IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN PORT ELIZABETH

CASE NUMBER: P168\05

In the matter between:

ELIAS MZWANELE YAWA **APPLICANT**

and

SPEAKER EASTERN CAPE PROVINCIAL

LEGISLATURE **RESPONDENT**

JUDGMENT

MOLAHLEHI J

Introduction

[1] Initially the applicant applied to the Commission for Conciliation,

Mediation and Arbitration (the CCMA), to have the settlement agreement made an arbitration award in terms of section 142A of the Labour Relations Act 65 of 1995 (the LRA). The applicant was unsuccessful and subsequently took the decision of the Commissioner on review. The review application was successful and Cele AJ issued the following order:

> "1. The second respondent's award is in case no ECEL 866-04 dated 4 January 2005 is reviewed and set aside.
>
> 2. Matter is referred to this Court for the hearing of oral evidence on the date to be determined by the Registrar.
>
> 3. The third respondent is granted leave to file an answering affidavit setting out its defense.
>
> 4. Third respondent is directed to pay the applicant's costs."

[2] The applicant's case now is that the settlement agreement should be made an order of Court, or if it is found that the agreement is vague and therefore not enforceable, the dispute should be referred back to the CCMA for arbitration.

[3] The case of the respondent is that it had complied with all the terms of the agreement and that its calculation of the amount which was due to the applicant as set out in the settlement agreement was correct. In the alternative the applicant claimed that the agreement should be rectified to give effect to the true intention of the parties.

Background facts

[4] The applicant who was formally employed as a senior manager by the respondent was dismissed during the early part of 2004. Subsequent to his dismissal the applicant referred an unfair dismissal dispute to the CCMA.

[5] During May 2004, the parties concluded a settlement agreement in terms of which the respondent was to pay the applicant certain amounts calculated in terms of agreed formulae.

[6] It is common cause that on 3rd June 2004, the respondent effected payment through the bank account of the applicant in the amount of R199040.71. The respondent contended that this payment was in compliance with the settlement agreement.

[7] The applicant was dissatisfied with the manner in which the respondent calculated payment due to him. As stated earlier he then filed an application to have the agreement made an award by the CCMA.

[8] In essence the issue in this matter, concerns the interpretation and implementation of the settlement agreement. The relevant clauses of the settlement agreement read as follows:

> "1**. Salary**
>
> The legislature pays Mr Yawa the balance between amounts already paid and the amount of 30 days accrued leave calculated in accordance with the package in terms of paragraph 1 above.
>
> 6. **Meaning of words**
>
> In this agreement;
>
> -amounts of the paid, means the amount of R472 124-24 and includes no payment for leave, (see breakdown document attached).

- package, means amount of R710 000.00

-balance, means difference and connotes a positive.

-CPIX, means 6.5%

- Agreement, includes the breakdown document attached and co-signed by the signatories hereto."

[9] In implementing the agreement on its interpretation, the respondent calculated what it believed was due to the applicant as follows:

"Package to be paid	R710, 00.00	
Less amount already paid	472,124.24	
Sub-total		237,875.76
Leave days 30/249 x710000		85,542.17
CPIX adjustment 710,000 x 6,5% 12 x8		30,766.67
Gross payment		354,184.60
Less PAYE		(155,143.89
Net amount deposited		199,043.71

[10] There is no dispute about the total package of R710, 000.00 and the

amount already paid being R472, 124.24. The amount of R472, 124.24 is the amount paid soon after the dismissal of the applicant. The breakdown of this amount is set out in a memorandum by the respondent as follows:

"Basic salary	293,892.00
Housing allowance	4,400.00
Car allowance	109,176.00
Provident fund- Employer's Contribution	4, 6656.24
Total	472,124.24

[11] In arriving at the amount of R199040.71 which was deposited into the bank account of the applicant after the conclusion of the settlement agreement, the respondent deducted from the settlement amount (R710 000.00) the amount already paid (R472 124.24) and added to it the value of the 30 (thirty) accrued leave which, is R85542.17.

[12] The applicant on the other hand contended that the correct formula was the difference between the amount already paid and the value of

the 30(days) accrued leave. In other words the formula according to the applicant was as follow: the amount already paid, subtract the value of the 30 days accrued leave would give the amount to be paid in as far as leave was concerned.

[13] Thus the applicant contended that what was due to him in terms of leave payment was the difference between the amount already paid (R472 124.24) and the value of the 30 days leave (R85542.17).

[14] I now proceed to deal with the issue of rectification of the agreement as prayed for by the respondent. The respondent prayed that clause 2 of the settlement agreement be rectified to read as follows:

> *" In respect of leave, the legislature undertakes to pay Mr Yawa the monetary equivalent of 30 days accrued leave calculated with reference to annual remuneration in the amount of R710 000.00."*

[15] A party seeking rectification of an agreement has to show that there exist; a written agreement between the parties; and that such an

agreement does not correctly reflect the common intention of the parties. The onus rests on the party seeking rectification to show the existence of the common, continuing intention of the parties, as it existed when the agreement was reduced to writing. See Amler's Precedent of Pleadings at page 298 and Lazarus v Gorfinkel 1998 (4) SA 123 at 131.

[16] Thus in the present case I need to determine whether the respondent being the party claiming rectification, has discharged its duty of showing that the requisites for rectification exist.

[17] The only witness that the respondent called was the Speaker of the Legislature, Ms Noxolo Kiewit whose testimony focused on the meetings she held with the applicant and the correspondence exchanged between the parties as they negotiated the settlement agreement.

