REPORTABLE

CASE NO: P424/2000

In the matter between:

Applicant

and

Respondent

JUDGMENT

FRANCIS AJ

Introduction

1.The applicant is employed as a manageress by the respondent. She referred a dispute relating to unfair dismissal for conciliation to the Commission for Conciliation, Mediation and Arbitration (the CCMA) on 30 March 2000. Conciliation took place on the 10 and 11 May 2000. On 11 May 2000 the parties reached a settlement agreement which was reduced to writing. In terms of the written settlement agreement, the applicant was reinstated. After the applicant was reinstated, she was suspended by the respondent from work on full pay pending a disciplinary enquiry. The applicant refused to be subjected to a disciplinary enquiry since she contended that the dispute was settled in full and final settlement of the dispute. The respondent contended that a further term of the agreement was that the applicant was going to be subjected to a disciplinary enquiry upon her reinstatement.

2.On or about the 2 June 2000, the applicant applied in terms of section 158(1)(c) of the Labour Relations Act 66, of 1995 (the Act), to make the settlement agreement an order of this Court. The respondent opposed the application on the basis that there was compliance with the settlement agreement and that the parties had agreed that the applicant would be reinstated and would be subjected to a disciplinary enquiry.

3.The application which was opposed was argued before Landman J on 3 November 2000 where after he made the following order:

"IT IS ORDERED THAT:

*i)*This matter is referred for oral evidence on a date to be arranged by the registrar on the issue whether the settlement agreement annexed to the founding application reflected the complete agreement between the parties or whether it was intended or agreed that following the reinstatement of the applicant the employer was to proceed with a fresh disciplinary inquiry.

*ii)*Any deponent to any affidavit and the officiating commissioner may be called as witnesses.

*iii)*The costs of 3 November are reserved."

4.Pursuant to the ruling of Landman J, the matter was referred to oral evidence to enable this Court to determine the full extent of the agreement reached by the respective parties during the conciliation proceedings.

The Issues to be decided

5.The issues that I am required to decide are whether the settlement agreement reached on 11 May 2000 reflected the complete agreement between the parties or whether it was intended or agreed that following the reinstatement of the applicant, the employer was to proceed with a fresh disciplinary inquiry.

Point In Limine

6.Mr Mogoai who appeared for the applicant had given notice that the applicant intended to raise a point in *limine* to the effect that because a settlement agreement had been reached between the parties which were reduced to writing, no oral evidence could be permissible in relation to what had passed between the parties either before the agreement was reduced to writing during the negotiation phase. This preliminary point had not been raised with Landman J when he considered the matter initially. However, Mr Mogoai's during his address abandoned this point in *limine*. It became unnecessary for me to rule on it.

The Evidence Led

7.The respondent called three witnesses in this matter. They are Ngcolo S Hempe - a commissioner at the CCMA, Fahiema Mahomed - the respondent's regional manager and Garry Cruywagen the general manager of the respondent. The applicant was present at court when this matter was heard. She did not testify but called

Johnson Xhango a union official who had representated her at the conciliation proceedings.

8.Mr Hempe testified that he is a full time commissioner at the offices of the CCMA in Port Elizabeth. He was appointed by the senior convening commissioner of the CCMA to conciliate in the dispute referred by the applicant. He had conciliated between 300 to 400 conciliation disputes at the CCMA. The applicant's conciliation meeting took place at the offices of the CCMA on 10 and 11 May 2000. The respondent was represented by Fahiema Mahomed and the applicant by Johnson Xhango. The applicant was also present at the conciliation meeting.

9.The procedure at such conciliation meetings is for a commissioner to have both parties present in one room for their opening address. Once the parties had given their opening address, the commissioner would thereafter separate the parties and conciliate the dispute between them. On 10 May 2000, during the respondent's opening address, Mahomed stated that the dispute involved misconduct with an element of dishonesty. The applicant challenged her dismissal on the basis that the procedures were not followed. Hempe then proposed to the parties that the applicant should be reinstated and once she had been reinstated her rights as an employee and the rights of the respondent as an employer would be restored and the proper procedures should than be followed. The applicant could then be charged. The applicant stated that she had no problem with returning to work and to be charged properly. Hempe thereafter separated the parties. Hempe canvassed with the applicant and her representative about what their stance was. The applicant indicated that she wanted unconditional reinstatement. Hempe conveyed this to Mahomed who requested an adjournment to enable her to obtain a mandate from the general manager about the settlement proposal. The meeting was adjourned for that purpose.

