IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D 350/23

Reportable/Not Reportable

In the matter between:

FINFLOOR (PTY) LTD **Applicant**

and

CHRISTOPHER SMETHURST HOLDEN **First Respondent**

NEXTSTEP FLOORING (PTY) LTD t/a

AZURA DISTRIBUTORS **Second Respondent**

Heard: 1 August 2023

Delivered: 11 August 2023 (Electronically)

JUDGMENT

WHITCHER J

Introduction

[1] Mr Holden was employed as a senior manager and director of Finfloor until his services were terminated in April 2023 by way of a Mutual Separation Agreement ("MSA").

[2] Finfloor seeks a final interdict restraining Mr Holden from breaching the confidentiality and restraint of trade undertakings ("restraint provisions") given in favour of Finfloor in Mr Holden's employment contract dated 31 May 2022.

[3] Mr Holden opposes the application and avers as a basis of his defense to the application that the MSA extinguished rights enjoyed by Finfloor pursuant to his employment contract, which contained the restraint provisions.

[4] Finfloor submits that the restraint provisions contained in Mr Holden's employment contract survived the conclusion of the MSA; and the MSA has in any event been cancelled as a result of a breach of the terms thereof by Mr Holden.

Background

[5] It is common cause that during 2022, Mr Holden faced a disciplinary enquiry.

[6] It is further common cause that subsequent to that disciplinary enquiry, but prior to Finfloor effecting the recommendation of the chairperson, Mr Holden's attorneys addressed correspondence to Finfloor in which *inter alia* it was stated that should Mr Holden be dismissed he intends proceeding with litigation before the CCMA, and made a proposal in full and final settlement of all disputes between the parties.

[7] Following this, on 21 April 2023, the parties signed an agreement, namely the MSA. The agreement was drafted by Finfloor's attorneys.

The Mutual Separation Agreement

[8] In terms of the MSA, it was *inter alia* agreed that:

(a) Mr Holden has elected to retire of his own free will (Clause 2);

(b) Mr Holden would receive an ex-gratia payment in the amount of R200 000.00 (Clause 3);

(c) Mr Holden would resign as a director of Finfloor (Clause 12);

(d) Finfloor would assist Mr Holden or his nominated agent to create Inovar Projects where Mr Holden or his nominee as a sole proprietor would become a franchisee of Inovar with no franchise fee payable (Clause 13);

(e) "The Parties undertake to treat this Agreement as strictly confidential the terms of this Agreement and specifically undertakes that neither they, their agent, their representative nor any other person with whom they may be associated shall divulge to any third party any aspect of this Agreement, including the existence thereof." (Clause 14)

(f) "The Employee furthermore undertakes that the details of this Agreement will not be used directly or indirectly to the prejudice of the Company in any manner whatsoever." (Second part of Clause 14)

(g) "This agreement shall constitute an agreement in full and final settlement of all claims of any nature whatsoever between the parties, whether arising from either the contract of employment, delict, contract, statutory (sic), equity or otherwise arising from the employment relationship between the parties. The employee specifically records that he understands that he has no recourse to refer a dispute relating to unfair dismissal to the Commission for Conciliation, Mediation and Arbitration as this Agreement was entered into freely and the employee sought and obtained independent legal advice. The employee confirms that he understands and accept the meaning of this clause". (Clause 15)

(h) "This agreement shall constitute the entire agreement between the parties and no variation or amendment of this agreement shall be of any effect unless reduced to writing and duly signed by both parties." (clause 16)

[9] The MSA also contained a breach provision that in the event that Mr Holden breached any of the terms of this Agreement and failed to remedy such breach within 7 (days) of written notice to do so (only in the event that such breach is capable of being remedied), then without prejudice to any other legal remedies that the Finfloor may have, it would be entitled but not obliged to terminate the MSA and/or revoke and terminate the franchise agreement and commission agreement and/or seek repayment of any amounts paid to the Employee in terms of clause 3 thereof (being R200 000-00) as pre-estimated damages which amount shall become automatically become due owing and payable on the date of the breach.

