

SOUTH AFRICA / JUDGMENT

**Potgieter v Samancor Chrome Limited t/a
Tubatse Ferrochrome (J 250/21) [2022]
ZALCJHB
83; (2022) 43 ILJ 1866 (LC) (6 April 2022)
[2022] ZALCJHB 83**

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

J 250/21

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IN THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 250/21

In the matter between:

DIRK WILLEM
POTGIETER
Applicant
and
SAMANCOR
CHROME LIMITED t/a
TUBATSE
FERROCHROME
First Respondent

Heard:

3 September 2021

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date and time for the hand-down is deemed to be on 6 April 2022 at 15:00

JUDGMENT

TLHOTLHALEMAJE, J

- [1] In his statement of claim, the applicant alleged that the respondent had failed to comply with the order of the Labour Appeal Court (LAC) delivered on 12 June 2014 under JA 71/12, in terms of which the respondent was ordered to reinstate him in its employ.
- [2] The dispute between the parties has a protracted history dating back to 2006, following the dismissal of the applicant. An arbitration award issued in favour of the applicant in June 2008 ended in

the LAC, which had confirmed the MEIBC's award that the dismissal of the applicant was procedurally and substantively unfair.

The respondent was ordered to reinstate the applicant with retrospective effect, together with back-pay.

- [3] Following discussions between the parties on how to give effect to the order of the LAC, the applicant was reinstated on 23 July 2015. Various disputes arose from the pleadings regarding the circumstances leading to the manner with which the LAC order was to be given effect to. Amongst other things the respondent had raised during engagements with the applicant, was that the latter was gainfully employed by a third party at some point between the date of his dismissal and the date of the order of the LAC, and could thus not be entitled to full back-pay.
- [4] Having been reinstated on 23 July 2015, it was common cause that in September 2015, the applicant was suspended and subsequently had certain allegations of misconduct levelled against him, which he was required to answer to at a disciplinary enquiry. Amidst these allegations and the scheduling of a disciplinary enquiry, the parties had on 23 November 2015, eventually concluded a Mutual Separation Agreement[1]. In accordance with the terms of that agreement, the parties inter alia agreed that the employment of the applicant was to be terminated with effect from 30 November 2015, and that he be paid his salary up to and including 30 November 2015.
- [5] On 26 May 2021, some six years after the conclusion of the Agreement, the applicant filed and served his statement of claim, alleging that his reinstatement on 23 July 2015 was not properly effected in accordance with the LAC order. He seeks a ruling or declaratory order as to whether he was reinstated in accordance

with that order. He further holds the view that his reinstatement was effected for the sole purpose of suspending and dismissing him again, and thus he seeks an order that he be reinstated by the respondent without any conditions.

[6] In its response to the statement of claim, the respondent raised three special pleas. The applicant had filed a statement of reply in the light of the points raised. Even though the claim ought to be

dismissed based on the first special plea, for the sake of completeness, I will deal with all of these points below.

(a) The claim has been compromised:

[7] This special plea is raised in the light of the Agreement entered into between the parties. Particular reliance was placed by the respondent on clause 4 of the Agreement under the rubric, 'Full and Final Settlement', and more specifically clause 4.4 which provides that;

'For the sake of clarity, Potgieter shall be entitled to pursue his claim for back pay for the period 25 October 2006 up until 23 July 2015. Other than the aforesaid claim, the Parties shall have no further claims in respect of the employment relationship, of whatsoever nature, including any future claim of reinstatement'

[8] The applicant in his reply alleged that his claim could not have been compromised in that he had cancelled the Agreement on 25 June 2018, after having given notice on 14 June 2018. He alleged that he cancelled the agreement on the basis that the respondent had breached its terms. The respondent had on 27 June 2018,

responded to the alleged notice and cancellation, denying such a breach and disputing the applicant's right to cancel the

agreement.

[9] In *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government*[2], the Supreme Court of Appeal (SCA) reiterated that an agreement of compromise is to create new rights and obligations as a substantive

contract that exists independently from the original cause. The SCA further added that the purpose of a compromise is to bring an end to existing litigation and to prevent or avoid litigation. Like any contract entered into voluntarily, the agreement may be set aside under strict grounds such as that it was fraudulently obtained; or on the ground of Justus error, 'provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise'; or if the parties to the agreement laboured under a common mistake. It was however added that a unilateral mistake on the part of one party that does not flow from a misrepresentation by the other, does not allow for the former party to resile from a consent agreement[3].

[10] To the extent that the applicant alleged that he had cancelled the agreement, the difficulty he is faced with is that he has not approached this or any other Court to have the agreement set aside. The second difficulty is that it is significant to note that the applicant purportedly cancelled the mutual termination agreement some two years and eight months since it was concluded. During that period, it was not in dispute that the applicant was paid in

accordance with its clause 3, which payment he had retained, and had not tendered to return to the respondent.

