



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no: D336/09

In the matter between:

NUMSA OBO M NGUBANE & 4 OTHERS

Applicant

and

XPANDA SECURITY (PTY) LTD

First Respondent

METAL & ENGINEERING INDUSTRIES

BARGAINING COUNCIL ("MEIBC")

Second Respondent

LISA WILLIAMS DE BEER N.O.

Third Respondent

Heard: 15 July 2014

Delivered: 19 September 2014

Summary: An *in-limine* application by the First Respondent seeking an order that the subject matter of the review application was settled. No unequivocal offer and acceptance and therefore no settlement agreement in existence. Application dismissed with costs.

JUDGMENT

HOBDEN,AJ.

Introduction

- [1] This is an *in-limine* application by the First Respondent in the review application. The parties agreed that it should be determined prior to the review. The First Respondent seeks an order that the dispute which is the subject of the review application has been settled and hence the review application cannot proceed.

The background

- [2] The Applicants were dismissed by the First Respondent for alleged misconduct prior to a planned protected strike.
- [3] The Applicant's referred an unfair dismissal dispute to the Second Respondent and it was ultimately arbitrated by the Third Respondent.
- [4] In an award dated 20 March 2009, the Third Respondent found the dismissals to be substantively fair but procedurally unfair and awarded each of the Applicants two weeks compensation.
- [5] The Applicants launched a review application in this Court on 6 of May 2009.
- [6] On 16 August 2009, the First Respondent's Attorney, John Dua ("Dua") initiated a telephonic discussion with the Applicant's Attorney, Ruth Edmonds ("Edmonds") about the possibility of settling the matter by payment of further compensation. Dua followed this telephonic conversation up with a letter dated 17 August 2009 confirming that Edmonds would revert on the possibility of settlement.

- [7] On 24 August 2009, Dua sent a "without prejudice" letter to Edmonds with an enclosed cheque made out to Ruth Edmonds Attorneys Trust in the amount of Twelve Thousand Seven Hundred and Thirteen Rands and Fifty Cents. The letter indicated that 'such cheque is tendered in full and final settlement of all or any claims in relation to this matter, and on the basis that acceptance of same shall be regarded as such full and final settlement and the matter shall be deemed to be settled.' The letter further stated that 'should your instructions be to refute the aforesaid proposal, you are kindly requested to return the cheque to us as soon as possible, and in this regard our instructions have then been to oppose any relief that you might seek'.
- [8] Edmonds did not respond and in September 2009 Ruth Edmond Attorneys withdrew as the Applicants attorney of record. The cheque was passed onto the National Union of Metal Workers of South Africa ("NUMSA").
- [9] In an email to Dua dated 12 February 2010, a Sarah Kuane ("Kuane") from NUMSA, who at the foot of the email is described as Legal Department Admin confirmed receipt of a cheque in the 'amount of R12713.50 which is written on Ruth Edmonds Attorneys as a full and final settlement of this matter'. It went onto state 'you are requested to cancel this cheque on (sic) Ruth Edmonds Attorneys name as she has been withdrawn as our Attorney in this case and write it on (sic) NUMSA's name.'
- [10] There was no reply from Dua to this email and Kuane followed up with an email dated 1 April 2010 which requested a reply.
- [11] Consequently Dua made a telephone call to Kuane. Dua cannot recall the exact details of the conversation but states it was formal.
- [12] Dua then sent an email to Kuane on 6 April 2010 which it stated 'we will take instructions from our client on same and will revert. If we are instructed accordingly, then the cheque will be tendered under the same conditions as before. Please confirm this is acceptable.'

- [13] Kuane replied by email on 7 April 2010 which reads 'Thank you for responding and everything on this email is accepted.'
- [14] On 15 April 2010, Dua in an email then asks Kuane for an address to post the cheque or alternatively where the cheque should be delivered. It is not clear if there ever was a response.
- [15] On 30 April 2010, a Natasha Russel from Dua's office attended on the Registrar of this Court and noted that the matter was not on the roll and that she was advised that a Notice of Settlement should be filed if it had indeed been settled.
- [16] The review application in this Court was then set down for hearing by the Registrar.
- [17] Thereafter, Ruth Edmonds Attorneys were reinstated as the Applicants attorneys of record on 7 May 2010.
- [18] On 11 May 2010, on receipt of a Notice of Set Down for the review application, Dua wrote to Xolisa Ngako, the attorney from Ruth Edmonds Attorneys now dealing with the matter, and indicated that the matter was settled and that the Applicants were now attempting to renege on the agreement reached.
- [19] On 13 May 2010, Dua wrote to Edmonds and indicated that he was 'advised by our client that your client has not yet deposited the cheque and in this regard our client has advised us that, on the basis that you have now reinstated yourself as Attorneys of Record, that they stop the initial cheque payment and reissue a further cheque to yourselves'. Dua further handwrites on the letter 'P.S. Our client's cheque enclosed in full and final settlement and as per the agreement reached. Should there be any dispute please advise by return.'
- [20] From 14 May 2010, Ruth Edmonds Attorneys have simply confirmed their instructions that the matter was not settled.