10.The next day Mahomed went with Garry Cruywagen the general manager to the CCMA where they met with Hempe. The applicant and her representative were not present. The respondent was prepared to reinstate the applicant and to subject her to a disciplinary hearing thereafter. Hempe drafted an agreement and telephoned Xhango, the applicant's representative. It was agreed that the applicant would be reinstated and would thereafter be formally charged. Xhango however requested Hempe not to include in the written

agreement that the applicant would be charged after she was reinstated. Hempe returned to Cruywagen and Mahomed and told them that the union representative had agreed that the applicant could be reinstated and would be charged although it was not included in the written agreement. Hempe later heard that the applicant wanted to make the settlement agreement an order of this Court which prompted him to write a letter that appears on page 13 of the bundle of documents. The relevant portion of the letter is quoted below:

"I have issued a certificate of settlement on the matter under the understanding that the employee will return to work. When the employee returns to work, the employer will then proceed with the disciplinary process of the employee correctly. The reinstatement was a redress by the employer to correct a disciplinary procedure defect.

The Union Official (JJ) had requested that we don't include that the employee will be charged on return to work although that was the understanding. I then did not include this part in the agreement. On the return to work of the employee, the Union dishonestly now denies that the employee was to be changed on return."

11. The second witness who testified for the respondent was Fahiema Mahomed. She is the regional manager of the respondent in Port Elizabeth. She testified that the applicant had resigned before she could be charged by the respondent. She was going to be charged with gross misconduct, for being in possession of company property and dishonesty. No enquiry was held. Mahomed confirmed the evidence given by Hempe in material respects. It is not necessary for me to repeat all her testimony. She confirmed that there was a proposal and counter proposal about how the matter could be settled. She had indicated that she would have to get a mandate from Cruywagen. The mandate that she had at the meeting was for reinstatement of the applicant and to hold a disciplinary enquiry once she had been reinstated. She had also made this offer to the applicant before she attended the conciliation meeting. On 11 May 2000 Cruywagen signed the agreement after he had been told by Hempe that the union representative had agreed that the applicant would be charged after she had been reinstated.

12. The third witness called by the respondent was Garry Cruywagen, the general manager of the respondent. He confirmed that he attended a conciliation meeting on 11 May 2000. This was after he was told by Mahomed about the applicant's counter proposal. The applicant's counter proposal was unacceptable to the respondent. He and Mahomed went to the CCMA where they met Hempe. He told Hempe that he was

prepared to reinstate the applicant subject to her being subjected to a disciplinary enquiry. Hempe left them in a room and returned 30 minutes later. Hempe told them that the applicant had agreed that she be reinstated and be subjected to a disciplinary enquiry thereafter. It was than that the agreement was signed. It was not Cruywagen's intention that the applicant would be reinstated and not be subjected to a disciplinary hearing.

13. Mr Johnson Xhango testified on behalf of the applicant. He confirmed that a conciliation meeting took place on 10 May 2000 before Hempe. At the joint session, the applicant's attitude was that she wanted reinstatement. The respondent was not prepared to reinstate the applicant. Hempe separated the parties and later informed the applicant that the respondent had agreed to reinstate the applicant and to subject her to a disciplinary enquiry. The applicant did not agree with that. The meeting was adjourned to enable Mahomed to obtain a mandate from the general manager. The commissioner was going to call the applicant the following day to sign the agreement if there were going to be no changes to it. The agreement was reduced to writing on 10 May 2000.

14. Xhango testified that on 11 May 2000 he received a telephone call from the applicant. He was attending another conciliation meeting in Graaff Reinett. The applicant told him that Hempe had told her to return to the CCMA to sign the written agreement reached the previous day. Xhango told the applicant to return to the CCMA to sign the agreement without any new clauses been added to it. The last time that he had spoken to the applicant was on 11 May 2000. He did not speak to Hempe on 11 May 2000 and only spoke to him once which was a month later when he was told by Hempe that the matter had been referred to this Court to make the settlement agreement an order of court. He denied that he had seen the letter written by Hempe wherein it was mentioned that he, Xhango agreed that the applicant could be subjected to a disciplinary enquiry. He said that he had seen the letter for the very first time in court during cross examination. This was also the very first time that he became aware of Hempe's version. He did not discuss the matter with the applicant.

15.The applicant was not called as a witness although she was present at court.

Analysis of evidence and arguments raised

16.The applicant is applying to make the settlement agreement an order of court in terms of section 158(1)(c) of the Act. It is clear that once the true extent of the agreement has been established that I can determine whether there is any basis upon which I ought to exercise my discretion in favour of making the agreement an Order of this Court in terms of section 158(1)(c) of the Act. Section 158(1)(c) of the Act grants me a discretion to make either a settlement agreement or an arbitration award an order of this Court or not. Where there has been compliance with the settlement agreement a Court will refuse to make it an Order of Court.