The parties' submissions

[10] In Mr Holden's view, clause 15 of the MSA is clear. It extinguished rights enjoyed by Finfloor pursuant to his contract of employment, which contract contained the restraint provisions. The terms of settlement as contained in the MSA are dispositive of Finfloor's right to claim performance in terms of the restraint clauses. In concluding the MSA, Finfloor has compromised its right to seek enforcement of the terms of the said contract of employment.

[11] Finfloor contends that:

(a) The MSA simply settled all disputes between the parties existing at the time of signature thereof.

(b) The MSA did not expressly waive the restraint provisions in the employment contract.

(c) Given the wording of the second part of clause 14, it was never the intention of the parties to waive the restraint provisions.

(d) It was never in the contemplation of the parties that Mr Holden would seek work at a competitor having elected to retire with the franchise offering a source of income.

(e) The employment contract contained a non-variation clause and the restraint provisions therein could only have been waived or varied in terms of that clause, which was not done.

Has Finfloor compromised its right to seek enforcement of the restraint provisions contained in Mr Holden's employment contract?

[12] The dispute comes down to the interpretation of the MSA.

[13] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1], the Supreme Court of Appeal held that:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[14] In *CUSA v Tao Ying Metal Industries and Others*[2], the Constitutional Court held that "it is not necessary to resort to extrinsic evidence if the meaning of the document can be gathered from the contents of the document".

[1] 2012(4) SA 593 (SCA) 13 para 18

[15] In my view, clause 15 of the MSA is clear. The wording employed in the clause, namely "this agreement shall constitute an agreement in full and final settlement of all claims of any nature whatsoever between the parties, whether arising from either the contract of employment, delict, contract, statutory (sic), equity or otherwise arising from the employment relationship between the parties" makes it clear that Finfloor compromised its right to seek enforcement of the terms of Mr Holden's employment contract. The wording "…all claims of any nature….whether arising from…the contract of employment…."extends far beyond the disciplinary issues the parties had at the time of concluding the agreement. It includes contractual claims arising out of the employment contract.

[16] As pointed out by Mr Purdon for Mr Holden, the facts of this matter are in remarkable coincidence with the facts recently before the Labour Appeal Court in *Wheelright v CP de Leeuw Johannesburg (Pty) Ltd*[1], where an employer, who had subsequently entered into a settlement agreement with a dismissed employee at the CCMA, then sought to enforce the terms of a previous contract of employment containing a restraint against an employee.

[17] As in the present case, the employer argued that the terms of the restraint agreement survived the settlement agreement. The Labour Appeal Court held at paragraphs 29 to 34:

> "[29] In the present case, the wording employed in annexure A went beyond a mere repetition of the words used in the standard form. In particular, as set out in clause 5, the wording referred to "all and any claims which the parties may have against each other whether such claims arise from contract, delict, operation of law, equity, fairness or otherwise". Manifestly, this clause extends beyond the specific referral to the CCMA which is expressly covered in the standard clause. How else can one explain the reference in annexure A to claims based on delict, operation of law, equity, fairness or otherwise? None of these causes of action were relevant to the specific issues which have been referred to the CCMA and which were covered expressly in the standard form. (Holden's underlining).
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> [30] As Unterhalter AJA reminds us in Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others,3 the task of judicial

interpretation of contract is not to divine a meaning of a contract which the court considers to be the contract that the parties might or ought to have entered into or which may be ethically preferably. The interpretative process cannot eschew a careful examination of the words and sentences that have been employed in the contested provision to determine how these words lead to the intended purpose of relevant clauses.

[31] It is significant that annexure A was specifically constructed by the parties and their representatives who chose the express words which they considered would represent the purpose they had in mind in reaching a settlement agreement. That the specific words chosen in this agreement (annexure A) were included by the parties provides the clearest possible indication, when the text is read in context, of the purpose for which the agreement was concluded.

