

SOUTH AFRICA / JUDGMENT

Sekoto v University of South Africa (JS 424/19) [2022]

ZALCJHB 34 (28 February 2022)

[2022] ZALCJHB 34

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhlamajhe

CASE / FILE NUMBER

JS 424/19

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

No: JS 424/19

In

the matter between:

B.V.M.
SEKOTO
Applicant
and
UNIVERSITY
OF SOUTH AFRICA
Respondent

Heard:

14 May 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 hand-down is deemed to be on 28 February 2022

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant (Sekoto) instituted a claim before this Court seeking an order that a purported settlement agreement concluded on 8 September 2017 between UNISA Black Forum (UNISABF) on his behalf, and the respondent, the University of South Africa (UNISA), be made an order of Court in terms of the provisions of section 158(1)(c) of the Labour Relations Act (LRA). The claim is resisted by UNISA on the basis that inter alia the parties did not conclude the purported

settlement agreement.

Background:

[2] The background to this dispute and to the extent that it is not seriously disputed is summarised as follows;

2.1 Sekoto was employed by UNISA in a senior position of Manager: Research Information with effect from 1 August 2014. On 14 December 2016, he was issued with a notice to appear before an internal disciplinary enquiry to answer to allegations of incapacity on account of poor work performance.

2.2 On 17 October 2017, the chairperson of the internal inquiry concluded that Sekoto was guilty of poor work performance, and had recommended that his services be terminated on notice. UNISA duly implemented the recommendation and had on 20 October 2017, issued Sekoto with a notice of his dismissal.

2.3 On 24 October 2017, Sekoto lodged an appeal against his dismissal. On the same date, UNISA had communicated to Sekoto that the appeal processes were not applicable to forms of dismissal on account of poor work performance.

2.4 On 27 October 2017, UNISA's Professor Nengwekhule (Director: UNISA School of Governance) was requested by the Principal & Vice-Chancellor of UNISA (Prof Makhanya) to undertake a review of the dismissal of Sekoto. This had followed upon Sekoto and UNISABF having asked Prof Makhanya to intervene.

2.5 The outcome of that review was that Prof Makhanya must reject the decision to dismiss Sekoto. In the intervening period, Sekoto with the assistance of the UNISABF had initiated discussions with UNISA, regarding allegations of sabotage, racism and victimisation being perpetrated against Sekoto.

2.6 Sekoto contended that following these discussions between himself as represented by the UNISABF, an agreement was reached on 8 December 2017 to the effect that his dismissal must be withdrawn, and further that he must be reinstated at the same salary level (P7) as his previous position albeit in a different department.

2.7 In confirmation of the purported agreement, UNISABF had on 18 December 2017, sent an email to Ms Linky Mogano (presumably in Prof Makhanya's office), recording that an agreement had been reached with Prof Makhanya that Sekoto ought to be issued with a letter informing him of the withdrawal of his dismissal, and further that he be paid his salary for the period November 2017 and December 2017.

[3] The principal issue for determination is whether the email of 18 December 2017 constituted confirmation that the parties had concluded a settlement agreement on the terms and manner contended for by Sekoto, and if so, whether this Court may make that settlement agreement an order of court. To the extent that such an order may be made, the applicant further seeks that he be retrospectively reinstated and/or re-employed from 1 January 2018.

Preliminary

issues:

[4] UNISA contended that the statement of claim was served on it via email without its consent contrary to the provisions of the Rules of this Court. In those circumstances, UNISA contended that the Sekoto's claim was thus defective on account of non-compliance with Rule 4 of the Rules of this Court.

[5] Inasmuch as it was conceded that Rule 4 of the Rules of this Court were not complied with in regard to the manner of service of the statement of claim, I agree that the defect in question is not of such a nature that had caused UNISA severe prejudice, particularly since it was common cause that it had fully participated in the proceedings, was able to meaningfully mount a defence to the claim and in the end, all the documentation and material is before the Court for a proper consideration of the matter. This is not to suggest that such lapses are readily condoned by the Court. Be that it may, this is one of those instances where the Court will exercise its discretion and condone the non-compliance with its rules in regards to manner of service.

[6] A second preliminary issue raised by UNISA was that in terms of Rule 7 of the Rules of this Court, Sekoto ought to have instituted his claim by way of notice and supporting affidavits and not to institute his claim in terms of Rule 6 of the Rules of this Court as he did in these proceedings. It was contended that Sekoto's claim was further defective also on account that applications contemplated in terms of section 158(1)(c) of the LRA ought to be brought by way of

an application and not a statement of claim.