Argument

- [21] The First Respondent submits that Kuane's reply in 7 April 2010 email that 'everything on the email is accepted' settled the issue and the tender became an agreement of settlement. The First Respondent argues that the settlement was effectively concluded on 12 February 2010 and confirmed on 7 April 2010. The agreement is partly written and partly oral.
- [22] The First Respondent invites the Court to explore what it argues is the factual matrix and sequence of events which led to the agreement. The First Respondent argues that from the telephone conversation between Dua and Kuane, and the email of 7 April 2010, there was a meeting of the minds and the requisite *animus* was in existence.
- [23] The First Respondent further argues that the terms contained in the letter dated 12 February 2010 were clear. The telephone call between Dua and Kuane consequent to Kuane's email of 1 April 2010 reinforced this. The terms and amount were clear. Kuane's email on 7 April 2010 was acceptance of the offer.
- [24] Mr. Ngake who appeared for the Applicant, argued that there was no valid settlement agreement. He focussed on the fact that there was no written agreement and further, that there were difficulties in alleging an agreement reached with Kuane who was in admin within the legal department of NUMSA.
- [25] It emerges from the papers that Kuane's version as to her action in calling for the cheque to be changed on 12 February 2010, was based on a misunderstanding that an agreement had already been reached whilst Ruth Edmonds Attorneys were still on record.

Legal principles

- [26] At issue is the existence of a settlement agreement. Was there an offer and acceptance of that offer?
- [27] Sharrock dealing with the authorities in his text defines an offer as 'a statement of intention in which the offeror sets out to the person to whom the

offer is made what performance and what terms he or she is prepared to bind him or herself to. An offer will normally be made expressly, that is in so many words, either written or oral, but there is no principle to prevent its being made tacitly by conduct.’¹

- [28] The same author defines acceptance as ‘a statement of intention in which the offeree signifies assent to the proposal embodied in the offer. An acceptance, like an offer, can be tacit, that is by conduct. The contract must, however, speak unequivocally of an intention to accept.’²

Analysis

- [29] I am not persuaded that there was an unequivocal offer and an unequivocal acceptance of that offer which brought a settlement agreement into existence.
- [30] Dua's 6 April 2010 email cannot be construed as an unequivocal offer it states that he will take instructions and therefore logically had no mandate to make any offer. He further refers to any future tender being under the same terms and conditions.
- [31] A plain reading of Kuane's email of 6 April 2010 cannot be construed as an unequivocal acceptance of an offer. It refers to everything on the email being accepted, that is, that Dua will take instructions and if instructed to make an offer by way of cheque, then such offer will be on the same terms and conditions as tendered on 24 August 2009.
- [32] Even if this is incorrect and the 6 April 2010 could be construed as an unequivocal offer, I am not persuaded that the requisite *animus* was present in circumstances where Kuane's acceptance is due to a mistaken belief that the matter had been settled previously. A common intention cannot be formed when parties are at cross purposes.

¹ Reference Works, Indexes, Dictionaries and Diaries, Law of South Africa, Volume 5(1) Second Edition Replacement Volume, Contract

² Reference Works, Indexes, Dictionaries and Diaries, Law of South Africa, Volume 5(1) Second Edition Replacement Volume, Contract

- [33] Insofar as it is necessary, I am further not satisfied that the chronological sequence of events as set out in the application, is consistent with an agreement coming into existence on 7 April 2010. Dua indicates after receiving Kuane's follow up on 1 April 2010, he contacted his client and sought instructions as to whether they were prepared to re-instate the cheque. Dua states he was instructed that, on condition that the matter was settled as per their tender, they would re-instate the cheque. This, I cannot reconcile with the 6 April 2010 email which states that 'we will take instructions and will revert. If we are instructed accordingly, then the cheque will be tendered under the same conditions as before.'
- [34] Further, after the 7 April 2010 email from Kuane, Dua replies on 15 April 2010 requesting an address for delivery. There is no reply. Dua refers to the review then being set down in the interim and an Associate from his firm being sent to this Court's Registrar on 30 April 2010. On 7 May 2010, Ruth Edmonds Attorneys is re-instated and Dua corresponds on 11 May 2010 stating the matter is settled. Dua indicates '*in the interim a replacement cheque had been posted to the Applicant for attention Sara Kuane*'. When this occurred is unclear and there is no copy of the letter or cheque. In the 13 May 2010 letter there is something of an ambiguity regarding the reference to the initial cheque. This is of significance because it would have been Dua acting in accordance with the obligations of the alleged settlement agreement.
- [35] A further element is the fact that the initial offer was made by way of unsolicited cheque. In order for the offer to be accepted and the matter settled, the cheque would have had to have been received, presented for payment and the cheque honoured. None of the three cheques were presented for payment. The First Respondent attempts to persuade this Court that the later two cheques were in terms of an agreement reached. In the absence of an agreement, however, they amount to no more than the initial offer and were not accepted.

Order

[36] The *in-limine* application of the First Respondent is dismissed with costs.

[37] The review application may be set down.

Hobden, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For Applicant: X. Ngako

Instructed by: Ruth Edmonds Attorneys

For First Respondent: John Dua

Instructed by: John Dua Attorneys