THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JS 237/15

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **First Applicant**

MAMABOLO AND TWO OTHERS **Second Applicant**

and

TRANSALLOYS (PTY) LTD **Respondent**

Heard: **14 and 15 September 2017**

Delivered: **21 September 2017**

Summary: **Contractual claim for breach of contract. No breach of contract but error.**

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicants approached this Court in terms of the provisions of section 77(3) of the Basic Conditions of Employment Act[1] (BCEA) and the nature of the claim is a breach of contract.

[2] The Respondent opposed the matter and both parties adduced evidence during the trial.

The evidence

[3] The material facts presented to this Court and as they are relevant to the breach of contract claim appear undisputed and uncontested. The main issue in dispute is whether there was indeed a breach of contract or whether the Respondent made a *bona fide* mistake.

[4] The relevant facts, as presented during evidence, are as follows:

[5] The Respondent placed an internal advertisement for three positions of lab analysts. In the advertisement the minimum requirements were recorded as well as the grade or level of the position as level 5C and the closing date was 31 January 2014. The Second Applicants (the employees) applied for the advertised positions, they were shortlisted and interviewed and they were successful.

[6] It is common cause that the level of the position and the salary attached to it were discussed with the employees during the interview and they were informed that the successful candidates would be employed and paid at salary level 5C.

[7] On 17 February 2014 an offer of employment was made to the employees. The offer of employment made to the employees was signed by the Respondent's general manager, Mr Theo Morkel and it was signed by the employees who confirmed their acceptance of the position offered to them on the conditions contained in the offer. The commencement date was 1 March 2014.

[1] Act 75 of 1997.

[8] In the offer of employment the terms and conditions of employment were set out and it was recorded that the employees would be appointed as lab analysts, level 5A of the 5 grade pay structure. The employees commenced employment as lab analysts on 1 March 2014 and they were remunerated on the salary scale attached to level 5A.

[9] It is common cause that all the other lab analysts in the employ of the Respondent are remunerated at salary level 5C and the evidence was that there is no difference between the duties and responsibilities of the lab analysts employed and remunerated on level 5C and the employees who were remunerated on level 5A. On 12 May 2014 NUMSA filed a grievance due to the discrepancy in the salaries of the lab analysts. NUMSA demanded that the lab analysts paid on level 5C also be paid on level 5A and that the human resources manager responsible for the contracts be reprimanded.

[10] The Respondent's case is that they became aware of the error in the salary levels on 12 May 2014 when the grievance was filed by NUMSA.

[11] On 16 May 2014 the human resources manager, Mr Sekgobela, was issued with a written warning for negligence in that the newly appointed lab analysts were appointed on level 5A instead of level 5C and the corrective measure recorded was that the mistake should be corrected with immediate effect.

[12] On 16 May 2014 Mr Sekgobela met with the employees and he explained to them that there was a payment error in that they should be paid on level 5C and not level 5A, that the error would be corrected and that they would not be expected to pay back the money that was already paid to them in error.

[13] On 16 May 2014 the Respondent also issued letters to the employees titled 'pay correction'. The employees were informed that they were given an incorrect salary when they were employed on level 5A instead of level 5C and that the mistake would be rectified with effect from May 2014.

[14] The salary paid at level 5A was R 27 719 per month and the salary at level 5C was R 24 228 per month. With effect from May 2014 the employees' salary

was reduced to level 5C. The Respondent did not recover the difference paid between level 5A and 5C for March and April 2014.

[15] On 3 July 2014 NUMSA on behalf of the employees filed a grievance and the nature of the grievance was recorded as a violation of the contractual agreement between the employer and the lab analysts in that their salaries were reduced and NUMSA demanded that the employer should adhere to the contractual agreement.

[16] The parties were unable to resolve the issue internally or at the bargaining council and the Applicants approached this Court for relief.

[17] The Applicants' case is that the Respondent issued contracts for the employees, which were signed by the general manager and that those contracts were clear on *inter alia* the commencement date, remuneration and the level of the position. The Respondent acted in breach of the contracts when the employees' salaries were changed from level 5A to level 5C. The employees do not regard the inclusion of level 5A in their contracts as an error and this is so because the contract was signed by the general manager, who should have picked up the error, but did not.

[18] The relief sought by the Applicants is an order to declare that the Respondent has breached the employees' contracts of employment and for the Respondent to be ordered to pay the employees the difference between what they earned on salary level 5A and 5C as from May 2014 to date.

[19] The Respondent's case is that it uses a five grade pay structure and the purpose of the grading system is to ensure that employees on certain grade levels would earn the same and lab analysts have been graded at level 5C. The employees applied for the position of lab analyst that was advertised at level 5C and when the contracts were issued to the employees, a typing error was made and their salaries were stated at level 5A. It was an administrative error that caused the employees to be placed on level 5A instead of level 5C and after the error was picked up, the Respondent merely corrected the error in May 2014 to level 5C and this does not constitute a breach of contract.

The issue: Was there a breach of contract

[20] The parties agreed that the issue this Court has to decide is whether there was a breach of contract.

[21] The starting point should be the contract of employment.