[7] It is correct that this claim was instituted in terms of Rule 6 of the Rules of this Court and following the parties' conclusion of pre-trial minutes, the matter was to proceed to trial, and this was the correct approach in the light of the anticipated disputes of facts. However, as per the directives of the Court, and further in view of the issues to be determined, the parties had agreed to have the matter argued following written submissions, and to disposed of

it without the need for oral evidence, with the agreed consolidated bundle serving as evidence. UNISA cannot therefore fault the

applicant for the manner with which the matter is to be determined by the Court in the light of the parties' agreements.

[8] Furthermore, it is accepted that relief under section 158(1)(c) of the LRA is ordinarily sought by way of motion proceedings. To however require of the Court to determine whether the disputed settlement agreement was concluded, and if so to determine whether that agreement ought to be made an order of Court, would not in my view contribute to expeditious resolution of disputes, and create an unnecessary burden on it. It is ordinarily desirable, in the interest of expedition and finality of litigation, to have one hearing only at which all issues are canvassed so that the court at the conclusion of the case may dispose of the entire matter . To the extent that the Court may find that there was a settlement agreement, and whether it should be made an order of Court, this will be dealt with in accordance with the normal principles to be considered as applicable

.

The merits and evaluation:

[9] As already indicated, the basis of Sekoto's claim is that there is in place, a valid and binding settlement agreement reached with Prof Makhanya on 8 December 2017, which was confirmed in an email on 18 December 2017.

[10] The starting point in determining whether there is a valid and binding settlement agreement capable of implementation or enforcement, is section 158(1)(c) of the LRA, which provides that this Court may make any arbitration award or settlement agreement an order of court. Section 158(1A) states that for the purposes of subsection (1)(c), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is only entitled to refer to arbitration in terms of section 22(4), 74(4) or 75(7) of the LRA.

[11] Notwithstanding the above provisions, it remains part of our law that settlement agreements can be concluded orally, but however any presumption can be rebutted on the facts of the case . This implies that Courts should not readily make such agreements its orders , unless inter alia, essential aspects of a valid and legally enforceable agreement are evident.

[12] In *Universal Church of the Kingdom of God v Myeni & Others*, it was reiterated that the intention of the parties in any agreement, express or tacit, is determined from the language used by the parties in the agreement, or from their conduct in relation thereto. Further, that not every agreement constitutes a contract. For a valid contract to exist, each party needs to have a serious and deliberate intention to contract or to be legally bound by the agreement, the *animus contrahendi*. The parties must also be *ad idem* (or have the meeting of the minds) as to the terms of the agreement. Obviously, absent the *animus contrahendi* between the parties or from either of them, no contractual obligations can be said to exist and be capable of legal

enforcement .

[13] It is common cause that no written agreement was concluded between Prof Makhanya and UNISABF on 8 December 2017. What Sekoto however contends is that the verbal agreement reached on that date, was confirmed by UNISABF in its email to Magano on 18 December 2017, and thus constitutes a valid and binding agreement.

[14] In the email, Magano was merely informed to bring the matter to the attention of Prof Makhanya, who had in turn passed the matter to be facilitated by Ms Griesel (UNISA's then acting Vice Principal: Institutional Development and Transformation). On 20 December 2017, UNISABF sent an email to Griesel requesting a letter informing Sekoto that his letter of dismissal has been withdrawn, and further informing him of where his new office/directorate that he will report to for duty at the beginning of 2018 will be. The issue of the November/December salary was again raised. It was recorded in the email that these matters were discussed and agreed to at a meeting held with Prof Makhanya on 8 December 2017.

[15] Griesel's response on the same date was to inform UNISABF that discussions were being held concerning a fixed-term contract with various portfolios where there were vacancies. The response of UNISABF in an email other than repeating the issue of the withdrawal of the dismissal and the salary, was that it was further resolved with Prof Makhanya that Sekoto was to return to his substantive position, but that he be moved to another directorate/department. UNISABF expressed the view that Griesel's previous response appeared to have 'eroded everything', and that the best way forward was to await the input of the Principal.

[16] On 22 December 2017, Griesel addressed an email to a Ms Lengane which was also copied to Prof Makhanya and UNISABF, requesting Lengane to process a letter indicating the withdrawal of Sekoto's dismissal, the reinstatement of his salary backdated from November 2017, and an appointment letter to be issued to him from January to December 2018 in a project. The project identified was Collaborative Human Resource Efficiency Project (UNISA and PSC) with a P6 Fixed-term contract).

