IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no JR 249/2015

The matter between:

A C AND C SOUTH AFRICA (PTY) LTD
t/a AFRICAN CAMP AND CATERING **Applicant**

and

COMMISSIONER DONALD KGALAKE NKADIMENG *N.O* **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION **Second Respondent**

SATAWU obo MOKETLO AND 13 OTHERS **Third Respondent**

Heard: 20 July 2017
Delivered: 08 August 2017

JUDGMENT

NTSOANE, AJ

Introduction:

[1] This is an opposed review application in terms of Section 158(1)(g) of the Labour Relations Act[1] (LRA) to set aside a decision of the first respondent for refusing the applicant's application for postponement. The review application further sought to review and set aside the arbitration award in terms of Section 145 of the LRA, the default arbitration award handed down by the first respondent under case number LP 7307/2014 dated 18 December 2014.

[2] In terms of the practice note filed by the applicant's attorneys on the 12th July 2017, the matter seems to have been settled and the relief sought was for the settlement agreement to be made an order of Court and the review application to be discharged. The matter was however anticipated to proceed but not on merits.

[3] I must admit that the practice note really confused me as far as the continuation of the matter is concerned however it then became apparent during the argument that the settlement agreement was in fact disputed for the reasons to be mentioned and determined herein below. This Court has enduring powers to set aside settlement agreements in terms of Section 158(1)(j) of the LRA on such grounds as are permissible in common law. The case of *Eugiene Ulster v The Standard Bank of South Africa Ltd and another*[2] is relevant.

Background:

[4] The individual third respondents were employed and dismissed by the applicant. Pursuant to the termination of their employment with the applicant,

[1] Act 66 of 1995
[2] (2013) 34 ILJ 2343 (LC). See also: *Department of Health v Jones and another* [2009] 3 BLLR 195 (LC) and *Eckhard v Filpro Industrial Filters (Pty) Ltd* (1999) 20 *ILJ* 2043 (LC) para [8]

they, through the union SATAWU, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The matter was ultimately set down for arbitration and was heard in the absence of the applicant subsequent to which a default arbitration award, forming the subject matter of this review application, was rendered.

[5] Interestingly enough, the applicant submits in its founding affidavit under the heading *pending application for rescission* that "*the applicant has however, also launched an application for the rescission of the default award which has been set down for hearing on Friday 20 February 2015 in Lephalale before the Commissioner himself. Obviously, if that application for rescission is successful then this review application will be withdrawn as the matter will then proceed to arbitration de novo and this application will be superfluous"*. As the review application was ultimately not argued, this piece of evidence was also not argued before me. It is however interesting to note that the applicant had simultaneously referred this matter to two forums. The applicant clearly contravened the principle of *lis alibi pendes* in this regard.

[6] In any event, during the subsistence of the review application, the parties reached a settlement agreement which Mr Baloyi sought to challenge hence the matter proceeding but not on merits.

[7] On or about 7 March 2017, MM Baloyi Attorneys filed notice of appointment as attorneys of record following the withdrawal of Mabaso Attorneys as the third respondent's attorneys. The notice filed by MM Baloyi Attorneys reflects "*KINDLY TAKE NOTICE that the Third Respondent (SATAWU obo MOKETLA AND 13 OTHERS - emphasis) hereby appoints MM Baloyi Attorneys as their attorneys of record in the above matter*". On the same day MM Baloyi Attorneys dispatched a letter to the applicant's attorneys requesting copies of the index and heads of argument to which a response of 10 March 2017 indicated that a settlement was imminent and that the applicant's instructions was to hold the matter in abeyance. MM Baloyi Attorneys responded on 24 March 2017 indicating that they were not contacted on the settlement negotiations and such letter remained

unanswered. On the same day, DETAWU also dispatched a letter seeking to inform the applicant that the individual third respondents were their members and that they have appointed MM Baloyi Attorneys to act on their behalf. The applicant's attorneys responded on the 6 April 2017 advising that the matter had already been settled between the applicant and SATAWU on behalf of the members.

[8] At the end, it appears that the parties settled the matter without the assistance of their respective legal representatives. In terms of the applicant's letter of 6 April 2017, SATAWU had prepared the settlement agreement which agreement was signed by the parties on 22 March 2017.

[9] The issues before me were:

9.1 Whether SATAWU had the necessary mandate to settle the matter on behalf of the individual third respondents (14 employees); and

9.2 Whether the settlement agreement concluded between the applicant and the third respondent on 22 March 2017 complied with the statutory requirements of the LRA and, therefore, valid and binding on the parties;

9.3 Whether the Court has the powers to declare the settlement agreement partly valid and partly invalid in so far as the members of SATAWU and members of DETAWU respectively.

<u>The Parties' arguments and submissions</u>:

[10] The validity of the settlement agreement is attacked on the ground that SATAWU had no mandate to settle on behalf of the individual third respondent, at least six of them namely F Seanego, MP Mojela, RJ Tabane, MG Mathokoa and PC Mathatho. Mr Baloyi argued that in so far as the settlement agreement may be valid then it is invalid as far as the six are concerned. Mr Baloyi submitted that as far as 7 March 2017, the applicant

was aware that the third respondent is being represented by MM Baloyi Attorneys thus it was irregular for the applicant to settle the matter without the third respondent's attorneys' involvement.