[18] Ms Kiwiet testified that, prior to reducing the agreement to writing, she had discussions with the applicant which were later reduced to

writing. The draft agreement according to her was given to the applicant who took it away and on returning it indicated that there were not many changes except that he had tried to put meaning to some words.

[19] Ms Kiwiet insisted that the agreement was that payment for accrued leave would be limited to 30 days and not more as the applicant contended. She stated that she could not have agreed to pay the applicant more than 30 days because at that stage he was still at home and not working. She in this regard stated:

> *"If a person is not at the place of employ, is at home, is the person entitled to leave? And in my quest to settle the issue we said that rather than us discussing this for a long time let us agree on a reasonable settlement, which at that time I looked at would be thirty days, because the entitlement in any event from a year, a year's leave is 30 days, so he said then let us agree on thirteen days accrued leave."*

[20] During cross examination when asked as to whether the agreement

contained what the parties agree upon, Ms Kiwiet answered in the affirmative and further stated that there was nothing wrong with the agreement. She was further during cross examination referred to her affidavit wherein she *inter alia* states:

> *"In the draft of the settlement a mistake was made. This was as a result of an error on the part of the applicant or an intentional act directed at misrepresenting the substance of the parties' consensus.''*

[21] In answering the question about the error she referrers to in her affidavit, Ms Kiwiet's said: "The *mistake that arises on (sic) the fact that we are here."* Ms Kiwiet was in this regard referring to the fact that matter was now before the Court.

[22] In my view the respondent has failed to show that there was common continuing intention between the parties at the time of concluding the agreement that only the value of 30 days accrued leave would be paid contrary to what is stated on the settlement agreement. In other words the respondent has failed to show that the parties never

intended the formula set out in clause 2 of the agreement to constitute part of the terms of the settlement agreement and that the intention was to limit the payment for leave to 30 days.

[23] Therefore, the claim for rectification could not succeed because the respondent has failed to prove common continuing intention to pay the applicant only 30 (thirty) days accrued leave.

[24] I now proceed to determine whether the terms of the agreement in particular clauses 2, 3 and 6 are clear and unambiguous such that the settlement agreement is enforceable and can be made an order of Court.

[25] In my view the Court should not readily conclude that an agreement is not enforceable simply because there is doubt about its terms. If the terms can be ascertained with reasonable accuracy or reasonable certainty from the written agreement, then any doubt that may exist should be put aside in the interest of giving an interpretation geared toward the enforcement of the agreement. See Christie: The Law of

Contract in South Africa 5th Edition page 154.

[26] The approach to be adopted when faced with doubt as to the terms of the agreement is well set out by Watermeyer CJ in the case of *Burroughs Machines v Chenille Corporation of SA (Pty) Ltd 1964 1 SA 669(W) at 670G* where the Court held that:

> *"I must therefore not lightly hold the document to be ineffective. I need not require of it such precision of langue as one might expect in a more formal instrument, such as a pleading drafted by counsel. Inelegance, clumsy draftsmanship or loose use of language in a commercial document purporting to be a contract will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract."*

[27] Turning to the facts of the present case, the settlement agreement document is in my view, clear and unambiguous. The parties agreed on a formula for the implementation of their agreement. Before dealing with the formula, I need to point out that the agreement

provides for a total package of R710 000.00. At the time of concluding the agreement the respondent had already paid the applicant the amount of R472124.24. The amount to be paid to the applicant is the difference between R710 000.00 and R472 124.24. There is no dispute about the interpretation and implementation of this formula, which is contained in clause 1 of the settlement agreement. This formula is similar to the one in clause 2 of the settlement agreement.

[28] The dispute between the parties in as far as the interpretation and implementation is concerned centered mainly on the interpretation of clause 2 of the agreement. The formula, as I understand it, in clause 2 of the settlement agreement, is that the respondent is to pay the applicant the difference between the amounts already paid and the 30 days accrued leave. The amount already paid is defined in clause 6 of the settlement agreement as R472124.24. While the settlement agreement is quite about the monetary value of the 30 days accrued leave, it seems common cause that the amount is R85542.17.

[29] This formula is, in my view clear and unambiguous. As indicated

earlier the formula is similar to the one in clause 1 of the settlement agreement. The intentions of the parties are very clear and become even much clearer as to the formula they intended using in terms of the specific amounts to be paid to the applicant when clause 1, 2 and 6 are read together.

[30] The amount already paid is defined in clause 6 of the settlement agreement to mean *"the amount of R472124.24 and includes no payment for leave."* It is apparent to me that what the parties intended to convey with this clause was that leave pay was not included in the "*amounts already paid."* It could not mean, as counsel for the respondent suggested, that accrued leave was not to be paid. This interpretation would be in conflict with clause 6 of the settlement agreement where it is provided; "*balance, means deference and connotes a positive amount."*

[31] In my view the settlement agreement is valid and enforceable. The dictates of law and fairness require that cost should follow the result.

[32] Accordingly the following order is made:

a. The respondent's claim for rectification of the settlement agreement is dismissed.

b. The settlement agreement is valid and enforceable.

c. The settlement agreement is made an order of Court.

d. The respondent is to pay the applicant's costs.

MOLAHLEHI AJ

DATE OF HEARING : 14 NOVEMBER 2007

DATE OF JUDGMENT : 21 FEBRUARY 2008

APPEARANCES

For the Applicant : ADV. I. J. SMUTS, SC

Instructed by : PRINSLOO ATTORNEYS

For the Respondent: ADV. R. P. VAN ROOYEN, SC

Instructed by : THE STATE ATTORNEY