

SOUTH AFRICA / JUDGMENT

Ndlovu and Others v Liberty Properties (Pty) Ltd and Another (21564/01) [2002] ZAGPHC 19 (16 April 2002)

[2002] ZAGPHC 19

COURT

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

21564/01

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 21564/01

DATE:2002-04-16

In the matter between

NDLOVU, N N AND OTHERS.....Plaintiffs

and

LIBERTY PROPERTIES (PTY) LTD.....First Defendant

SOUTH AFRICAN COMMERCIAL CATERING AND

ALLIED WORKERS UNION.....Second Defendant

JUDGMENT

WILLIS. J: The plaintiffs who consist of some 108 security guards have brought an action in which they seek the following relief:

1. A declarator declaring that the agreement dated 8th August 1966 (6) [it should clearly be 1996], a copy of which is Annexure A to the particulars of claim, is void as being inter alia contra bonos mores and unconstitutional.

2. Further and/or alternative relief.
3. Costs of suit as against first defendant.
4. Costs of suit as against second defendant only in the event that it should defend this action.

The agreement was concluded between Liberty Life Properties (Pty) Ltd and the South African Commercial Catering and Allied Workers Union. Essentially it relates to the implementation of what was known as a "rationalisation of certain divisions of the company's

activities". The agreement purported to deal with issues such as provident fund pay outs, severance pay, subsidised medical aid, subsidised housing, bonds, school bursaries, early retirement, pro rata shares, guaranteed jobs, notice pay, pro rata bonus and annual leave. It is recorded in paragraph 3 of the agreement:

"This memorandum of understanding is in full and final settlement of all disputes and/actions against the Company by the Union and/or its members arising out of the rationalisation of certain divisions of the Company's business and/or the Provident Fund dispute between the Union and the Company. The contentious clause reads as follows:

"(4) The contents of this agreement is confidential and no one of the parties or the beneficiaries hereto may disclose any of the contents hereof unless agreed to beforehand in writing by both parties. If any party hereto breaches this confidentiality clause, then this agreement will be regarded as null and void and the company may withhold any payment in terms hereof and reclaim all monies already paid."

In paragraph 11 of the particulars of claim the plaintiffs allege as follows:

".. the plaintiffs to sue for and on behalf of the persons whose names are listed in Annexure A hereto -

11.1 the matters set forth in paragraph 3 above are repeated. The plaintiff acts in the interests of the persons whose names are set forth in Annexure "X" hereto.

11.1 (again). The persons whose names are set forth in Annexure "X" hereto are not in a position to seek relief in their own names because they do not have the financial ability or the intellect to do so. They rely in this respect on the provisions of section 7(4)(iv) of the Interim Constitution No. 200 of 1993 read with their right of access to a court under section 22 thereof interpreted according to the dictates of the mode of interpretation provided for in section 35 thereof. They furthermore allege that it is unconscionable and unconstitutional that they should be denied assistance in the prosecution of a remedy which has been made essential directly in consequence of the contra bonos mores secrecy provision in and underlying the validity of the agreement, Annexure A hereto, of which agreement first defendant was the profferer.

11.2 It is furthermore in the public interest in relation to section 7(4)(b)(v) of the Interim Constitution that those persons whose names are listed in Annexure "X" hereto should not be denied properly represented access to a fair hearing pursuant to the right of access to court

under section 22 of the Interim Constitution. An interpretation of the Interim Constitution, including section 22 thereof under the interpretation provision, section 35 thereof, provides that every person of a class or group aforementioned should have access to courts, meaning fair access to court, meaning in turn fairly informed access to a court, meaning yet in turn fairly informed access to court untrammelled by contra bonos mores secrecy provisions such as that underlying the validity of the agreement, Annexure A, hereto." In paragraph 1 2 of the particulars of claim it is alleged:

"It is just a proper that this Honourable Court should exercise its discretion to grant a declarator that the agreement, Annexure A hereto, should be declared contra bonos unconscionable, unconstitutional and invalid upon inter alia one or more of the following grounds:

