

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

Reportable

CASE NO

D654/04

DATE

2006/04/06

In the matter between

F E A FYNN Applicant

and

UNIVERSITY OF KWAZULU-NATAL Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 6 APRIL 2006

ON BEHALF OF APPLICANT:

MS C NEL
(Instructed by Deneys Reitz Inc)

ON BEHALF OF RESPONDENT:

MR A I J CHADWICK
(Instructed by Shepstone &Wylie)

JUDGMENT 6 APRIL 2006

PILLAY D, J

- [1] The applicant is Frances E A Fynn, the former human resources manager of the University of Durban/Westville ("UDW"). The respondent is the University of KwaZulu-Natal. It came into existence on 1 January 2004 with the merger of UDW and the University of Natal ("UND"). It assumed all the rights and obligations of UDW and UND upon the merger.
- [2] The parties entered into an agreement in settlement of the alleged unfair dismissal of the applicant. The respondent refused to pay certain amounts purportedly due in terms of the agreement. The applicant applied to make the agreement an order of this court. The respondent consents to the agreement being made an order of court but declines to pay the costs as the real dispute, it alleges, was not compliance with the agreement, but its interpretation.
- [3] In turn, the respondent launched a counter-application for a declarator, as amended in the following terms:
- "1. An order declaring that on a proper interpretation of clause 5 of the Settlement Agreement which is annexed to the Applicant's Notice of Motion herein as Annexure "A", the word "disbursements" is declared to mean the following:
- 1.1. The Applicant and her two sons be entitled to a full remission of fees for three years' study in any course of their choice at the Respondent; and

1.2. That in the event of the Applicant or either of her two sons enrolling at another South African University in a course of study which is not offered by the Respondent, the Respondent is directed to pay (as disbursements) the cost of accommodation at a students' residence at such other South African University and residence meals at that University which might be incurred by the Applicant on her own behalf or on behalf of either or both of her two sons, as well as the tuition fees for such course of study.

2. An Order directing the Applicant to pay the costs of the application and counter application."

[4] Clause 5 of the agreement which is in dispute reads as follows:

"The Applicant and her two sons will be entitled to a remission of fees and disbursements for three years studies in any course of their choice at the new University which will result out of the merger of the University of Natal and the University of Durban-Westville."

The dispute turns on the meaning of the word "disbursements".

[5] MURPHY AJ had referred the matter for oral evidence. Only the respondent led oral evidence by calling witness Romilla Singh, who had signed the agreement as the human resources manager. Singh testified that she was not party to the negotiations that preceded the agreement. Attorney Kamdar, acting for UDW, had asked her for information and she

provided him with, amongst other things, the policy regarding the remission of study fees at UDW for employees and their dependent children. The Vice-Chancellor of UDW instructed her to sign the agreement as the university was closing that day and no one else was available to sign on its behalf.

[6] She testified that the policy of UDW was to exempt full-time staff and their dependent children annually from paying study fees for any course undertaken at UDW. In addition, UDW would also pay 75% of accommodation costs and lecture fees due by a dependant of a staff member at a university outside the Durban metropolitan area for undertaking any course of study not offered at UDW. If the dependant is registered at a university within the Durban metropolitan area for courses not offered by UDW, 75% of only the lecture fees would be remitted by UDW.

[7] Three versions have emerged as to what the meaning of "disbursements" was in the context of the agreement.

[8] The first version

The applicant pleaded in what is really her answering affidavit to the counter-application, that disbursements included but was not limited to "residence fees, text books, study material, etcetera". She has submitted vouchers for expenses incurred under these headings, as well as for stationery and for a printer cartridge. Ms Nel, for the applicant, submitted that "disbursements" should be given its

ordinary meaning to refer to any expense necessarily incurred for the purpose of study that the respondent undertook to fund. Furthermore, the parties went outside the respondent's policy. This was evident from their election to use the words that they did instead of simply referring to the policy documents. Going outside the policy was permissible as it had been done previously with executive permission. In this instance the Vice-Chancellor had approved the terms of the settlement. So she submitted.