[22] It is common cause that the employees were appointed to the position of lab analyst with effect from 1 March 2014 and that their contracts show that they were appointed on salary level 5A and they were so paid until the Respondent became aware of this in May 2014, when their salary levels were adjusted to level 5C.

[23] The Respondent's case is that this was a *bona fide* error as lab analysts are employed on salary level 5C and not on level 5A.

[24] In *Sonap Petroleum (SA)(Pty) Ltd v Pappadogianis*[2] it was held that:

> 'In my view therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?
>
> ….To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention, secondly, who made that representation and thirdly, was the other party misled thereby. The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled'?

[25] If the mistaken party has conducted himself as to give the other party reasonable believe that he was contracting with him on certain terms, he is bound on the basis of quasi-mutual assent unless there is some special reason for classifying the mistake as a *iustus error.* One such reason obviously exists when the other party knew of the mistake and such

[2] 1992 (3) SA 234 (A)

knowledge enables the mistaken party to rescind the contract if the mistake was material.[3]

[26] A mistake will be treated as a *iustus error* if the other party ought, as a reasonable person, to have known of it and where the offer made is snapped up when the person purporting to accept the offer knows or ought to know that there was no intention to make the offer as it appears from the wording of the contract. This was also accepted in *Sonap Petroleum* where the court held that:

> 'If he realised (or should have realised as a reasonable man) that there was a real possibility of a mistake in the offer, he would have had the duty to speak and to enquire whether the expressed offer was the intended offer'.

[27] A unilateral mistake of motive has no effect on the validity of the contract but it does not follow that a party is entitled to enforce a contract when that party knew or ought reasonably to know that the contract was entered into where the other party was mistaken on some matter in the contract[4].

[28] *In casu* the advertisement for the positions of lab analyst clearly indicated that the positions are on level 5C and during the interview process the employees were also informed that the lab analysts would be appointed and remunerated on level 5C. The offer of employment subsequently made to them, reflected the post as lab analyst at level 5A, which is inconsistent with the advertisement and information given to the employees in the interview. It is also inconsistent with the fact that all other lab analysts are employed an remunerated at level 5C and the fact that the position of lab analyst was graded at level 5C.

[29] The Applicants' witness, Mr Nyaze, conceded in cross-examination that the error in respect of the salary level for lab analysts was not made in the advertisement, but was made in the contract issued to the employees.

[3] R H Christie *The Law of contract in South Africa* 5th edition p 318
[4] R H Christie *The Law of contract in South Africa* 5th edition p 319

[30] Ms Maumela, one of the applicant employees, testified that the contract they signed should remain intact and that it is not an error because the contract was drafted by the human resources manager and was signed by the general manager. She testified that when she saw that the contract was on a higher salary level than what was advertised and communicated to her during the interview, she thought that she was upgraded to a higher level and she did not bring this to the Respondent's attention as she believes that she has no responsibility to do so. Ms Maumela conceded that the error was made by the person responsible for the drafting of the contract.

[31] The employees knew that they applied for a position of lab analyst on level 5C and they were told that they would be appointed on level 5C and in my view they could not have expected anything but an offer of employment on level 5C. On the employees' own version they noticed that the contract offered to them was on a higher salary level. This should have raised a question in the employees' mind and should have sparked a thought that there was a real possibility of a mistake in the offer and they had the duty to speak and to enquire whether the expressed offer was the intended offer. Ms Maumela's version that she had no responsibility to raise the issue with the employer is unreasonable, opportunistic and indicative of the employees' attempt to snatch the bargain. The employees knew or ought to have known that there was a real possibility of a mistake in the offer on level 5A.

[32] The fact that the contract was signed by the general manager does not automatically mean that a contract that contains an error should remain intact and be enforceable, even where the contract indeed contains an error, simply because it was signed by the general manager. This Court has to consider the context within which the contract came into existence. The position of lab analyst was advertised on level 5C, it was confirmed during the interview that the post was on level 5C, all other lab analysts are employed on level 5C and the post of lab analyst was graded on level 5C. It is within this context that I accept that the intention was to appoint the employees on level 5C and a contract within this context that reflected level 5A, contained an obvious error in respect of the salary level.

[33] I am persuaded that the inclusion of level 5A in the offer made to the employees was a *bona fide* error as the employees were to be appointed on level 5C. I am further satisfied that the Respondent in adjusting the employees' salary levels to level 5C corrected the error that was made and that this does not constitute a breach of contract but rather a rectification.

[34] In respect of the issue of costs Mr Masutha for the Applicants argued that no cost order should be made as there is an ongoing relationship between the parties. Mr Berry for the Respondent argued that the Applicants should pay the Respondent's costs. I am disinclined to make a cost order for two reasons. Firstly, there is an ongoing relationship not only between the Respondent and the employees but also between NUMSA and the Respondent. Secondly, the Respondent was not represented by lawyers but was represented by an employer's organization that is not entitled to charge legal fees for services rendered to its members and in those circumstances there would be no purpose to grant a cost order where there are no costs that could be taxed as is the case with lawyers.

[35] In the premises I make the following order:

Order:

1. The Applicants' case is dismissed;
2. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr Masutha of NUMSA

For the Respondent: Mr D Berry of the Guardian Employers Organisation