17.The respondent contends that there was compliance with the written settlement agreement in that the applicant was reinstated but refused to subject herself to a disciplinary enquiry in terms of the oral agreement reached on 11 May 2000. What is in dispute therefore is whether the parties had agreed that the applicant would be subjected to a disciplinary enquiry. The onus is on the respondent to prove on a balance of probabilities that an oral agreement was concluded in terms of which the applicant was going to be subjected to a disciplinary enquiry.

18.The upshot of the matter is that I am faced with two conflicting versions, only one of which can be correct. The onus is on the respondent to prove on a balance of probabilities that the applicant had agreed that on reinstatement she would be subjected to a disciplinary enquiry. The onus will be discharged if the respondent can show by credible evidence that their version is the more probable and acceptable version. The credibility of the witnesses and the probability or improbability of what they say should not be regarded as a separate enquiry to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the respondent's version, an investigation where the questions of demeanour and impression are measured against the content of a witness' evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day and one can say with

conviction that one version is false and may be rejected with safety. In this regard see *Mabona and another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 662 C-F.

19. What is clear from the evidence is that at no stage did the respondent agree that the applicant could be reinstated on terms that excluded, either expressly or impliedly, the conduct of a disciplinary enquiry. Hempe, Mohamed and Cruywagen were all clear and consistent in testifying to the effect that, from the respondent's point of view, any reinstatement would have to be if the applicant subjected herself to a disciplinary enquiry. At no stage was this evidence challenged during cross examination. It was not put to any of the respondent's witnesses that the respondent intended agreeing to the applicant's reinstatement on her terms.

20. One thing is thus certain: to the extent that the applicant may have believed, or was led to believe, that the respondent had agreed to her unconditional reinstatement, it had not. On this basis alone the applicant's application stands to be dismissed simply because of the fact that there was, at best for the applicant, a complete lack of consensus.

21. However, the more important question is whether or not - as testified to by Hempe - there was an express agreement (albeit orally) that the applicant would return to work and upon her return subject herself to a disciplinary enquiry. This question turns solely on the further question whether or not, and on 11 May 2000, Xhango expressly agreed that the applicant would be subjected to disciplinary proceedings on the understanding that this would however not be recorded in the written agreement. This sharp factual dispute is easily resolved with reference to both the inherent probabilities and a consideration of the relevant credibility of the respective witnesses. What is apparent is that the version advanced by both Hempe and Xhango are mutually destructive. Hempe alleges a telephonic discussion whilst Xhango denies that any such discussion ever took place.

22. There are a number of facts rendering Hempe's version far more probable than that advanced on behalf of the applicant:

22.1 The respondent's representatives had throughout the conciliation process insisted that any reinstatement be conditional upon the applicant accepting that she would be subjected to disciplinary proceedings upon her return. This was most certainly conveyed to Hempe by Cruywagen on 11 May 2000. Why this is important is that it is most certainly more probable than not that Hempe would have sought to convey the respondent's stance to the applicant. Given that (according to Xhango's evidence) the applicant was not present, the question arises whom Hempe would have conveyed this stance to. On the inherent probabilities it had to be Xhango, the very person who had up to that point represented the applicant in the conciliation process.

22.2 On Xhango's own version he could not proffer any explanation as too why Hempe would have had reason to invent not only the contents of a conversation, but also the fact that a conversation ever took place. The clear absence of any evidence of a motive to misrepresent the facts is self-evidently a fact rendering some form of telephonic discussion more probable than not.

22.3 Having regard to the very thorough and diligent efforts by Hempe during 10 May 2000, it is obviously highly improbable that Hempe would have subsequently disregarded the clear mandate given by Cruywagen on 11 May 2000 or made no endeavour to convey the respondent's stance to the applicant. Hempe did after all agree to postpone the conciliation for the very purpose of affording Mohamed the opportunity of establishing the extent of the mandate.

22.4 The fact that Xhango was on his evidence contactable by telephone - as Hempe alleges he was - is in itself an objective fact which, on the probabilities, is supportive of Hempe's account of a telephonic discussion with Xhango on 11 May 2000.

22.5 It was further the unchallenged evidence of Hempe that he specifically conveyed to the respondent's representative that their final proposal as put forward on 11 May 2000 had been accepted by the applicant and her representative. Mohamed in fact recalls Hempe specifically referring to the fact that he had a discussion with Xhango who indicated that he did not wish the disputed clause to be reflected in the written agreement. Any suggestion that this information was conveyed to Mohamed (by Hempe) without any discussion having taken place implies of necessity that Hempe at an early stage foresaw the need to invent a

discussion with Xhango and convey the invented discussion with the respondent. Such a construction is wholly improbable and in fact borders on the absurd. This construction was most certainly never even suggested to Hempe during his cross-examination.