12.1 Both plaintiffs have an existing contingent or future right to be untrammelled by an agreement such as Annexure A hereto;

12.2 There is a dispute both plaintiffs of the one part and first defendant on the other part as to at least one or more of the

following:

12.2.1 whether when the first defendant proffered the agreement, Annexure A

hereto, for signature, it must have known and therefore knew that the secrecy provision which underlay the validity of the agreement, Annexure A, was calculated to cause and would inevitably cause persons of a class or group whose names are set forth in Annexure A hereto, to be induced, to be denied and denied (for all practical purposes) properly and fairly informed speedy legal representation in properly and fairly informed speedy litigation for the setting aside of or a declarator and/or other relief in regard to this agreement.

12.2.2 Whether the first defendant must have known and therefore knew that such inducement and denial will in regard to a class or group of persons with a lesser intellectual ability such as those whose names are listed in Annexure "X" create in that group or class a financial bargaining position unequal and inferior to that of the first defendant with regard to "rationalisation" and other related

matters and thereby offend against the rights of equality before the law and equal protection of the law held by the persons whose names are set forth in Annexure "X" hereto.

12.2.3 Whether the said denial and inequality cause an offence against public policy as also the rights of the said persons and plaintiffs to equality as described above and to fairly and unreasonably informed litigation and related protection of their rights.

12.2.4 Whether the facts herein described are sufficient in the light of what the first defendant knew and therefore must have known as to render the said agreement void and contra bonos mores and for unconstitutionality.

12.3 It is in the interests of the proper administration of justice that this Honourable (sic) should enquire into and determine the dispute." The first defendant gave a notice in terms of Rule 23(1) that it intended taking an exception to the plaintiff's particulars of claim on the basis that no cause of action is disclosed and/or on the basis that it lacks averments which are necessary to sustain an action and/or on the basis that the allegations set out in the plaintiff's particulars of claim are vague and embarrassing. Plaintiffs are afforded 15 days to remove the causes of complaint set out therein, failing which the first defendant will proceed with the exception.

After serving this notice on 9 November 2001, the first defendant served a further notice of exception on 10 December 2001. The grounds of the exception were numerous, dealing inter alia with the locus standi of the plaintiffs, the jurisdiction of this court and various other grounds. The most important ground was that the allegation that the clause was contra bonos mores by reason of the confidentiality provision and the allegation that it was unconstitutional disclosed no cause of action.

Mr Kock who appears for the plaintiffs, conceded that at common law there is no basis upon which a confidentiality clause could be regarded as contra bonos mores per se. This concession, in my view, was entirely correctly made and I need not go much further in this judgment other than to observe that in my view there are instances where a confidentiality clause may well be highly desirable and could serve both parties beneficially. Clearly, in my view, a confidentiality clause per se cannot be contra bonos mores. I also am unable to find anything in the Constitution that would override the common law right to contain a confidentiality clause per se. Mr Kock, however, argued that the real basis of clause 4 offends to the Constitution was that it denied that the plaintiffs the right to consult with their attorneys and to be advised as of their rights.

In my view, no reasonable person, reading clause 4 (and I accept that it may well be amenable to criticism on other grounds, other than those listed in the particulars of claim) could possibly construe clause 4 as denying a right to the plaintiffs to consult with their legal representatives as to their rights in terms of this agreement.

If I understood Mr Kock correctly this was the last leg upon which his argument stood. In other words, he accepted that if this argument fails, then the exception was well taken on the basis that no transgression of constitutional provisions was sustained. I may mention at this stage that in my view not all the grounds of the exception raised by the first defendant were well made but it is unnecessary to consider this point. Clearly, by reason of what I have already set out, no cause of action has been disclosed and consequently the exception is upheld.

The following order is made:

1. The exception is upheld with costs and the plaintiffs' particulars of claim are set aside with costs.
2. The plaintiffs are given leave to amend their particulars of claim within 21 days of this order.

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