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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J4338/99

2002-12-02

In the matter between

ECCAWU SA

obo MR T C SHAPU Applicant

and

HILTON HOTEL SANDTON Respondent

J U D G M E N T

LANDMAN J: Mr T C Shapu was employed as a captain in the food and beverage division of the Hilton Hotel Sandton. He was dismissed from his employment. During proceedings before the CCMA, Mr Shapu and Hilton settled the dispute. The written agreement of settlement dated 28 September

1999 reads as follows:

"That Mr Shapu, the applicant, shall receive four months' salary calculated on gross salary he earned before his dismissal. He will be reemployed with the same terms and conditions of employment as before. He will be offered a position within the hotel of the same level to that which he occupied before his dismissal. He will resume his duties on 1 October 1999 at 08:00. This serves as full and final settlement of this dispute."

Certain events took place before 1 October 1999, the day on which Mr Shapu would resume his services. I will return to these in due course. But the result was that Mr Shapu did not resume duties in the sense that he was not reemployed, and as a result he and his union applied in terms of section 158(1)(C) of the Labour Relations Act 66 of 1995 to make the agreement an order of court. The application was opposed.

Hilton in brief stated that the monetary amount had been paid. Hilton went on to say in the founding affidavit in 5.5, and this is the affidavit of Mr Dubani, the then human resources manager. He says:

"On 1 October 1999 I presented a letter of appointment to the

second respondent (Mr Shapu) for perusal and signature. The letter contained the terms and conditions on which the second respondent was to be reemployed by the respondent. Furthermore the letter of appointment also provided for the signature by the second respondent in acceptance of the terms and conditions set out therein. The second respondent refused to accept reemployment and refused to sign the letter of appointment. The copy of the letter of appointment which is signed by myself is annexed hereto marked 'RTZ' and I respectfully refer this honourable court thereto.

5.6 I respectfully state the respondent has complied with the terms of the agreement."

Mr Shapu and his union responded by adding an alternative prayer to the notice of motion that the Hilton be ordered to pay compensation to Mr Shapu in terms of section 194(2) of the LRA. The notice or intention to amend also sought to amend the founding affidavit. This of course impossible. It is, however, common cause that Hilton has complied with the monetary obligation resting upon it in terms of the settlement agreement. The replying affidavit by a union official confirmed a year later why Mr Shapu states:

"The second applicant denies that he was presented with any

documentation for perusal and signature and the respondent is put to the proof thereof.

2. The second applicant presented himself for reemployment at the respondent's premises on 1 October 1999 in accordance with the agreement and on his arrival he was informed by Mr Dubani, the human resources manager of the respondent, that the general manager and the head of department (food and beverage) have resolved that the second applicant should not be reemployed in that he was unfit to be in a continued employment relationship with the respondent.

3. The second applicant was further informed by Mr Dubani to come back at 13:00 to collect his cheque which would be ready for collection then. The second applicant duly went back at 13:00 to collect his cheque, which cheque was in fact ready for collection but no documents whatsoever was produced for signature or perusal and the respondent is accordingly put to the proof. The respondent further refused to reemploy the second applicant during a meeting which was held on 28 January 2000 between the parties at Sandton for the following reasons:

12.4.1 Due to the second applicant's alleged misconduct of 30 September 1999 ..."

Which is immaterial to this application.

When the matter came before my brother Ngamu AJ he referred the matter to oral evidence. The matter was referred to oral evidence in respect of the following:

"1. Whether the second applicant tendered his services on 1 October 1999.

2. Whether the employment letter was tendered to second applicant for his signature.

3. Whether second applicant sought to amend the said letter.

4. Whether second applicant sought financial settlement instead of reemployment.

5. Whether second applicant misconducted himself prior to 1 October 1999."

The matter served before me on 28 November 2002. Mr Shapu testified about the matter as referred to oral evidence and Mr Rufus Dubani did the same. I do not intend summarising the evidence of the witnesses. I do not believe that Mr Shapu has told me the entire truth, and I have the same doubts about the testimony of Mr Dubani. Mr Shapu agrees that after he had been dismissed he returned to the hotel on a social occasion and was removed from the Faces lounge bar by two members of the South African Police.

