

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 113/18

In the matter between:

TRANSNET GROUP CAPITAL

Applicant

and

REFILOE KHWELA

1ST Respondent

TRANSNET BARGAINING COUNCIL

2nd Respondent

SEELE MOKWENA

3rd Respondent

Heard: 12 November 2019

Delivered: 14 November 2019

Summary: Jurisdictional review – On the objective facts – Arbitrator correct that there is jurisdictional power. Held (1) the condonation application is granted. Held (2) the application for review is dismissed. Held (3) there is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Before me is a jurisdictional review. The applicant effectively contends that the claim alleging unfair labour practice was compromised by the first respondent.

Background facts

- [2] Since the present application turns on a narrow point of law – was the unfair labour practice claim compromised – it is unnecessary to recount all the facts of this case in this judgment. The relevant facts are: On or about 12 December 2016, the first respondent was demoted. Following that, the first respondent referred a dispute alleging unfair labour practice. Whilst the dispute was pending before the bargaining council, the first respondent was offered and accepted a voluntary severance package (VSP). The first respondent upon receipt of a written offer, she proposed an amendment as she held a view that certain clauses in the offer were aimed at destroying her pending litigation dispute. The proposal was rejected in writing by the applicant. Consequentially, the first respondent inserted what she proposed and signed the agreement with amendments effected on it. Upon receipt of the document as signed by the first respondent, the applicant's representative, Mr Mohammedys appended his signature but did not initial the handwritten inscriptions made by the first respondent. The signed voluntary severance agreement has in place handwritten inscriptions where the first respondent clearly indicated that she is not compromising the pending unfair labour practice dispute.
- [3] The first respondent left the applicant's employ on the strength of the VSA (Voluntary Severance Agreement). On 6 November 2017, the unfair labour practice dispute was enrolled for arbitration. At the commencement of the arbitration process, the applicant objected to the jurisdiction of the bargaining council on the basis that the claim had become compromised. After hearing submissions, the appointed arbitrator assumed jurisdiction and concluded that the claim was not compromised. Aggrieved thereby, the applicant launched the present application. The application was 9 days out of the prescribed time period and condonation was sought. The application stands opposed.

Evaluation

[4] The first respondent objected to the hearing of this application on the basis of the provisions section of section 158(1B) of the LRA. Since the review application was enrolled before me, I decided to hear the application. This section only prohibits the Labour Court to review, as in setting aside a ruling, and not hearing an application enrolled before it. In other words, a Court of review may still hear the application but refuse an application on the strength of the provisions of the section. However, given the view I take at the end, this point is academic. As a point of departure, it is important to define this defence of *compromise*. The reason being that it shares commonalities with the contractual defence of *waiver*. *Waiver* relates to a contractual right and or acquired right, whilst *compromise* relates to a litigation dispute.

[5] Miller J.A in *Gollach & Gomperts v Universal Mills & Produce Co*¹ had the following to say about the defence:

“...was a *transactio* in the sense of the word as used in the Roman Dutch law and applied in South Africa. In *Cachalia v Harberer & Co.*, 1905 TS 457 at p. 462, SOLOMON J., accepted the definition of *transactio* given by Grotius, *Introduction*, 3.4.2., as

“an agreement between litigants for the settlement of a matter in dispute”

...The purpose of *transactio* is not only to put an end to existing dispute but also to prevent or avoid litigation...

[6] In *casu*, there is no relationship between the VSA and the litigation dispute – alleged unfair labour practice. The VSA was ignited by the operational requirements of the applicant. The offer for VSP was offered to a number of employees. The VSP was aimed at mutual termination, which may be followed by a forced termination based on operational requirements, if not accepted. What actually happened in this matter is that the draft VSA was more like an offer that the applicant made to the

¹ 1978 (1) SA 914 (AD)

first respondent. The handwritten inscriptions was more a counter-offer. Once, Mohammedys signed the VSA with the handwritten inscriptions, the applicant accepted the first respondent's counter offer.

