in dispute between the parties and that this agreement partly reads as follows:

> *"…the undersigned parties record the settlement of the dispute in the following terms. By signing this agreement, the parties acknowledge that the agreement was read to them and interpreted where necessary) and that they understand the contents hereof. This agreement is in full and final settlement of the dispute referred to the CCMA as well as in*

[1] 2015 (8) BCLR 904 (CC).
[2] Para 16. See also paras 14 and 15.

> ***<u>full settlement of the statutory payments</u>*** *due to the applicant unless specifically excluded in paragraph 4 of this agreement…"(Own emphasis)*

[8] The applicant in his heads of argument argued that this agreement makes no mention of full and final settlement of all and/or any other disputes that he could institute against the respondent and gives the example of the dispute before this court. The applicant urges this court, as I do forthwith, to look at the statement of case, as to what is the claim against the respondent. In paragraph 3.6.1 the applicant avers that in respect of notice pay it was agreed in the contract of employment that it would be equivalent to eight (8) weeks, and the applicant has been paid part of it. However, he is demanding payment of the balance. In arguing against the compromise defence, the applicant refers this court to *Hubbard v Mostert 2010 (2) SA 391 (WCC)* paragraphs 7 to 11, and *Leon De Lange v Kosmosdal Ext 61 & Ext 62 case number JS 172/15* paragraphs 2 to 13. I must mention that these authorities have not assisted the applicant as the facts and circumstances of both cases are in contrast with what is before this court, as the respondent relying on the fact that the CCMA settlement records a *"full settlement of the statutory payments."*

[9] This court must guard against a situation whereby parties will attempt to avoid situations such as when parties attempt to avoid complying with valid binding contracts or statutes which govern their relationship and approach this court by crafting their pleadings in a way that will attempt to undermine the same contracts or statutes with an intention of sourcing an unfair advantage using the provisions of section 77 of the Basic Conditions Of Employment Act.[3] For example in *Steenkamp and others v Edcon Limited*[4] the Constitutional Court said,

[3] 75 of 1997 ("the Act").

[4] (CCT46/15, CCT47/15) [2016] ZACC 1; (2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC) (22 January 2016), at para 173.

> *"However, the applicants have dressed their complaint up as something else so that they can avoid the mechanisms and remedies under the LRA and seek a remedy that falls outside of the LRA concerning dismissals. They do so in an attempt to get maximum benefit that is available only when the breach relied upon is not that of the provisions of the LRA. What the applicants are doing is not exactly forum-shopping, but it is analogous to forum-shopping. Where the law permits forum-shopping, a litigant cannot be denied relief just because it is engaging in forum-shopping. However, in this case, there is no room for granting the remedy sought by the applicants."*[5]

[10] I am of the view that the applicant in respect of both these claims waived his rights to institute any action, emanating from notice pay and leave pay, against the respondent as he settled the dismissal dispute and *"all statutory payments"* because section 37 of the Act provides that ,

> *" 37. Notice of termination of employment.—(1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice* ***of not less than****—*
> *(a)****one week****, if the employee has been employed for six months or less;*
> *(b)****two weeks****, if the employee has been employed for more than six months but not more than one year;*
> *(c)****four weeks****, if the employee—*
> *(i)has been employed for one year or more; or*
> *(ii)is a farm worker or domestic worker who has been employed for more than six months."* (Own emphasis)

[11] The applicant's contract of employment is governed by the same Act and the payment that the applicant received is "***not less than"*** what is contained in subsection 37(1)(c) of the Act, and by accepting the amount of money that he

[5] Supra n 4, para 125.

agreed to at the CCMA, he clearly waived his right to claim payment in terms of the contract of employment that he entered into which is governed by the Act. As to whether the parties agreed that the applicant was to receive eight weeks' notice pay is not important anymore because he decided that he would not take any action relating to the same issue. Under those circumstances, I conclude that the applicant is barred from continuing with a claim for payment of contractual notice pay and contractual leave as both are governed by the Act, and such payments are respectively regulated by sections 21 and 37 of the same Act which parties agreed that are settled.

Lack of jurisdiction

[12] The respondent contends that, the balance of the applicant's claims (contractual vehicle expenses, and contractual salary increases) relate to a benefit which he was entitled during the subsistence of the employment relationship and under those circumstances the respondent avers that this court has no jurisdiction to deal with this matter, as the applicant was supposed to refer the dispute to conciliation. Mr *Nel* during submission, on behalf of the respondent, wisely withdrew the special plea in respect of contractual vehicle expenses claim. However, he pressed on the one of salary increase. The respondent argues that the applicant should have referred the dispute to the CCMA for conciliation as is an unfair labour practice dispute.

[13] The respondent misses the point in respect of this argument in that the applicant is no longer an employee of the respondent and to say the matter should be conciliated is a thinly-veiled defence taking into account that it is common cause between the parties that the applicant was dismissed in July 2016 and the statement of case was delivered in June 2017. The claim herein is different from the claims which are based on the Act, in that the applicant's case is based on the employment agreement wherein he was entitled to annual salary increases for the periods of May 2015 to April 2016, May 2016 to 31 August 2016. The applicant says as a result of the unlawful and breach of the employment agreement the applicant has suffered damages, therefore, wants to recover such damages. In my view, section 77 of the Act caters for

instances of this nature especially if the employee is no longer employed by such an employer. Considering the applicant's statement of case, the way this point is pleaded I am satisfied, unlike the contractual notice pay and leave pay claims mentioned above, that the issue is about damages.

[14] Wherefore the following order is made:

Order

1. The special plea of *res judicata* is dismissed.
2. The special plea of Compromise is upheld.
3. The special plea that this court lacks jurisdiction to adjudicate a claim for damages relating to non-payment of contractual salary increase is dismissed.
4. No order as to costs.

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S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv J D Withaar
Instructed by: A H Stander Attorneys

For the Respondent: Adv Nel
Instructed by : Lee and McAdam Attorneys