[9] The second version

Mr *Chadwick* submitted for the respondent that "disbursements" could not bear its ordinary meaning because in the context it was ambiguous. Hence the need to consider the background and circumstances surrounding the agreement.

[10] The third version

The third version which emerged from the applicant as the argument proceeded was that "disbursements" meant "accommodation fees and residence meals at the University of KwaZulu-Natal, alternatively the equivalent rand value for each of the years of study together with all necessary administration and registration charges imposed by the KwaZulu-Natal University". A draft order was submitted in these terms.

[11] That there were three versions as to what

"disbursements" meant confirms that the word "disbursements" was ambiguous. E A Kellaway, in

Principles of Legal Interpretation : Statutes, Contracts and Wills, states as follows at 432:

"If to read words in a contract in their ordinary and grammatical sense would lead to some absurdity or would be plainly repugnant to the clear intention of the parties, another construction which does not necessarily follow the ordinary and grammatical meaning of the words must be sought."

"A court may decide whether a special meaning is to be given to words used by parties to a contract by considering the circumstances of the parties at the time the contract was concluded, and the subject matter of the agreement. If such special meaning *is* determined then a court shall not construe the contract according to the ordinary or popular meaning of the language used but, according to that special meaning."

At 433:

"The meaning of the words will reasonably depend on the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire contract."

A 435:

"If words in a contract construed in their ordinary or popular sense produce a meaning which:

- a is absurd, or
- b inconsistent with the contract read as a whole,
or
- c would create for a contracting party an
obligation which he could not reasonably be
presumed to have undertaken, or
- d is in conflict with the clear intention of the
parties or the purpose of the contract,

the ordinary or popular meaning of the words may be reassessed with a view to construing them so as to qualify them, modify them or completely depart from their ordinary mean, provided the words are capable of such reassessed meaning."

[12] The first version must be rejected for at least three reasons. Firstly, no criterion was set for what constitutes necessary expenses. They could include anything from exam fees to computers to internet access connection fees and even the costs of an overseas conference.

[13] Secondly, the agreement arose in the context of the settlement of an alleged unfair dismissal dispute. The costs of the settlement had to be reasonably determinable. This would not have been possible if the claim for disbursements was as open-ended as the applicant alleged.

[14] Thirdly, the applicant would have been compensated for a fringe benefit more than was agreed as a condition of her service which incorporated the policy of UDW.

[15] There were any number of explanations as to why the parties chose the particular words for the agreement and not simply referred to the policy. The most probable explanation is not one that would have opened the respondent to unlimited expenses. The more probable explanation is that it was known at the time that UDW and UND were in the process of merging. It was not known what the new policy

would be. Furthermore, there is no evidence as to whether and how the applicant's employment outside Durban contributed as background or a circumstance that might have influenced the wording of the agreement. The fact that the applicant is now working in Pietermaritzburg is not a factor that can assist in determining the meaning of the word "disbursements".

[16] Singh gave evidence of two instances between 2002 and 2003 when executive permission was obtained for the payment of accommodation costs where the students were at UND medical school, that is within the Durban area. The rationale for the special dispensation on those occasions was that the students had to attend clinic after hours and could not return to their homes in outlying areas thereafter. A similar rationale did not exist in the applicant's case. There was therefore no reason to compensate her more than she would have been entitled to in terms of the policy. For this reason, the third version must be rejected.

[17] The most probable meaning to be attributed to the word "disbursements" must be one that falls within the policy of UDW, modified upwards to accommodate firstly, the fact that the applicant is no longer employed there and secondly, the new policies, if any, of the respondent.

[18] As a human resources manager of UDW at the time, the applicant was fully acquainted with the extent and limits of the study costs covered by UDW as a fringe

benefit. Those representing UDW had also acquainted themselves with this information. There is no evidence that any other standard was set to fix the meaning of "disbursements". The respondent's tender is superior to UDW's policy in that it provides for a full remission of fees and the cost of accommodation and meals.

[19] The counter-application, as amended, succeeds with costs.

[20] The application to make the settlement agreement an order of court is granted with no order as to costs.