- [17] On 8 February 2018, Griesel issued a memorandum indicating that it would not be possible to withdraw Sekoto's dismissal and reinstate him to his substantive position and have him moved to another department.
- [18] On 12 February 2018, Prof Makhanya had sent an email to Griesel, recording that he agreed with her approach on the matter, further requesting her to fast track the fixed-term contract appointment. In line with Prof Makhanya's instructions, payments were made to Sekoto during March 2018, and his appointment on a fixed-term contract was facilitated. It is common cause that as at May 2018, Sekoto had declined the offer of 12 months' fixed-term contract.
- [19] It was submitted on behalf of Sekoto that despite payments in accordance with the agreement having been made, Griesel had failed to implement the agreement by not withdrawing the letter of dismissal. It was further submitted that despite the payments, UNISA and Prof Makhanya had on 12 February 2018, attempted to propose that the reinstatement/employment was to be on a fixed term contract, and that the offer of the fixed term contract was irrelevant as it was an attempt to re-negotiate new terms and conditions of employment which Sekoto had rejected, as they were not in line with the agreed settlement reached on 8 December 2017.
- [20] It is my view that in line with the authorities set out elsewhere in this judgment, the facts of this case, properly construed from various emails exchanged between the parties and the conduct of the parties in relation to the purported agreement, do not all demonstrate a meeting of minds, even though it can be accepted that there was an intention on the part of the parties to reach some form of agreement post the dismissal of Sekoto. My conclusions in this regard are fortified by the following considerations:

20.1 It was not in dispute that following the discussions with Prof Makhanya on 8 December 2017, and the email of UNISABF on 18 December 2017, on 8 February 2018, Griesel had circulated a memorandum in which it was stated that the reinstatement of Sekoto would be impossible. It was on this basis that Prof Makhanya had recommended that Sekoto be offered a fixed-term contract of employment. In my view, it was at that point that differences of approach between Prof Makhanya and Sekoto became apparent.

20.2 Sekoto placed heavy reliance on handwritten notes made by Prof Makhanya on an email exchange between Griesel and UNISABF on 20 December 2017, in which he instructed her to ensure that Sekoto was paid for two months and that the letter of dismissal be withdrawn.

20.3 Irrespective of Prof Makhanya's approach on 20 December 2017, his definitive approach however as at 12 February 2018, was that he agreed with the proposal that Sekoto be offered a fixed-term contract. It was apparent at that stage that clearly there was no meeting of minds between UNISABF and Prof Makhanya in regards to how the matter ought to be dealt with. Furthermore, it should have occurred to UNISABF and Sekoto that an offer of a fixed-term contract, could not be equated to a reinstatement.

20.4 If ever there was a clear lack of meeting of minds, this was further demonstrated by UNISABF's own subsequent emails to Griesel. The first was on 12 January 2018. It will be recalled that in the 18 December 2017 email which is said to be the valid agreement, UNISABF had outlined the terms of that agreement as being the withdrawal of the dismissal letter and Sekoto's payment. In the email of 12 January 2018, UNISABF however added a third condition, being that Sekoto was to 'return to his substantive position but that he be moved to another directorate/dept'.

20.5 The second email was on 31 January 2018 from UNISABF to Griesel, further requesting that Sekoto ought to be informed of the new directorate he will be reporting to. The third email was on 13 May 2018 from UNISABF, repeating the other two demands and further adding that Sekoto be returned to his 'P6 permanent position and that he report to a different dept, that aligns well with his skills and qualifications'. That email came long after Prof Makhanya had agreed in his email of 12 February 2018, that he agreed that Sekoto be offered a fixed-term contract. This was Prof Makhanya's position as late as 22 May 2019, and after Sekoto had lodged his claim.

- [21] It is trite that any form of settlement agreement or contract between parties ought to be free from ambiguity or uncertainty as to its terms and conditions, in order for it to be enforceable, let alone be made an order of Court. This is so in that any order granted must give finality to the dispute between the parties and not leave doubt when it came to its compliance. Differently put, the terms and conditions of a settlement agreement must be clear and unequivocal, particularly in regards to the rights and obligations arising therefrom. This is even moreso since it is not for the Court to create a contract for the parties, where uncertainties and ambiguities are glaring.
- [22] In this case, other than the issue of the payment for November and December 2017, in the light of the divergent views of Sekoto as represented by UNISABF and those of UNISA in regards to the nature and terms of Sekoto's return to service, there is not only uncertainty in regards to the terms of the purported oral settlement agreement, but also a clear indication that there was never at any stage, a meeting of minds as to the terms of the purported agreement. In these circumstances, there is nothing placed before the Court that demonstrates an enforceable settlement agreement. Thus, in the absence of the existence of a settlement agreement, the question of section 158(1)(c) of the LRA falls away.
- [23] Having further had regard to the requirements of law and fairness in relation to costs, it is my view that upon the facts and circumstances of this case, any award of costs would be not be appropriate.

[24] Accordingly, the following order is made;

Order:

1. The Applicant's claim is dismissed
2. There is no order as to costs.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: C.J. Geldenhuys, of C.J.

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