[32] In this case, an agreement was concluded subsequent to the termination of the appellant's employment. On the facts as set out, it was clear that the respondent was aware that the appellant may not adhere to the restraint agreement. There was thus the possibility that the respondent's proprietary interest would be infringed. Accordingly, clause 5 referred to all and any claims which the parties 'may have' and whether the source thereof would be in delict, operation of law, equity and fairness'. A sensible interpretation of the meaning of this phrase cannot be confined to the specific claims which were brought about the intervention of the CCMA.

[33] Aware as it was of the existence of the restraint agreement; it behoved the representatives of the respondent, if the latter was so concerned, to carve out an exclusion so that the restraint of trade agreement continued to be operative, notwithstanding the conclusion of annexure A. The absence of any attempt in this regard and the use of the words to which I have made reference, namely 'all and any claims' which the parties may have which was sourced in causes of action extended way beyond the contractual relationship between the parties. This conclusion is fatal to the interpretation sought to be placed on annexure A by Mr Pincus on behalf of the respondent.

[34] It must follow therefor that the court a quo erred in finding that the settlement agreement did not include a dispute that might arise out of the restraint of trade agreement".

[18] It is further relevant to note, in the light of the LAC's finding at paragraphs 31 and 33 that the *contra proferentem* rule, in the interpretation of a document provides that in cases of doubt, the terms of a contract must be construed against the party by whom or on behalf of whom it was formulated.[2] The reason for this rule is that the responsible contractant should have used the opportunity to express herself clearly.[3]

[19] Notably, the MSA contains various very specific terms of settlement going forward. If Finfloor wanted to maintain the restraint clauses going forward, the agreement would and should have expressly reflected same. The absence of any attempt in this regard and the use of the words to which I have made reference, is fatal to the interpretation sought by Finfloor.

The non-variation clause in the employment contract

[20] As to Finfloor's submission that the contract of employment contained a non-variation clause, and that the contract of employment has not been varied, the simple answer to that is that the MSA was a compromise and the effect of a compromise is that it extinguishes any legal relationship that may have previously existed between the parties.[4] It is not a question of the antecedent employment contract being novated or varied.

Does the purported cancellation of the MSA revive the employment contract?

[2] See *inter alia: Durban's Water Wonderland (Pty) Ltd v Botha & Another* [1999] 1 SCA 989-990.
[3] See inter alia: *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance* [1961] 1 SA 103 (A) 107 and *De Wet v Santam Bpk* [1996] 2 SA 629 (A) 637.
[4] *Massey-Ferguson (SA) Ltd v Ermelo Motors (Pty) Ltd & Others* 1973 (4) SA 206 (T); *Boland Bank v Steele* 1994 (1) SA 259 (T); *Choice Holdings v Yabeng Investment Holding* 2001 (3) SA 1350 (W); *Road Accident Fund v Ngubane* 2008 (1) SA 432 (SCA).

[21] As submitted by Mr Purdon, the insuperable difficulty faced by Finfloor is that there is no provision in the MSA affording it a right to revive the terms of the employment contract should Mr Holden allegedly have breached its terms.

[22] Basically, the MSA was not subject to a suspensive or resolutive condition which provided for reliance on the original agreement in the case of a breach. It follows that the employment contract could not revive upon repudiation or breach of the MSA.[5]

Conclusion

[23] In all the circumstances, Finfloor does not enjoy a right to the relief sought in this application.

Costs

[24] As the matter is to be treated as a civil claim the regime for costs is that, absent special considerations, costs ought to follow the result.

The Order

[25] The application is dismissed with costs.

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Benita Whitcher

Judge of the Labour Court of South Africa

[5] See: RH Christie, The Law of Contract in South Africa, 5th ed, page 455-461 and *Breet v Maxam Dantex South Africa (Pty) Ltd* (unreported judgment, JR 2025-2010) at paragraphs 4- to 42.

APPEARANCES:

For the Applicant:	Adv. M.A. Lennox, instructed by Botoulas Krause & Da Silva Inc.
For the Respondents:	Mr Purdon, from Purdon & Munsamy Attorneys