THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 200/16

SIBUSISO XABA	**First Applicant**
VUSUMUZI DLAMINI	**Second Applicant**
AND 144 OTHERS	**Third Applicant**
and	
I G TOOLING & LIGHT ENGINEERING (PTY)LTD	**First Respondent**
NUMSA	**Second Respondent**
SOLIDARITY	**Third Respondent**
INDEPENDENT REPRESENTATIVE EMPLOYEE'S FORUM	**Fourth Respondent**
M A AUTOMATIVE TOOL & DIE (PTY) LTD	**Fifth Respondent**
CCMA	**Sixth Respondent**

Heard: **8 November 2018**

Delivered: **28 November 2018**

Summary: Review of a settlement agreement. No merit in the application. Costs granted *de bonis propriis.*

JUDGMENT

PRINSLOO, J

Background facts

[1] The First Respondent (the employer) contemplated the retrenchment of its affected employees and embarked on a large scale retrenchment process, as provided for in section 189A of the Labour Relations Act[1](LRA). The Second Respondent (NUMSA) was the majority representative trade union in the workplace, the Third Respondent (Solidarity) represented 14 of the affected employees and the employer requested the remainder of the affected employees who were neither members of NUMSA nor Solidarity, to create the independent Representative Employee's Forum (IREF), cited herein as the Fourth Respondent, and to appoint a representative. The matter was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for facilitation in terms of section 189A of the LRA and the parties engaged in four facilitation meetings between the period 16 July and 12 August 2015.

[2] On 13 August 2015, a retrenchment settlement agreement (the agreement) was signed and entered into by the employer, NUMSA, Solidarity and the IREF. It appears from the agreement that it was specifically recorded that the parties reached an agreement on the retrenchment of the employees and the terms of the agreement were recorded.

[3] The Applicants were all employed by the employer and their services were terminated on 27 November 2015.

[4] On 3 February 2016, the Applicants filed this application seeking *inter alia,* the review and setting aside of the settlement agreement.

[5] The First, Third and Fifth Respondents opposed the matter. I will refer to the First and Fifth Respondent collectively as 'the Respondents' where appropriate to do so.

[1] Act 66 of 1995, as amended.

[6] Before I deal with the relief sought and the merits of the application, it is necessary to mention the events that transpired in Court when the matter was set down for hearing, as it will provide context to some of the findings in this judgment.

[7] The matter was set down for hearing on 8 November 2018, and Mr Mashele, instructed by Ehlers Fakude Inc Attorneys, appeared for the Applicants. Mr Mashele made it clear that his instruction was to remove the matter from the roll and effectively Mr Mashele was seeking a postponement. Mr Searle for the First and Fifth Respondents opposed the application and submitted that if the Court was inclined to grant the postponement, the Applicants should not be burdened with the costs, but that their legal representatives should be ordered to pay the costs. The Second and Third Respondents also opposed the application for postponement.

[8] In considering the application for postponement, I indicated to Mr Mashele that the Practice Manual of the Labour Court[2] provides that applications will generally not be postponed and that it could only be done with the permission of the presiding Judge, more so where the other parties to the matter oppose the application for postponement. In order to assess the application for postponement, I enquired from Mr Mashele what the purpose of the postponement would be and what the Applicants seek to achieve by postponing the matter. Mr Mashele indicated that the purpose of the postponement was to amend the Applicants' papers to bring it in line with the applicable law. I asked Mr Mashele what was it that the Applicants intend to amend, as I was of the view that the Applicants case had no merit in law and no amount of amendment could cure the fatal defects of the case. Surprisingly Mr Mashele, in seeking a postponement to amend the papers, was unable to tell me what the amendments would be and what the Applicants intend to place before this Court, should a postponement be granted. I was not satisfied that any purpose would be served by postponing the matter and the application to postpone was refused.

[2] April 2013.

[9] I invited the parties to make submissions on the merits, whereupon Mr Mashele indicated that he had no instructions to do so, as he came to Court only to postpone the matter.

Relief sought and analysis

[10] In the notice of motion, the Applicants seek relief in the form of review and declaratory orders. I will deal with the relief sought *infra.*

The review

[11] The Applicants seek to review and set aside the agreement signed on 13 August 2015.

[12] The Applicants brought the review application in terms of the provisions of section 158(1)(g) of the LRA and the gist of their case is that at the time that the agreement was entered into, crucial information was unknown or not divulged and had this information been known or divulged, the Applicants would not have been party to, and agreed to the agreement. The agreement constituted a waiver of the Applicants' constitutionally entrenched rights and the waiver of these rights was not voluntarily, freely expressed and with a clear understanding of the true consequences and effects of doing so, thus not an effective waiver of rights.

[13] Section 158(1)(g) of the LRA provides, this Court may 'subject to section 145, review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law'. Consistent with the wording of section 158(1)(g), this Court's powers under the said section are limited to the review of the performance or purported performance of statutory functions provided for in the LRA, undertaken by statutory bodies or functionaries, such as the CCMA, bargaining councils, Ministers etcetera[3].

[14] Section 158(1)(g) of the LRA provides for a review on any grounds permissible in law and what constitutes permissible grounds of review is dependent on the nature of the decision taken or the function performed and

[3] Myburg and Bosch, *Reviews in the Labour Courts*, Lexis Nexis, 2016 at p 123 – 140.

three grounds are potentially available namely: A review based on section 6 of the Promotion of Access to Justice Act[4] (PAJA), the principle of legality or common law grounds.

[15] It is within this context that the Applicants' application for review is to be decided.

[16] In my view there are three difficulties with the relief sought in respect of the review filed under section 158(1)(g) of the LRA. The first and the most obvious is that the Applicants seek the review and setting aside of a settlement agreement that was entered into between the parties. Review proceedings must be directed at the conduct or performance of statutory functions, provided for in the LRA, undertaken by statutory bodies or functionaries.

[17] *In casu,* there is no arbitration award but a settlement agreement signed by the parties and recording the terms of their settlement. The settlement agreement did not come about as a result of a decision or ruling made by an arbitrator or any other statutory functionary.

[18] In *Malebo v Commission for Conciliation*, *Mediation and Arbitration and Others*[5], it was held that:

> '[u]ntil the agreement is made an award it remains simply a settlement agreement. Any legal force it carries is derived from the ordinary binding power of a contractual arrangement between the parties. Even though the agreement may have come into being through the facilitation of the commissioner, his role in the conclusion of the agreement does not entail the exercise of any statutory decision-making powers on his part to make an award or ruling which is binding on the parties. The document embodying the settlement simply records what the parties to the dispute have agreed.'

[19] A settlement agreement that has not been made an arbitration award in terms of section 142 of the LRA cannot be reviewed and there is no basis upon

[4] ACT 3 of 2000.
[5] (2010) ZALC 97 (15 April 2010) at para 12, referred to in *Cindi v CCMA* (2015) 36 ILJ 3080 (LC).

which the settlement agreement entered into between the parties can be reviewed.

[20] Secondly, and even if I am wrong in my finding that a settlement agreement cannot be reviewed and set aside in terms of the provisions of section 158(1)(g) of the LRA, the Applicants have not set out any grounds for review in respect of the agreement. Their case, that they were not aware of all the facts at the time of signing the agreement, is not a ground for review, but rather a ground to set it aside on the grounds of misrepresentation, duress or whatever other reason there may be. If the Applicants have a case and if they are entitled to relief, they are certainly not so entitled on the basis of the provisions of section 158(1)(g) of the LRA and on the facts that they have placed before this Court.

[21] Thirdly, the Applicants were paid in accordance with the terms of the agreement and to date they made no tender whatsoever to repay the monies they received.

[22] The principle that where a party accepts payment, it is bound by the acceptance was enunciated in *Makiwane v International Healthcare Distributors* as follows:[6]

> 'It is common cause between the parties that the applicant has been paid all the monies set out in the settlement agreement, that he has kept such monies and has made no tender to return them to the respondent. To my mind this clearly signifies his acceptance of such monies in full and final settlement of his claims against the respondent.
>
> Our law is trite that where a party accepts the benefits under any settlement agreement in full and final settlement of the benefits owing to him by his former employer arising from the termination of his employment relationship with such employer, and has abided by such acceptance of those benefits, he has placed himself beyond the jurisdiction of this court (see *United Tobacco Co Ltd v Baudach* (1997) 18 ILJ 506 (LAC)).'

[6] (2003) 24 ILJ 2150 (LC) at paras 18-19.

[23] The doctrine of peremption is well established in our law and was explained in *Hlatshwayo v Mare and Deas*[7] as follows:

> '[A]t bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold, to approbate and reprobate.'

[24] For the above reasons, the Applicants' review application in terms of section 158(1)(g) of the LRA has to fail.

Declaring the agreement void ab initio

[25] The Applicants seek an order declaring the agreement void *ab initio* and as being of no force and effect.

[26] The relief sought in prayer 2 of the notice of motion is problematic for a number of reasons. Firstly, the relief is not sought as an alternative to prayer 1, where the review and setting aside of the agreement is sought and it is mutually destructive of the relief sought in prayer 1. The Applicants seek the review and setting aside of the agreement, which relief is not possible or competent if the agreement is void, as it needs to exist to be set aside. Equally so, if the agreement is void, it cannot be reviewed and set aside.

[27] Secondly, and as already alluded to *supra,* the Applicants were paid in accordance with the terms of the agreement and to date they have made no tender whatsoever to repay the monies they received. Without any tender to repay the monies received, the Applicants are not in a position to seek that the agreement be declared void.

[28] Thirdly, it is evident from the Applicants papers that they are effectively seeking the rescission of the agreement because facts were misrepresented at the time that the agreement was entered into. For the Applicants to succeed on this aspect, they must show that they were induced or coerced into signing the agreement as a result of a material misrepresentation. The Applicants have not placed any facts before this Court that would support

[7] 1912 AD 242.

such a claim and in the absence of such evidence, the Applicants are bound by the agreement reached by their representatives.

Section 197 of the LRA

[29] The Applicants seek an order declaring that they are employees of the Fifth Respondent (MA Automotive) in terms of the provisions of section 197 of the LRA and an order that they are retrospectively reinstated by MA Automotive with effect from 1 December 2015, alternatively with immediate effect.

[30] Section 197 (1) and (2) of the LRA provide that:

> '(1) In this section and in section 197A
>
> *(a)* "business" includes the whole or a part of any business, trade, undertaking or service; and
>
> *(b)* "transfer" means the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern.
>
> (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -
>
> *(a)* the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
>
> *(b)* all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
>
> *(c)* anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
>
> *(d)* the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.'

[31] The question whether or not there has been a transfer of a business as a going concern entails an enquiry into (1) the existence of a business (is there an economic entity capable of being transferred) (2) whether there was a transfer of a business and (3) whether the business is transferred as a going concern[8]. For section 197 to be triggered, the three discrete requirements must be met and if the transfer meets these requirements, the transferee is substituted automatically and by operation of law for the transferor as the employer of those of the transferor's employees engaged in the business on the date of the transfer. Whether there has been a section 197 transfer is a matter of fact to be determined objectively.

[32] A perusal of the Applicants' papers show that the only allegation made in respect of section 197 is that between 2010 and 2011 MA Automotive bought shares from the employer and it became a 100% shareholder in the employer. A vague and generic statement is made that the transfer of the business was a transfer as a going concern.

[33] The Applicants' averments are without merit. Firstly, a change in ownership of shares is nothing but a change in shareholding and that does not automatically result in the transfer of the business.

[34] Secondly, the employer and MA Automotive explained that MA Automotive is part of an international group of companies and in South Africa this group consists of separate companies that manufacture and supply components to the motor vehicle manufacturing industry. The employer and MA Automotive are sister companies and wholly owned by MA Automotive South Africa (Pty) Ltd. It is denied that there was any transfer of the business of the employer to MA Automotive Tool & Die (Pty) Ltd in 2011 or thereafter and no employees were ever transferred to MA Automotive. The Applicants failed to put any facts before this Court to rebut this version and I accept that the employer and MA Automotive are separate legal entities, operating separate businesses and that they form part of the same group of companies, known as the MA Group.

[8] See: *Fnman Services (Pty) Ltd v Simba (Pty) Ltd and Another* (2013) 34 ILJ 897 (LC).

[35] Thirdly, in order to succeed with this claim, the Applicants have to show the existence of a business, that there was a transfer of a business and that the business was transferred as a going concern. The Applicants dismally failed to make any averments to support this claim.

[36] The Applicants' application has to fail for lack of merit.

Costs

[37] The last issue to be decided is the issue of costs.

[38] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[39] Considering the merits of this application and the attempt made by the Respondents to avoid further costs when they indicated to the Applicants' attorneys that the application should be withdrawn, there is no reason in law or fairness not to make a cost order in favour of the Respondents. I can see no reason why the Respondents should be burdened with the legal costs incurred as a result of the Applicants' conduct and in defending a meritless application.

[40] The Respondents are entitled to costs. The question is who should be ordered to pay the costs.

[41] Mr Searle argued that the Applicants should not be ordered to pay the costs, but that a cost order *de bonis propriis* should be made. This argument was supported by correspondence Mr Searle referred to. The first letter from the Respondents' attorneys is dated 23 February 2016 and was addressed to the Applicants' attorneys shortly after the application was filed on 3 February 2016. In this letter the Applicant's attorneys were invited to withdraw the application, with a tender for costs, failing which the attorneys would attend to serving the Respondents' answering affidavit. In the letter of 23 February 2016, the Applicant's attorneys were warned that the Respondents would seek the dismissal of this application with costs *de bonis propriis.* This letter

was sent to the Applicants' attorneys prior to the filing of opposing papers and before costs were incurred in that regard.

[42] On 2 March 2016, another letter was addressed to the Applicants' attorneys, indicating that no response was received to the letter of 23 February 2016. The Respondents subsequently filed an answering affidavit on 4 April 2016.

[43] On 18 April 2016, Solidarity addressed a letter to the Applicants' attorneys wherein reference was made to the Respondents' opposing affidavit and it was specifically brought to the Applicants' attorneys attention that a settlement agreement cannot be the subject of a review application in terms of section 158(1)(g) of the LRA. Solidarity also urged the attorneys to withdraw the application. On 22 April 2016, Solidarity went further and provided the Applicants' attorneys with the latest case law on this issue which was to convince the Applicants to withdraw the misconceived application.

[44] This did not spark any consideration of the merits of the case or the way forward. Instead, the Applicants filed a replying affidavit, clearly signifying the intention to proceed with the application.

[45] Notwithstanding the legal position as set out in the case law that was provided to the Applicants' attorneys in April 2016 and notwithstanding pleas from the Respondents and Solidarity that the application be withdrawn as far back as 2016, the Applicants' attorneys instead filed heads of argument on 1 February 2017. The attorneys waited for the matter to be enrolled for hearing on 8 November 2018, on which occasion they briefed counsel with the only instruction to remove the matter from the roll so that the papers could be amended. In view of my findings on the law and the merits of this application, there is no prospect that an amendment would change the outcome of this matter.

[46] Mr Searle submitted that the Applicants' attorneys were warned two and a half years ago about the fatal flaws in the application and they were responsible to advise the Applicants, their clients and laypersons, about the flaws in the application and they ought to have acted accordingly. The Applicants, as

laypersons who relied on the advice and assistance of their attorneys, should not be burdened with costs in this instance.

[47] In *SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others* [9] the Constitutional Court ordered costs *de bonis propriis* on a scale as between attorney and client and held that:

> 'An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.'

[48] In *Indwe Risk Services (Pty) Ltd v Van Zyl*[10] the Court considered circumstances where a *de bonis propriis* cost order was warranted and held that:

> 'I am also mindful of the fact that an order for costs *de bonis propriis* is only awarded in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure from the responsibilities of his office. Such an order shall not be made where the legal representative has acted *bona fide* or where the representative merely made an error of judgment. However, where the court is of the view that there is a want of *bona fides* or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative. Because the representative acted in a manner which constitutes a departure from his office, the court will grant the order against the representative to indemnify the party against an account for costs from his own representative. (See in general Erasmus *Superior Court Practice* at E12-27.) '

[49] *In casu,* it is evident that the Applicants' attorney filed an application without any reflection as to the provisions of the LRA, without any consideration of the applicable case law and without any attention to the question whether the Applicants have prospects of success and whether the matter should indeed

[9] 2009 (1) SA 565 (CC) at para 54.
[10] (2010) 31 ILJ 956 (LC) at para 39..

be pursued. One could reasonably accept that a practising attorney assisting a paying client, should at least consider the law, the applicable legislation and the merits of a case before an application is filed and before other parties are dragged to Court.

[50] It is further aggravating that the Applicants' attorneys were provided with the applicable case law and were aware of the issues raised in the Respondents' answering affidavit as far back as April 2016, yet it did not trigger them to reconsider the case. Instead, they pursued the matter and it proceeded on an opposed basis, on which occasion a postponement was sought.

[51] To persist with this application in the face of the applicable authorities and defects as indicated in the Respondents' opposing papers, is not merely an error of judgment and does not indicate *bona fides*. Ehlers Fakude Inc Attorneys acted in a manner that constitutes a departure from their office by persisting with a meritless application and when allocated a date in a Court with limited resources and a substantial backlog, to instruct counsel not to proceed with the matter but to remove it from the roll. This Court's displeasure should be known to the attorneys.

[52] This is an exceptional case where the Applicants' representatives acted in a manner that justifies an order for costs *de bonis propriis*

[53] I am of the view that Ehlers Fakude Inc Attorneys should be ordered to pay the Respondents' costs *de bonis propriis.* I am guided by the principles set out by the Courts in making such an order, being mindful that it is awarded only in exceptional cases.

[54] The Applicants have not placed any compelling reason before this Court as to why cost should not be ordered as aforesaid. I invited Mr Mashele to make submissions in reply to the Respondents' submissions, but he declined to make any submissions.

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

Order:

1. The application is dismissed;

2. Ehlers Fakude Inc Attorneys are ordered to pay the First and the Fifth Respondent's costs *de bonis propriis.*

_____

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate M Mashele
Instructed by:	Ehlers Fakude Incorporated Attorneys
For the First and Fifth Respondents:	Mr N Searle of Fasken Martineau Attorneys
For the Second Respondent:	Mr T T Modisane
For the Fourth Respondent:	Mr H Perry of Solidarity