22.6 The undisputed fact that Hempe joked, as confirmed by Cruywagen, that he would see the parties in about a month's time are self evidently consistent with a version in terms of which the applicant would in fact be subjected to a disciplinary enquiry upon her return. On the inherent probabilities, this joke had to have had its origins in Xhango's acceptance of the fact that the clear understanding was that the applicant would be disciplined upon her return.

22.7 When it became apparent that there was a dispute to the parties, the fact that Hempe specifically records that:

"The Union Official (JJ) had requested that we don't include that the employee will be charged on return to work although that was the understanding."

is an objective fact clearly relevant to the inherent probabilities. Firstly, Hempe's subsequent recollection of the exchange reveals that he was entirely consistent with that which was conveyed to the respondent during the conciliation process. Secondly, Hempe's immediate protest and the fact that it specifically records that *"the Union dishonestly now denies that the employee was to be charged on return"* is on the probabilities consistent with a telephonic discussion having taken place. So too the fact that it seems Hempe, upon becoming aware of the dispute, sought guidance from a Judge of this Court.

23.The inherent probabilities are overwhelmingly in favour of the version put forward by Hempe. There is another important reason why the evidence of Hempe is to be preferred. The following is trite law.

"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness, and if need be, to inform him, is he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved." (See *Small v Smith* 1954 (3) SA 434 (SWA) at 438).

24.Although it was put to Hempe during cross examination that Xhango had not conveyed that which is recorded in Hempe's letter, it was most certainly not put to Hempe that no telephone call had in fact taken place. In the

present matter, and if in fact that there had been no telephone call at all, this omission is at best startling. It suggests that Xhango conveyed to the applicant's representative that a telephone call did take place although the content of their decision was at variance with that advanced by Hempe.

25. Purely at the level of credibility, there were a number of features of Xhango's evidence which are cause of serious disquiet:

25.1 The suggestion that Xhango first heard of Hempe's allegations during cross examination is patently ridiculous. At the most elementary level one has to accept that Xhango was called specifically to deal with Hempe's allegations as contained in his undated letter. It defies logic that Xhango would not at the very least have consulted the applicant's legal representatives regarding this central issue and, in particular, the content of Hempe's letter.

25.2 That Xhango was in fact acutely aware of Hempe's letter - and the allegations contained therein - is borne out forcefully by the following: if Xhango had no knowledge of what Hempe was alleging, the applicant herself would have had no way of knowing how to respond to the following question posed in the Respondent's Rule 6(4) Notice:

"With reference to Annexure "FS1" to the Applicant's Answering Affidavit (the undated letter from Ngcolo Hempe), is it the Applicant's case that the responsible commissioner is being dishonest where he asserts that ....."

The answer was of course that *"the commissioner is indeed untruthful in that regard"*. The applicant would also not have been able to state, under oath, that *"the commissioner has landed himself into a situation where he cannot escape being mulcted in costs because he has effectively opposed the application....."*.

25.3 Xhango's further suggestion that at no stage did the applicant discuss Hempe's stance with him is equally dishonest. All the difficulties associated with the present application - launched by the applicant - emanate directly from Hempe's undated letter and its contents. To suggest that the applicant would not at some stage have requested Xhango to comment on the content of the letter is simply outrageous.

25.4 Xhango's evidence to the effect that the entire agreement - including the fact that the applicant would return without a hearing - was concluded on 10 May 2000, offends all the evidence as also the unchallenged fact that Mohamed had absolutely no mandate to reach any such agreement.

25.5 It is of course not surprising that at no stage during cross examination was it ever put to Hempe that the only telephone discussion between himself and Xhango occurred approximately four to five weeks after the conciliation process had ended. Equally unbelievable is the fact that Hempe would have seen it fit to contact Xhango merely to inform him that the matter would be proceeding to the Labour Court.

26.It is apparent from the evidence that Xhango had to deny ever having been made aware of Hempe's allegation. If he did not do so, he would have been forced to explain why, in the context of the applicant's section 158(1)(c) application, he did not file a supporting affidavit indicating, under oath, that the contents of Hempe's letter were a figment of his (Hempe's) fertile imagination.