[11] Mr van der Riet on behalf of the applicant submitted that the parties are at liberty to enter into settlement negotiations and even settle the matter without their respective legal representatives. The applicant further submitted that the notice appointed MM Baloyi Attorneys as the third respondent (SATAWU obo Moketla and others)'s attorneys and not DETAWU's.

The issue of SATAWU vs DETAWU

[12] Firstly, there is no question that DETAWU is not a party to these proceedings and no notice was filed by the third respondent seeking to amend the citation of the third respondent. In terms of MM Baloyi Attorneys' notice of appointment as attorneys of record, they were being appointed to act as such on behalf of the third respondent – SATAWU obo Moketla and others. This is, in any event, immaterial as I will determine herein below. In so far as the withdrawal of membership is concerned from SATAWU to DETAWU, this is a union internal administrative issue and in line of SATAWU's constitution, and unless there is evidence to show that the six employees are now DETAWU members, then the matter would proceed as initially cited.

[13] Section 200 of the LRA specifically deals with the representation of employees by trade unions:

> "**200. Representation of employees or employers.**—(1) A registered *trade union* or registered *employers' organisation* may act in any one or more of the following capacities in any *dispute* to which any of its members is a party—
>
> (a) in its own interest;
>
> (*b*) on behalf of any of its members;

(*c*) in the interest of any of its members.

(2) A registered *trade union* or a registered *employers' organisation* is entitled to be a party to any proceedings in terms of *this Act* if one or more of its members is a party to those proceedings."

[14] There is no dispute that SATAWU is a registered trade union and at the time of referring the matter to the CCMA and ultimately the Labour Court, the employees were represented by SATAWU and the employer recognised SATAWU as the bargaining agent for its employees. Indeed, SATAWU is still the third respondent on behalf of its members before this Court and before the CCMA. Section 200(1)(b) therefore grants the union an unfettered right to act on behalf of and represent the individual third respondents in the Labour Court. At no point was there any withdrawal of membership by the individual third respondents from SATAWU, at least no such evidence was presented to the Court.

[15] This then brings me to the next issue whether the parties may enter into a valid settlement agreement outside the assistance of their representatives.

[16] It is settled in law that litigants are the owners of the litigation and the role of the representative is to assist and represent the litigants in so far as the latter may require the assistance. It is common knowledge that when parties are legally represented then their representatives would deal with issues on their behalf. This however does not preclude the parties from contacting each other outside their representatives in order to discuss and pursue settlement. This is what has happened in this regard. Once a settlement is reached, such settlement is valid and binding on the parties provided that such settlement agreement complies with the common law requirements of a valid agreement. In the case of *Universal Church of the Kingdom of God v Myeni and Others*[3];, the Court determined that:

[3] (2015) 36 ILJ 2832 (LAC); [2015] 9 BLLR 918 (LAC); [2015] JOL 33521 (LAC); at para 44

> 'It is settled law that the intention of the parties in any agreement - express or tacit - is determined from the language used by the parties in the agreement or from their conduct in relation thereto. Further, that not every agreement constitutes a contract. For a valid contract to exist, each party needs to have a serious and deliberate intention to contract or to be legally bound by the agreement, the *animus contrahendi*. The parties must also be ad idem (or have the meeting of the minds) as to the terms of the agreement. Obviously, absent the *animus contrahendi* between the parties or from either of them, no contractual obligations can be said to exist and be capable of legal enforcement.'

[17] Section 158(1A) of the Labour Relations Act reads as follows:

> 'For the purposes of subsection of (1)(c), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is only entitled to refer to arbitration in terms of section 22(4), 74(4) or 75(7).'.

[18] The third respondent has not demonstrated any basis for the agreement to be declared void or invalid. I am satisfied on the arguments that the parties entered into and signed the settlement agreement and were fully aware of the nature of settlement agreement, had fully understood the terms and conditions of the agreement they had entered into, and the consequences thereof. The third respondent has thus failed to discharge the onus placed on it to show cause why the agreement should be declared invalid or void or be set aside. The settlement agreement was the product of a long and protracted consultation and negotiation between the applicant and the third respondent. There was a long outstanding litigation issue in respect of which the applicant decided to engage the third respondent in an attempt to resolve the dispute once and for all. The parties are thus bound by its terms.

[19] In the event that the individual third respondents (DETAWU members) are distressed by the conclusion of the settlement agreement, then this becomes a separate issue and cause of action between the individual third respondents

and SATAWU. As it stands, the valid and binding settlement agreement rested the pending dispute at the CCMA and/or the Labour Court. Therefore, and once again, MM Baloyi Attorneys' representation is immaterial at this juncture.

[20] In the premise, I make the following order:

Order

1. The settlement agreement entered into between the applicant and third respondent is valid and binding;

2. The applicant's application for review is accordingly withdrawn;

3. There is no order as to costs.

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M.M Ntsoane

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate H van der Riet

Instructed by : Cuzen Randeree Attorneys

For the Respondent: Mr Moses Baloyi

Instructed by: MM Baloyi Attorneys