- [7] Watermeyer CJ in *Collen v Rietfontein Engineering Works*² stated the following:

“It must also be remembered that a counter-offer is in general equivalent to refusal of an offer and that thereafter the original offer is dead and cannot be accepted until revived. (See *Watermeyer v Murray* 1911 AD 61) “

- [8] To the extent that the applicant argues that the original draft VSA had in it a clause that compromised³ the litigation dispute, that offer was not accepted by the first respondent. Since the draft VSA was not accepted by the first respondent, then there is no agreement of compromise. It is clear that the applicant vaguely wished to reach a compromise. Like any other agreement, *consensus* is a requirement for a compromise agreement. The first respondent made it abundantly clear that she had no intention to compromise her claim that was pending at the bargaining council. She counter-offered as follows: “*Except for case no BC Khwela TCP/GR 13552 and 13586 pending finalization at the Transnet Bargaining Council*”. This handwritten inscription was made alongside clauses 116.1 and 116.2, which as prepared by the applicant sought to introduce a compromise.

- [9] Mr Ford for the applicant placed reliance on the decision of *Blue IQ Investment Holdings (Pty) Ltd v Southgate*⁴. This decision is not helpful

² 1948 1 SA 413 (A) at 420

³ In my view, clauses 116.1 and 116.2 cannot be interpreted to include the litigation dispute. At the time of making the original offer, the litigation dispute was easily describable. To simply classify it under *all claims* was unnecessary. In crafting the offer, the applicant had an opportunity to describe the dispute with ease. On application of the *contra proferentem* rule the offer must be interpreted against the applicant given the vagueness as to what *all claims* includes, when the applicant could have made the meaning clearer and plain.

⁴ [2014] 35 ILJ 3326 (LAC)

to the applicant. It dealt with a non-variation clause. In *casu*, at the time of the handwritten inscription by the first respondent, the parties had not reached an agreement yet. They were still at the point of offers. The applicant made an offer, which was not accepted by the first respondent. At the initial stages of the negotiations, the first respondent counter-offered and the counter-offer was rejected. However, the first respondent insisted with the counter offer and the second time around, Mohammedys, by appending his signature, he assented to the counter-offer. The first party to sign an agreement⁵ makes an offer and the other by his signature accepts.⁶ The fact that Mohammedys chose not to initial alongside the counter-offer is of no consequences. Further, Mr Ford placed reliance on the decision of *Ulster v Standard Bank Ltd & another*⁷. This decision too is unhelpful to the applicant. In it an employee attempted to resile from an already reached agreement. Finally, he placed reliance on *Maetisa v Pernod Ricard SA Ltd*⁸. Similarly, this decision does not advance the applicant's case. In it, the employee attempted to bring into a settlement agreement an issue raised during a consultation process, which did not make its way into the settlement agreement. As pointed out earlier, in this matter, when the first respondent made the handwritten inscription (which I had termed a counter-offer), no agreement was reached as yet. I asked Mr Ford to demonstrate to the Court that an agreement was already reached, but he could not.

[10] The arbitrator was spot on when he concluded that a settlement agreement has as its genesis a dispute and must resolve that dispute.

⁵ Mr Ford resisted the submission made by Biggs that the first respondent was the first party to sign. This resistance is not supported by the facts as pleaded in this case. The Founding Affidavit is vague and contradictory on this issue. The Answering Affidavit makes it plain in that the first respondent testifies that she signed first and Mohammedys signed after with the handwritten inscription already made. This evidence was not sufficiently denied in the Replying Affidavit. On application of the Plascon-Evans rule, I must conclude that first respondent signed first.

⁶ *Indrieri v Du Preez* 1989 2 SA 721 (C). See also Christie's *The Law of Contract in South Africa* 6th ED 2010

⁷ [2013] 34 ILJ 2343 (LC)

⁸ [2013] 34 ILJ 2044 (LC)

Correctly, and on the objective facts, the VSA did not resolve the unfair labour practice between the parties. The dispute remained live for resolution through arbitration. Therefore, a conclusion that the bargaining council has the requisite jurisdiction to arbitrate the dispute was correct. Accordingly, the application is bound to fail. The delay to launch the review application is minimal and condonable, regard being had to the explanation offered.

[11] Accordingly, I make the following order:

Order

- 1 The application for condonation is granted.
- 2 The review application is dismissed.
- 3 There is no order as to costs.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate B Ford

Instructed by: Mkhabela Huntley Attorneys Inc.

For the Respondent: Mr Biggs of Snyman Attorneys