27.Mr Magoai had argued that Xhango was a nervous witness. I do not agree with that assessment. He struck me as a witness who has been around. He had represented the applicant at the conciliation meeting on 10 May 2000. The next day he was conducting another conciliation meeting in Graaff Reinett. He had been involved in many conciliation proceedings. I observed him carefully when he testified in court. He was more of an evasive witness rather than a nervous witness. He wanted questions to be repeated on several occasions. Mr Magoai conceded that Xhango was not truthful when he testified that it was in court that he became aware for the first time about the contents of Hempe's letter.

28.A very troubling feature of the applicant's case was the fact that the applicant was not called to testify. She was in court and shortly after the respondent had commenced with its case went to sit outside court. Mr Magoai during closing argument said that the applicant could not testify because she was still in mourning for her husband who had committed suicide recently. Mr Wade contended however that the applicant's husband had committed suicide some six years ago. Mr Magoai did however not request that the matter be postponed. I had indicated that the applicant was in court and left when the respondent called its first witness. If she was not going to testify in court, why did she leave the court and went to wait outside. The only conclusion to be drawn is that she was going to testify in court. She should at the very least have been called to deal with the following material issues:

28.1 Her understanding of the agreement, and how the fact of the agreement was conveyed to her;

28.2 Her discussions with Xhango, and whether or not the respondent's final position was in fact conveyed to her and in what terms;

28.3 How it was that she could deny Hempe's version (under oath and in the pleadings) when, if Xhango's evidence is to be accepted, she would have had no way of knowing whether or not Hempe's version was correct;

28.4 The respondent's version in terms of which it alleged that she was acutely aware of the fact that she would be subjected to a disciplinary enquiry upon her return; and

28.5 Whether or not she in fact discussed the content of Hempe's letter with Xhango, and what was conveyed to her by him.

29.In *Galante v Dickinson* 1950(2) SA 460 (A) at 465, Schreiner JA had the following to say where the defendant was not called to testify in his defence:

"In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination."

30.In the present matter the only inference to be drawn is that the applicant declined to give evidence simply in account of the fact that she recognised that I would be driven to conclude that she was at all material times acutely aware that she had in fact agreed to be reinstated subject to the holding of a disciplinary enquiry. Given the patently dishonest evidence tendered by Xhango, this inference is unavoidable.

31.I am satisfied that the respondent has discharged the onus that rested on it.

32.It is my finding that the written settlement agreement dated 11 May 2000 does not reflect the complete agreement between the parties. The parties had agreed that following the reinstatement of the applicant that

the respondent would proceed with a fresh disciplinary enquiry.

33.In the circumstances the applicant's application to make the settlement agreement an order of this Court fails.

34.I need to say something about commissioner Hempe. It was contended that he had been dishonest about how he dealt with this matter. I could find no shred of evidence that he acted in a dishonest and fraudulent manner. He was perhaps naive when he accepted the word of the applicant and Xhango that they had agreed that the applicant would still be subjected to a disciplinary agreement without having to include this in the written agreement. The lesson I hope he has learnt from this matter is that he should record fully the terms of agreements' reached by parties.

35.All that remains is the question of costs. The leading case regarding attorney and client law is the decision of the Appellate Division in *Nel v Waterberglandbouers KO-op Vereeniging* 1946 AD 597. In this case it was held that something more underlies the practice of awarding costs as between attorney and client than the mere punishment of a losing party. According to Tindall JA, *"the true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."*

36.Mr Wade had argued that the applicant should pay the respondent's costs on an attorney and client scale. Mr Magoai argued against granting of such an order. This court has a discretion when it comes to the issue of costs. Factors that the court normally takes into account is the nature of the dispute, the conduct of the parties in the matter, whether the parties still have an ongoing relationship etc.

37. About the question of costs, it is not without significance that the applicant has for the past ten months drawn her full salary without being required to work. Both the applicant and Xhango clearly dishonestly sought to exploit the terms of the written agreement, and in particular, the "full and final" clause well knowing that at their insistence the written agreement did not reflect all the terms of the agreement. The extent of the dishonest version conveyed on behalf of the applicant is in itself deserving of severe censure. The respondent has been made to incur substantial costs in opposing an application which was and remains both frivolous and vexatious.

38. This is a matter where I am of the view that the applicant should be directed to pay the respondent's costs on an attorney and client scale in this matter.

39. The following order is made:

(a) The applicant's application to make the agreement an order of court is dismissed.

(b) The applicant is directed to pay the respondent's costs, including the costs associated with the hearing before Landman J on 3 November 2000, on a scale as between attorney and client.

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FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: ATTORNEY MAGOAI OF ROUTLEDGE-MODISE ATTORNEYS

: ADVOCATE R B WADE INSTRUCTED BY DENEYS REITZ ATTORNEYS

: 14 AND 15 MARCH 2001

: 16 MARCH 2001