[11] Other than the fact that the Agreement remains extant, the applicant can also not extricate himself from its terms in the light of principles set out in two main decisions of this Court[4] as relied upon by the respondent. Accordingly, since the applicant has accepted the benefits owing by the respondent arising out of the termination of the employment relationship, and accepted the benefits of the Agreement, he has placed himself beyond the jurisdiction of this Court. On this ground alone, the applicant's claim ought to fail. The rights emanating from the agreement of compromise entered into between the parties created new rights and obligations which the applicant was entitled to pursue under the provisions of clause 4.4 of that agreement. The right nonetheless specifically excluded any referral of a dispute related to his reinstatement.

(b) Res judicata/Issue estoppel:

[12] Even though not necessary to deal with this special plea, it was common cause that following the LAC's judgment and order, the applicant was reinstated on 23 July 2015. A matter is deemed res judicata if in the previous proceedings, it was adjudicated upon for the same cause, involved the same parties and the same relief.

[13] In this case, the dispute before the Court involves the same parties, and the applicant seeks the same relief based on the same cause of action, which relief he has in any event obtained. The LAC has long pronounced on the matter by ordering the applicant's reinstatement and thus, the matter is res judicata.

[14] In disputing that the matter was res judicata, the applicant had submitted that his claim was based on events subsequent to the reinstatement, as his reinstatement was not properly effected. This contention nonetheless makes the applicant's case even more unsustainable. This claim, given the manner with which it was brought before the Court, is misguided. A party that complains about non-compliance with the terms of a court order, ought to approach the Court by way of contempt proceedings, and not by way of a statement of claim in respect of the same issues that have been determined. It is impermissible based on the principles of res judicata for a party to seek the same relief in respect of issues that have already been determined.

(c) Waiver/Peremption:

[15] A waiver entails the legal act of abandoning a right on which a litigant is otherwise entitled to rely[5]. In *Jiyana and Another v Absa Bank Limited and Others*[6], the SCA had long stated that that;

“[15] The law on peremption is settled. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he or she does not intend to attack the judgment, then they are held to have acquiesced in it. The conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. The onus of establishing that position is upon the party alleging it...” [Authorities and citations omitted]

[16] In this case, it has already been concluded that the mutual separation agreement remains extant, and notwithstanding the applicant’s denials, he was indeed paid in accordance with the provisions of clause 3 of that agreement, which payment he has retained. It is not even necessary for this Court to indulge the applicant’s arguments related to whether he was coerced into that agreement or unduly influenced, more particularly in the absence of the validity of the agreement having been properly challenged. The respondent’s motivations for entering into that agreement within the context of this claim, are equally irrelevant, as these are not issues that are properly before the Court. What is however relevant as already indicated is that the applicant has benefitted financially from the terms of that agreement. It is inexplicable as to the reason the applicant would want to argue that he did not receive the payment, whilst in the same breath he would contend that he could not pursue contempt proceedings as he had received the payment. It is apparent that as the applicant’s case unravels,

the more confusing it became.

[17] In the end, the applicant’s conduct pointed indubitably and necessarily to the conclusion that he has unequivocally and consistently, acquiesced to the terms of the agreement. It follows that the applicant’s claim is not only one in which he had ousted the jurisdiction of this Court by virtue of the compromise, but also one that is unsustainable either on the grounds of the matter being *res judicata*, or based on the principles of estoppel.

[18] In regards to costs, it was correctly submitted on behalf of the respondent that the applicant’s claim was not only meritless but also frivolous and vexatious in the extreme. There was no need for either this Court or the respondent to be burdened with the same issues that have been dispensed with. Inasmuch as litigants are entitled to approach this Court, there is however a limit to that entitlement, which is reached when matters have been finally disposed of. In these circumstances, the requirements of law and fairness dictate that the applicant be burdened with the costs of this claim. Accordingly, the following order is made;

Order:

1. The special pleas raised by the Respondent are upheld.
2. The Applicant’s claim is dismissed with costs.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

In person

For the Respondent:

Adv. P Moll, instructed by Solomon Holmes Attorneys

[1] Annexure 'SC35' to the Statement of Claim

[2] (432/2016) [2016] ZASCA 157 (3 October 2016)

[3] At paras 7 - 8

[4] Nkosi v SSG Security Solutions (Pty) Ltd

(2020) 41 ILJ 1408 (LC) at 1408 and Makiwane v International Healthcare Distributors (2003) 24 ILJ 2150 (LC)

[5] NUMSA v Intervale Ltd and Others (2015) 36 ILJ 363 (CC)

[6] (1424/2018) [2020] ZASCA 12 (19 March 2020)

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Prepared on 10 October 2026 · Esheria