IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: J 486/07

In the matter between:

XOLANI HLONGWANE **APPLICANT**

and

CISCO SYSTEMS SOUTH AFRICA

(PTY) LTD **1ST RESPONDENT**

CISCO SYSTEMS INCORPORATED **2ND RESPONDENT**

JUDGMENT

CELE AJ

INTRODUCTION

[1] The applicant seeks an order which will direct the parties to have the main application referred to oral evidence in terms of rule 7 (7) (b) of the rules for the conduct of proceedings in this court. In the main application, the applicant seeks a declarator in terms of section 158 (1) of the Labour Relations Act 66 of 1995 ("the Act") on the basis that the dispute between the parties is one contemplated by the provisions of section 77 (3) of the Basic Conditions of Employment Act 75 of 1997 ("the BCEA"). The

application is opposed by the respondents who contend that the dispute between the parties is not an issue as contemplated by the provisions of section 77 (3) and that therefore the reliance on rule 7 instead of rule 6 for the secondary application is ill-founded.

BACKGROUND FACTS

[2] The applicant was in the employ of the first respondent as a Business Development Manager. There is a dispute about whether or not his employment was of a permanent nature. The respondents are the leading suppliers of networking equipment and network management for the internet in the world. The first respondent is a subsidiary company of the second respondent, with its principal place of business at Bryanston, Johannesburg. The second respondent is a global company listed on the Nasdaq Stock Exchange in the United States of America with its main corporate headquarters in Califonia, USA.

[3] While the background to the matter is rather complex, an attempt at summarising same will be made as this judgment deals only with the secondary application. On 12 June 2006 the applicant lodged certain grievances in terms of the respondents' grievance procedure, with senior personnel of the first respondent. The grievances concerned the potential misrepresentation of the respondents in a way that the National Industrial Participation Programme (NIPP Projects) with the Government of South Africa and other relevant parties had been handled. It also concerned the possible conflict of interest between Mr Barron Cox, applicant's Line Manager, and Umvula Consulting, a third party, where, according to the applicant, it appeared that Mr Cox could illicitly benefit financially from Umvula Consulting. Further, it appeared to the applicant that there had been a possible breach of

confidentiality in that Mr Cox, according to the applicant, had given the Chief Executive Officer (CEO) of Umvula Consulting, Mr Lemmy Khumalo confidential information about the respondents which he believed had put his life in danger. The grievance was also about the allegation by the applicant that, since July 2005, Mr Cox had continuously harassed and intimidated him by swearing at him and threatening him with his job.

[4] The grievances were supposed to have been attended to within 7 days in terms of the respondents' grievance procedure but they were not. The position taken by the respondents is that the applicant was aware that the allegations of misconduct against Mr Cox and Mr Khumalo were the subject of two independent investigations and could not be attended to within the 7 days' period. On 18 July 2000 the applicant met Mr Spies of the first respondent to discuss his grievances. On the other hand, Mr Fynn the Managing Director of the first respondent escalated the applicant's grievances to Mr Williams in the United Kingdom and Mr Williams set up an investigation.

[5] When the applicant felt that he was not getting any response to his grievances, he escalated the complaint to the second respondent by writing a letter dated 17 July 2006, addressed to Mr De Simone as the immediate supervisor of Mr Cox. A similar letter was also sent to Mr Mountford. On 21 July 2006 the applicant addressed a further e-mail to Mr De Simone and Mr Mountford in which he raised complaints about the manner in which the investigations

were undertaken and that nothing had been done about his grievance of intimidation and harassment which had led to more frustrations as he worked with Mr Cox everyday. Also, on 21 July 2006 Mr Spies, acting on instructions of Mr Fynn, responded to the applicant and, inter alia, instructed the applicant to desist from continuing to communicate with Mr De Simone and Mr Mountford, until such time as Mr Fynn had dealt with the issues. On 24 July 2006 the applicant sent another e-mail to Messrs De Simone and Mountford pertaining to his grievances. On the same day, the first respondent, represented by Mr Fynn, Mr Spies, Mr Zeeman and Ms Sookaria held a meeting with the applicant. The main issue was around the continued communication with the second respondent by the applicant. At the end of that meeting Mr Fynn informed the applicant that he would be charged with an act of misconduct of gross insubordination. He was immediately suspended. On 26 July 2006 the applicant was served with a copy of the charge sheet.

[6] On 21 August 2006 the applicant lodged a protected disclosure in terms of section 6 of the Protected Disclosure Act 26 of 2000 with the second respondent. Mr Mills, an attorney, was appointed to investigate the matter. He held a meeting with the applicant on 23 and 24 August 2006. The applicant wrote a letter dated 30 August 2006 to Mr Mills, requesting to be furnished with findings pursuant to the investigations conducted by Mr Mills and the status of his suspension.

[7] The question of resignation of the applicant upon terms to be agreed to with the respondents had cropped up between the parties. The applicant had already instructed a legal representative from whom he received advice. In the meantime, the first respondent was scheduling and rescheduling the disciplinary hearing against the applicant. The first date of hearing was 11 August 2006. The matter was postponed to 29 August 2006, upon a report that the applicant was ill. It was then set down for 19 October 2006 and finally for 27 October 2006. The parties are in dispute as to the reason why the hearing of 27 October 2006 did not proceed. According to the applicant the first respondent failed to find a chairperson. According to the respondents, a Commissioner of the CCMA, Ms Nsibanyoni was available but the representatives of the parties had reached a settlement agreement and Ms Nsibanyoni was accordingly informed and advised not to proceed with the disciplinary hearing.

[8] Up until 27 October 2006 the parties continued to explore the prospects of a settlement, Mr Hardie was the initial legal representative of the applicant and on 8 September 2006, he held a discussion with Mr Mills *inter alia* on the prospects of a settlement.

[9] The applicant decided to correspond directly with the CEO of the second respondent in the USA, Mr Chambers by writing to him a letter dated 20 October 2006, as he believed that the disciplinary process was being used as a ploy to work him out. At that stage the

applicant was represented by Mr Casasola who had instructed Advocate Ford. The letter is headed*: "Protected Disclosure in terms of section 6 of the Protected Disclosure Act 26 of 2000."*

It is a very comprehensive letter which outlines a chronology of events that unfolded as far as the applicant was concerned. It expresses a loss of faith by the applicant to an intervension by Mr Mills, due to lack of a feedback to the applicant on investigations conducted by Mr Mills. The applicant asked for an intervention of Mr Chambers by correcting the the position before 24 October 2006 so that the applicant and the the second respondent could communicate further by complying with:

- Discontinue procedurally unfair practices
- Desist from using cheap tactical methods of a DC threat
- Nullify the suspension and disciplinary hearing
- Engage for a way forward in an honest manner to solve the impasse amicably.

[10] Amounts of R800 000 and US $2 million were discussed by Mr Mills and the legal representatives of the applicant at different times in an attempt to settle the dispute between the respondents and the applicant. After the applicant had sent the letter of a protected disclosure dated 20 October 2006, he periodically corresponded with Ms Roxanne Marenberg as the in-house counsel for the second respondent. In the main, correspondence was about an expectation of a positive intervension by Mr Chanbers which he hoped to receive through her. Messrs Casasola and Ford

communicated with the applicant through their cellular telephone messages as all awaited Mr Chamber's response.

[11] As already indicated the parties are indispute on why the disciplinary enquiry did not proceed on 27 October 2006. The version of the respondents is that the legal representatives of the applicant and Mr Mills had reached a settlement agreement through which R800 000 would be paid to the applicant, as a severance package. He would also be paid the proceeds from the sale of his vested option shares. In return he would tender his resignation from the employment of the first respondent. The applicant disputes having authorised his legal representatives to settle the dispute with the respondents. He said that the enquiry did not proceed because the chairperson was not available.

[12] On 2 November 2006, the applicant apparently terminated the mandate he had given to Mr Casasola and to Advocate Ford. He reinstated Mr Hardie as his attorney. On 6 November 2006 Mr Hardie sent a letter by e-mail to Mr Mills indicating that the applicant was not prepared to relinquish his job security voluntarily unless there was a dramatic movement by the respondents in their settlement proposal. He called on the first respondent to constitute the disciplinary hearing, if it felt it had sufficient grounds so to do. He outlined conditions for the holding of the hearing. Mr Cliffe Dekker, an attorney acting for the respondents with Mr Mills, responded by a letter of 13 November 2006 to Mr Hardie's e-mail. He expressed surprise in the letter of 6 November 2006 as

according to the respondents the matter had been settled after extensive discussions and negotiations between Mr Dekker and the erstwhile legal representatives of the applicant. He tendered payment of the amount of money as in terms of the agreement. Mr Hardie responded to Mr Dekker's letter with one letter dated 19 March 2007. Mr Hardie tendered services of the applicant, stating that the applicant was willing and able to work in terms of his contract of employment and that he expected the tender to be accepted by the respondents. He said that if the tender was not accepted an application for a declaratory order would be brought in this court. Mr Dekker responded with a letter dated 15 February 2007 and he acknowledged receipt of Mr Hardie's letter with a tender of services by the applicant, as dated 24 January 2007. The date of 19 March 2007 in Mr Hardie's letter must therefore be erroneous, Mr Dekker recorded that the first respondent was not prepared to accept a tender of services by the applicant as it persisted that a binding and enforceable agreement was concluded between their respective clients, duly represented by their legal representatives.

THE ISSUE

[13] In the main application the applicant seeks a declaratory order in the following terms:

(a) Declaring the applicant still to be in the respondents' employ and compelling the respondents to accept the applicant's tender of his services made on 11 December 2006 in terms of the permanent contract of employment between the parties.

(b) Ordering the respondents to renumerate the applicant from 31 October 2006 as if the applicant had remained in respondents' employ from that date on wards and in terms of their obligations to do so in terms of the permanent contract of employment between the parties.

[14] Two crisp points were raised by the respondents *in limine*, in their answering affidavit, namely:

(1) At the time the applicant deposed to the founding affidavit, he must have been aware that material and numerous disputes of facts would arise between him and the respondents. The initiation of motion proceedings was therefore improper and inappropriate, and

(2) The current dispute amounts to nothing more than an allegation that the applicant has been unfairly dismissed by the first respondent. In such a case, the applicant ought to have initiated a claim for unfair dismissal as contemplated by the Act.

[15] In his reply, the applicant stated that he was not denying that arising from the respondents having served and filed answering papers, there are material disputes of fact which may not be resolved on affidavits filed by the parties. He evered that no other procedure existed, other than motion proceedings in terms of rule 7, for bringing such a dispute to this court. He said that if the court is unable to make a finding on the affidavits filed, it has a discretion in terms of rule 7 (7) (b) to refer the dispute for the hearing of oral evidence. In respect of the second point, he said that the dispute concerns whether or not a valid settlement agreement was entered into between the parties, in terms of which the applicant agreed to resign from the first respondent. He contended

that the dispute is therefore not one of an unfair dismissal necessitating a referral to the CCMA.

SUBMISSIONS BY PARTIES

[16] Mr Hardie appeared for the applicant and submitted briefly that:

- Whichever way one characterises the dispute between the parties, it is not a dispute which fits into any of the categories contained in paragraphs 1 – 6 under footnote 1 to rule 6;
- As appears from rule 7 relating to applications brought before this court, footnote 2 therof sets out the sections of the Act to which it applies. It also indicates in footnote 2 – 15 that rule 7 applies to applications to this court in terms of any other Act.
- In terms of section 77 (3) of the Basic Conditions of Employment Act 75 of 1997 ("BCEA"), this court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic conditions of employment constitute a term of that contract.
- The applicant seeks to compel the respondent to abide by the contract of employment which exists between the parties, and as such, he was obliged to bring this application in terms of rule 7.
- Rules 6 and 7 are peremptory. It was not possible for the applicant, whether or not he should have

reasonably foreseen that there would be a material dispute of facts, to refer the dispute to this court in terms of rule 6.

- The rules create a *numerus clausus* for both rules 6 and 7, determining which disputes are referred in terms of which rule. Rule 7 (7) makes provision for this court to deal with applications where there is a dispute of facts, by referring a dispute for the hearing of oral evidence.

[17] The submissions made by Mr Mills who appeared for the respondents are:

- The crisp question for determination is whether or not the applicant's employment with the respondents was terminated pursuant to the terms of a settlement agreement;
- The dispute has nothing to do with the applicant's contract of employment with the respondents. Nor is it an issue which is contemplated by section 77 (3) of the BCEA;
- The issue to be determined is whether or not there is a dismissal and whether such dismissal is fair or unfair.
- It was therefore not competent for the applicant to have launched an application in terms of rule 7;
- As appears from rule 7, footnote 2 sets out the sections of the Act to which it applies. The validity

or otherwise of a settlement agreement has no application to any of the items 1 – 23 listed in footnote 2 and accordingly, the application is not competent;

- It would amount to a strained construction of section 77 (3) of the BCEA to contend that the application for a declaratory order has been launched to determine a matter concerning a contract of employment;
- It is entirely inappropriate to launch an application in terms of rule 7 if the applicant should have realised, when launching his application, that a serious dispute of facts, incapable of resolution on the papers, was bound to develop.
- The court should dismiss the application where there are fundamental disputes of fact on the papers and the applicant failed to make out a case for the relief claimed.
- The applicant ought reasonably to have realised when launching his application that a serious dispute of facts was bound to develop as the parties were already in dispute as to whether there was a settlement agreement. On this basis, the application must be dismissed with costs.

ANALYSIS

[18] Mr Hardie has incorrectly assumed that footnote 1 to rule 6 has

paragraphs 1 – 6 only. A copy of the rule he annexed to his heads of argument had paragraphs 1 – 6. The footnote has 1 – 9 paragraphs in fact. Paragraph 7 of footnote 1 of rule 6 reads:

> "If a material dispute of fact is foreseen, rule 6 may be used to initiate the determination of any matter concerning a contract of employment in terms of section 77 (3) of the Basic Conditions of Employment Act of 1997 (Act 75 of 1997) (see footnote to rule 7)"

[19] As can be seen on paragraph 7 of footnote 1 to rule 6 there is cross-reference to "footnote to rule 7". Paragraph 21 of footnote 2 to rule 7 reads:

> "If a material dispute of fact is not reasonably foreseen, an application for the determination of any matter concerning a contract of employment in terms of section 77 (3) of the Basic Conditions of Employment Act, 1997, maybe initiated in terms of rule 7 (see footnote to rule 6)."

[20] The e-mail of 6 November 2006 states that the applicant was not prepared to relinquish his job security voluntarily. In its letter of 13 November 2006 the first respondent said it was astounded by the conduct of the applicant in disregarding the agreement which it said was concluded on his behalf by his erstwhile legal representatives. The first respondent proceeded to tender payment of the amount due in terms of the agreement which it said had been reached. The applicant retorted by tendering his employment services in a letter of 24 January 2007, wrongly dated 19 March 2007. The first respondent declined to accept the tender of services and persisted that a binding and enforceable agreement was

concluded between the parties – (see letter dated 15 February 2007, issued by Mr Dekker for the first respondent). These events unfolded long before the applicant launched the main application. Surely, it was then reasonably foreseeable that a serious dispute of facts incapable of a resolution on the papers was bound to develop as the parties were already locking horns on whether or not there was a settlement agreement. It was disingenuous of the applicant to aver that the material dispute of facts arose only from the respondents having served and filed answering papers.

[21] Mr Mills' submission that the applicant ought to have launched the main application in terms of rule 6 is certainly sound in law and should prevail. There remains the question whether I should dismiss the application as prayed for by the respondents or refer the matter to oral evidence as sought by the applicant. Mr Mills has drawn my attention to the case of *Van Aswegen & Another v Drotskie & Another 1964 (2) 391 at p 395* where the court approved the test stated at page 54 of the Civil Practice of the Supreme Courts of South Africa by Herbstein and Van Winsen, where the learned author had the following to say:

> "If the applicant ought reasonably to have realised when launching his application that a serious dispute of fact was bound to develop, the appropriate order is that the application must be dismissed with costs."

See also *Winsor v Dove 1951 (4) SA 42 (N) at p 54*. In the *Van Aswegen case*, Smuts AJ had the following further to say; on page 395 line C – D:

> "It does of course not follow that because a dispute of fact is

> reasonably foreseeable that an application on notice of motion will always be dismissed with costs. There may still be circumstances present which will persuade a court not to dismiss an application but to order the parties to go to trial together with an order that the costs of the application be costs in the cause or else that the costs stand over for determination at the trial."

[22] I see no reason why I should not be guided by the authorities I have referred to in holding that a court has a discretion, judicially exercised, in deciding whether or not to dismiss an application to refer a dispute to oral evidence where the applicant ought reasonably to have realised, when launching his or her application that a serious dispute of fact was bound to develop, which is incapable of a resolution on the papers.

[23] Mr Mills has submitted that the applicant ought not to have referred the dispute to this court in the first place. He said that the dispute between the parties related to the termination of the applicant's employment with the respondent and falls to be categorised as one of an unfair dismissal. He everred that the applicant should have referred it either to a council, if the parties fell within the registered scope of that council or to the commission, if no council had jurisdiction. Yet, according to the version of the respondents, there never was a dismissal. The contract of employment was terminated because the parties reached a settlement agreement. Clearly therefore, the respondents would object to the jurisdiction of either the council or commission by everring that there was no dismissal. If successful, the applicant

would only belatedly have to approach this court. On the other hand, the applicant can only enforce the terms of the contract of employment in this court. If not successful, he will not be able to proceed with a claim of an unfair dismissal, having not first referred the dispute to conciliation. In my view therefore, the launching of the application to this court was not a misdirection, based on the nature of the dispute.

[24] A further submission by Mr Mills is that there is no issue which this court is required to determine concerning a contract of employment in terms of section 77 (3) of the BCEA. The expression in section 77 (3) *"any matter concerning a contract of employment"*, if not given a narrower interpretation, should, in my view, be inclusive of the issue of the enforcement of the terms of the contract of employment, which the applicant effectively seeks.

[25] In the exercise of a judicial discretion, whether to accede to the application, I take particular note that the applicant made a protected disclosure to the second respondent. While the outcome of such disclosure is not overwhelmingly clear, it bears noting from his submission that Messrs Fynn and Cox have since left their employment with the respondents. It is beyond the scope of this application to dwell on the circumstances of the termination of their employment.

[26] All submissions considered, it would not be appropriate, in my view, to dismiss the application to refer the dispute to oral

evidence. Nor will I allow myself to be constrained by the form in which the application is brought instead of the substance thereof. If the main application had been brought in terms of rule 6 of the rules of this court, it is quite conceivable that the secondary application would have been avoided. The respondents would, in that event, have been saved the expenses of defending the secondary application. In their answering affidavit, the respondents dealt comprehensively with the issues raised by the applicant in his founding affidavit. However, in the replying affidavit the applicant, it seems to me, dealt in the main, with the points raised *in limine*. I accordingly grant the applicant a further relief of delivering a replying affidavit, should he so deem appropriate.

[26] In the circumstances, the following order will then issue:

(1) The dispute between the parties is referred to oral evidence with the papers as they stand, except if the applicant delivers a replying affidavit within 14 days from the date hereof.

(2) The applicant is ordered to pay the costs incurred by the respondents in defending the application to refer the dispute to oral evidence.

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CELE AJ

Date of Hearing: 7 February 2008

Date of Judgment: 18 April 2008

APPEARANCES

For the Applicant: S Hardie

For the Respondent: T Mills