Previously Mr Shapu had been the captain working in that part of the hotel. The police removed him after he had been asked to leave by various managers. He put the date of this incident in August 1999. Mr Dubani puts it on the day before Mr Shapu appointed for work, namely 1 October 1999. I believe that Mr Dubani is correct. This explains why Mr Shapu was kept waiting when he reported for duty on 1 October and why on his evidence he was told that the meeting of managers had not reached a resolution concerning him. Mr Shapu also was told that they had not reached their verdict. It is common cause that Mr Shapu's cheque was not ready and he was obliged to return for it later that day.

I am of the opinion that the evidence shows that the Hilton did not want to reemploy Mr Shapu, as a result of what I shall call as the commotion which he created on the previous day. This is reinforced by the allegations in the answering affidavit which refers to the misconduct of Mr Shapu. Although Mr Dubani says:

"I am advised (it is not material to the present application) the second applicant was suspended pending a disciplinary inquiry."

I accept that Mr Shapu tendered his services to be reemployed

by 1 October and that Hilton rejected it on account of his misconduct. The letter offering reemployment is dated 30 September, but I find that this was not presented to Mr Shapu. It has been overtaken by events, including the meeting of management which was held on 1 October to consider and deal with the misconduct. I also find that Mr Shapu did not attempt an order to seek financial settlement, not did he attempt to have the letter of appointment changed simply because it was not placed before him. I also note that Mr Shapu said under cross-examination that he may not want to go back to the hotel.

This brings me to the question whether the application should be granted. Mr Shapu is not certain that he wishes to be reemployed by the Hilton. This is understandable as some three years has passed and the order should not be granted if it would be an academic one. However, Mr Shapu's persistence with this application since 28 October 1999 is an indication that we are not under pressure, he wishes to return to his employment. What troubles me that the settlement agreement contains a *patrede contrahenda*. Van der Merwe, *Contract General Principles* Juta (1993) 69-70 deals with the relationship between parties *in contrahendo* and after setting

out the South Africa Law as an introduction they say:

"In continental legal systems it is well established that the capacity to break off negotiations is restricted by normative considerations. It is accepted that entering into negotiations for a contract creates a particular relationship between the parties which is governed by good faith and objective reasonableness and which requires each party to have regard to the legitimate interest of the other. Depending on the circumstances duties to inform, to exercise due care, to compensate for loss suffered by a party as a result of the frustration of reasonable expectations or to continue negotiating in good faith may arise by operation of law. The position in South African law is not altogether clear or wholly satisfactory. There is for instance doubt about the extent to which the norm of good faith applies *in contrahendo*."

In this case I am of the opinion that there exists agreement as evidenced in the settlement agreement on the precise terms of the contract of reemployment. In any event it would have been competent for the CCMA, assuming it had jurisdiction and found that the dispute was substantively unfair, to have ordered to ... (inaudible) to reemploy Mr Shapu. If this is so then a contractual agreement between an

employer and an employee that the employer will reemploy the employee would be enforceable, provided that any prior or contemporaneous obligation resting on the employee had been met.

What is the effect of the misconduct which took place on 30 September, that is between the date the settlement was arrived at and the date that Mr Shapu would report for his duties? If this agreement, which I found to be a contract *de contrahendo* had been pleaded differently and had there been evidence on the papers regarding his conduct as a defence to complying with this agreement then matters may have turned out differently and even have influenced the exercised of my discretion. But it was not the Hilton's case that it was entitled not to comply with this agreement on account of the misconduct. On the contrary, as I have set out earlier it was Hilton's case that Mr Shapu was in default of his obligations.

I propose granting the applicants the relief which they seek. I however express the refrain from commenting on the legal consequences attendant since the tender to enter into the contract of reemployment on 1 October 1999 and the date of this order. This was not argued before me.

In the result I make the following order: The following

part of the deed of settlement concluded between the second applicant and the respondent is made an order of court, namely:

He will be reemployed with the same terms and conditions of reemployment as before.

He will be offered a position within the hotel of the same level to that which he occupied before his dismissal.

The respondent is ordered to pay the costs of this application.

LANDMAN J:

ON BEHALF OF APPLICANT:

ON BEHALF OF RESPONDENT: