

SOUTH AFRICA / JUDGMENT

GB Engineering Pty Ltd v Mbongo and Others (JA75 / 2022) [2023] ZALAC 29; [2024] 1 BLLR 14 (LAC); (2024) 45 ILJ 267 (LAC) (18 October 2023) [2023] ZALAC 29

COURT

Labour Appeal Court

BEFORE

Molahlehi, Malindi, Smith

CASE / FILE NUMBER

JA75 / 2022

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IN THE LABOUR APPEAL

COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA75 / 2022

In the matter between:

GB
ENGINEERING PTY LTD Appellant
and
MBONGO,
LUCKY JOHANNES AND 16 OTHERS First
Respondent
COMMISSIONER
LUNGILE MTIYA Second
Respondent
METAL AND ENGINEERING
INDUSTRIES
BARGAINING
COUNCIL
Third
Respondent
Heard: 05
September 2023
Delivered: 18
October 2023
Coram: Molahlehi
ADJP, Malindi AJA and Smith AJA

JUDGMENT

MALINDI AJA

Introduction

[1] The appellant appeals against a portion of the judgment and order handed down by the Labour Court on 8 February

2021. It held that the court had jurisdiction to adjudicate the dispute under case number JS373/18. The matter had been adjudicated together with case number JS1093/18 under consolidated case number JS 372/2018.

[2] The merits of the two cases were not adjudicated due to the fact that a preliminary point on jurisdiction was raised on whether the court had jurisdiction to hear the matter as a whole. The question was whether the court had jurisdiction in the dispute in circumstances where the appellant and the National Union of Metal Workers of South Africa (NUMSA) had entered into a settlement agreement in the following terms:

‘2 Settlement: selection of retrenches

2.1 it is recorded that of the number of employees who have faced retrenchment as a result of this consultative process, 49 employees took voluntary separation packages (“VSPs”) And have left the employee of their company. NUMSA and the company agreed on the package (“VSP Package”) paid to those 49 employees which included a sweetener of R 3000 .00 (three thousand rand) per person.

2.2 In addition to the 49 employees who have taken VSP packages, as recorded in paragraph 2.1 above, there are a further 20 employees who are to be retrenched by agreement. Their names are set out in Annexure “A” Attached hereto.

...

3. Settlement: severance package

3.1 the parties have agreed that the 20 employees whose names appear on annexure “A” Will receive the VSP sweetener in the amount of R3000.00 (three thousand rand) per person...

4. Termination date

The date of termination of employment of the 20 employees whose names appear on ANNEXURE “A” is Friday, 13 April 2018.

7 Full and final settlement

7.1 this agreement is reached in full and final settlement of the section 189A large scale retrenchment process and all issues related thereto. Neither party shall declare any dispute against the other arising from this section 189 capital A large scale retrenchment process and the termination of services that has occurred on the agreed basis as recorded in this agreement.'

[3] This agreement was entered into on 12 April 2018 and signed on behalf of the appellant by Mr K Blumenthal and Mr Herbert Tshabalala, the regional organiser of NUMSA, on behalf of the employees.[1]

Common cause facts

[4] The following facts are common cause and are crucial in determining the appeal.

[5] The first respondents, advised and represented by NUMSA, entered into the settlement agreement with the appellant.

[6] The settlement agreement was a product of a consultation process between the first respondents, represented by NUMSA, and the appellant under the auspices of a senior commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA).

[7] The first respondents were paid the amounts mentioned in the settlement agreement.

[8] The first respondents did not tender the repayment of the amounts paid to them.

[9] At all material times, the first respondents were members of NUMSA and NUMSA had the authority and mandate to enter into the settlement agreement on behalf of the first respondents. This is contested by the first Respondents in these proceedings.

[10] Even after their dismissal for their participation in an unprotected strike, the first respondents made an application to NUMSA for a continuation of their membership.

[11] The settlement agreement was reached in full and final settlement of the section 189A large scale retrenchment process and all issues related thereto.

[12] The parties agreed in the settlement agreement that neither party shall declare any dispute against the other arising from the section 189A retrenchment process and the termination of services.

[13] The settlement agreement has not been set aside.

Appellants submissions

[14] The appellant contends that the court below lacks the jurisdiction to adjudicate the Mbongo dispute. It submits that:

14.1 The genesis of this matter was an unprotected strike that occurred between 26 and 30 October 2017, where all employees of the appellant participated in an unprotected strike demanding a wage increase.

14.2 On 30 October 2017, after numerous opportunities were provided to the appellant's employees (including the first respondents) to return to work to avoid dismissal, they refused and were dismissed in line with the final ultimatum that was issued.

14.3 During 2017, the dismissed employees, including the first respondents herein, approached the bargaining council for their dispute regarding an alleged unfair dismissal.

14.4 The dispute concerning the mass dismissal of the workforce, including the first respondents herein, was conciliated by the CCMA.

14.5 On 30 January 2018, after having taken legal counsel on the matter, the appellant took a decision to offer the dismissed employees (which included the first respondents) an opportunity "to return to work on the same terms and conditions of employment as applied when you (they) were dismissed". The offer was in writing to each such employee and a copy was sent to the bargaining council. The first respondents accepted the offer and returned to work for the appellant.

14.6 On 1 March 2018, the appellant issued a notice to NUMSA informing it that it was contemplating a large-scale retrenchment process that could impact as many as 85 employees. NUMSA was not a party to the proceedings in the court a quo, and the issue of a non-joinder was raised by the appellant during the hearing in the court a quo.

14.7 The appellant had suffered significant economic difficulties in 2017/2018 and had lost much of the work from what had previously been an anchor client, namely Edcon (then Edgars). This had led to a substantial loss of business. The first respondents and the other employees who had returned to work were fully aware of this. It was a point of debate at the time of the unprotected strike in October 2017 because the appellant could not afford to increase the wages of the first respondents.

14.8 The appellant elected for the large-scale retrenchment to be facilitated by a Commissioner of the CCMA. This is provided in the Labour Relations Act[2] (LRA).

14.9 The Commissioner mooted the possibility of voluntary early retrenchments and possible voluntary separation packages (VSPs) as early as the first facilitation meeting held on 12 March 2018.

14.10 The VSP option was put to the appellant's employees, including the first respondents, and was a process managed by the independent CCMA facilitator.

14.11 Those employees who were interested in taking a VSP were required to submit a written application to the appellant. The first respondents elected not to apply for VSPs.

14.12 The appellant submits that it must be made clear that it was never suggested that if the employees (including the first respondents) did not opt for the VSPs, they would be forcibly retrenched. This is not supported by the factual matrix.

14.13 On 12 April 2018, the appellant entered into a settlement agreement with NUMSA regarding the employees who elected to not accept VSPs. The settlement agreement was essentially to the effect that the first respondents agreed to be retrenched by agreement. The names of the first respondents were attached to the Agreement's Annexure "A".

14.14 The first respondents agreed to receive a 'sweetener' payment in the amount of R3,000 per person.

14.15 The settlement agreement was not made an order of court nor was it ever set aside by any competent court.

Respondent's

submissions

[15] The first respondents' submissions are as follows:

15.1 the appellant's grounds of appeal are based on the settlement agreement which was a collective agreement entered into between the parties;

15.2 the first respondents were not part and parcel of the collective bargaining settlement because NUMSA had no mandate to act on their behalf as their membership had been terminated. The first respondent did not recognise the settlement agreement because NUMSA did not have the mandate to represent them because they were no longer members of the union. Alternatively, if the first respondents were members of the union at the time or at all material times, the union did not have the mandate to represent them because they did not obtain the necessary instructions from the first respondents.

The Court below

[16] The court below distinguished between the Mbongo dispute and Zwane dispute as follows:

'It is common course that the applicants were members of NUMSA and that after conclusion of the settlement agreement were invited to apply for voluntary severance payments. The applicants in Zwane dispute applied for such voluntary severance payments and ultimately agreed to be terminated upon the first respondent's acceptance of the applications. As already pointed above the applicants in Mbongo dispute did not agree to applying for the voluntary severance payments.'

[17] During March 2018, Mr Zwane and others made an application for voluntary retrenchment in which applications they confirmed that the appellant has been in consultation with NUMSA and its shop stewards regarding the need for the appellant to retrench its employees due to prevailing economic circumstances. They offered out of their own free will, without any pressure or coercion from anyone, to apply for voluntary retrenchment. In turn, the appellant issued notices of voluntary retrenchment on about 3 April 2018 wherein it confirmed that consultations took place between the employee and management regarding the need of the appellant to reduce the size of its workforce due to prevailing economic

circumstances accepts the employees' applications for voluntary retrenchment.

In the notices of voluntary retrenchment, it is stated that the employees' acceptance of the VSP packages constitutes "a full and final settlement of all or any claims you may have had against their company arising from your employment with it and then mutually agreed combination thereof."

[18] In distinguishing the Mbongo dispute from the Zwane dispute, the court below contradicts itself as follows:

'Turning onto [sic] the case of applicants in the Mbongo dispute, it is well established that they were terminated based on what is termed forced retrenchments. The absence of their applications for voluntary severance payments and agreement to terminate clearly suggests that their terminations were not mutual. The settlement agreement also recognized that. Since their terminations were forced, they certainly have a right to be aggrieved by same. In essence that is where the issue of fairness emerges.'

[19] For this reason, the Labour Court concluded that it had no jurisdiction over the Zwane dispute, whereas it does in the Mbongo dispute. The court below referred to *Goddard v Metcash Trading Africa (Pty) Ltd*[5] (Metcash) for the authority that if an employee challenges the validity of a settlement agreement with the employer, the Labour Court has

jurisdiction to adjudicate the matter and set it aside if a case is made therefor. In *Metcash*, the employee had pleaded misrepresentation in that he had been made to conclude an agreement on the understanding that his position was redundant when it was later discovered that it was not.

On appeal

[20] The appellant submits that the Labour Court erred in finding that, albeit there being a valid and binding settlement agreement between NUMSA, acting on behalf of the employee respondents, and the appellant, the court had jurisdiction to adjudicate the dispute. It is contended that the settlement agreement constitutes a collective agreement and that the agreement was reached in full and final settlement of the section 189A large scale retrenchment process.

[21] In argument before us, Mr Makka, for the appellant, correctly submitted that this matter rests on the interpretation of the settlement agreement although there are other grounds of appeal. On the other hand, Mr Khumalo, for the employee respondents, contends that the judgment of the Labour Court below is correct in that the respondents had been represented in the conclusion of the agreement by NUMSA, whose membership had been terminated. They submit that the union had no mandate to represent them in the consultations on the section 189A large-scale retrenchment. It is submitted in the alternative that even if it is found that they were members of the union at the time and at all material times, the union lacked the mandate to represent them because the union did not act on the necessary instructions from them.

- [22] Further to its submissions above, the appellant submits that having discharged its obligations under the settlement agreement, and the employee respondents having accepted the offer of money in settlement of a dispute between the parties, it constitutes a waiver by the employees of their right to litigate over the issue. The respondents have not dealt with this submission.
- [23] The appellant refers to *Ulster v Standard Bank of South Africa Limited*[6] (*Ulster*) for both the propositions that a settlement agreement could be set aside if it was entered into under duress, and that the party alleging such must prove the duress. A party to a settlement agreement who fails to repay the settlement amount immediately when they raise a dispute as to its validity weighs against the one alleging duress. {GM, would you like to review this paragraph, there seems to be something missing?}

Analysis

- [24] A settlement agreement between the parties puts to rest the dispute and consequently resolves the underlying dispute[7] unless the circumstances referred to in *Metcash* and *Ulster* are present. The respondents could not plead duress or misrepresentation, coercion, or any other form of undue influence since the process preceding the signing of the agreement is common cause and is recorded in the introduction to the settlement agreement. That is, commencing on 1 March 2018, the section 189A large-scale restructuring process was commenced and a commissioner from the CCMA was the facilitator in the whole process.
- [25] It has been held by the Constitutional Court that when parties settle an existing dispute in full and final settlement the public and the courts have a powerful interest in enforcing such an agreement and that none should be lightly released from an undertaking seriously and willingly embraced.[8]
- [26] When engaged by the court, Mr Khumalo for the employee respondents, was unable to show that the employee respondents were no longer members of the union at the time that it entered into the collective agreement with the appellant. He could also not provide an answer to the proposition that a union represents employees who were its members at the time of the dispute even if their membership subscriptions were automatically terminated after the termination of the employment.
- [27] The employee respondents cannot escape the consequences of the collective agreement. In this regard, the Constitutional Court in *CUSA v Tao Ying Metal Industries and Others*[9] said the following:

‘[55] The issues raised in this case are matters of public interest. This case also concerns the enforcement of a bargaining council agreement which sets out minimum wages and other conditions of employment and requires us to apply the provisions of the LRA. The right of every trade union and every employers’ organisation and employer to engage in collective bargaining is entrenched in section 23(5) of the Constitution. The concomitant of the right to engage in

collective bargaining is the right to insist on compliance with the provisions of the collective agreement which is the product of the collective bargaining process.

[56] Compliance with a collective bargaining agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council, but it is also crucial to the sanctity of collective bargaining agreements. The right to engage in collective bargaining and to enforce the provisions of a collective agreement is an especially important right for the workers who are generally powerless to bargain individually over wages and conditions of employment. The enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law. [Footnotes omitted]

[28] The fact that in the Zwane dispute, the employees individually applied for VSPs does not elevate those agreements above the agreement in a collective agreement entered into on behalf of their employees in the Mbongo dispute.

Conclusion

[29] The court below erred in concluding that it had jurisdiction in this dispute. The authorities are clear that a collective agreement

entered into between the employer and a trade union representing employees in terms of the LRA is binding.[10] The employee respondents have not pleaded any circumstances manifesting duress, misrepresentation, coercion or any undue influence to justify a court assuming jurisdiction in order to adjudicate an alleged unfairness of a dismissal on the basis that it cannot be enforced. The common cause facts reveal a process voluntarily entered into by the employees' trade union representing them.

[30] In the circumstances, the judgment of the court below stands to be reversed. Accordingly, the following order is made:

Order

1 The appeal succeeds with no order as to costs.

2 The order of the court a quo is set aside and replaced with the following:

"1. The Court lacks jurisdiction to adjudicate the dispute under case no: JS 1093/18;

2. The Court lacks jurisdiction to adjudicate the dispute under case no: JS 373/18;

3. There is no order as to costs."

Molahlehi ADJP and Smith AJA concur.

APPEARANCES:

FOR THE APPELLANT: A

Makka

Instructed by Cliffe Dekker Hofmeyr

FOR THE FIRST RESPONDENTS: Q Khumalo of Quinton Khumalo Inc

[1] Record volume 3 pp 226 - 231 Annexure “A” to the agreement appears at p 232.

[2] Act 66 of 1995, as amended.

[3]

Judgment:

Vol. 4, p.289 at para 10.

[4] Judgment, volume 4, page 291, para 14.

[5]

[2009] ZALC 62; (2010) 31 ILJ 104 (LC).

[6]

[2013] ZALCCT 3; (2013) 34 ILJ 2343 (LC).

[7] See: Ngwathe Local Municipality v SA Local Government Bargaining Council and others
(2011) 32 ILJ 2724 (LC).

[8] Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another

[2016] ZACC 33; (2016) 37 ILJ 2723 (CC) at para 24.

[9]

[2008] ZACC 15; 2009 (2) SA 204 (CC) at paras 55 – 56.

[10] See also Natal Joint Municipal Pension Fund v Endumeni Municipality

[2012] ZASCA 13; [2012] 2 All SA 262 (SCA).

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