IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 2189/09

In the matter between: **REPORTABLE**

NATIONAL UNION OF MINEWORKERS **Applicant**

LUCKY P. MOKGOADI **Second Applicant**

and

TOKISO DISPUTE SETTLEMENT (PTY) LTD **First Respondent**

TANYA VENTER N.O. **Second Respondent**

SAMANCOR LIMITED **Third Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1. This is an opposed review application. The subject matter of the review is a ruling in which by the second respondent - a member of the private dispute resolution panel of Tokiso - found she had no jurisdiction to entertain the dispute before her. The panellist characterised the dispute as one about "whether the alleged unfair dismissal of Mr Mokgoadi [the second applicant] had been concluded by agreement or not."

2. Mr Mokgoadi alleged he had been unfairly dismissed by the Third Respondent, Samancor in October 2002. His dispute, together with that of other members of the First Applicant, the National Union of Mineworkers ('NUM'), was referred to Tokiso for conciliation, apparently under the terms of a collective agreement which provided that Tokiso performed conciliation and arbitration functions for NUM and Samancor. A settlement agreement was reached in respect of cases conciliated on 13 September 2004.

3. Certain portions of the settlement agreement need to be specifically mentioned. The settlement agreement was entitled: "Settlement Agreement with regards to the Dismissal cases Conciliated on the 13 September 2004".

4. The preamble to the settlement agreement reads:

> "***WHEREAS*** *the parties have entered into a Conciliation process to resolve the dismissal cases of:*
>
> *1. P Makola*
> *2. L.P Mokgoadi*
> *3. A. Molabe*
> *4. M.J.Maloma*
> *5. P.J. Komane*
> *6. T.Masinga*
>
> ***NOW THEREFORE*** *the parties agree as follows:…"*

5. Of the six dismissed employees mentioned, it was agreed that Makola's case was withdrawn, and Molabe and Maloma were reinstated. In clause 4 of the settlement agreement, it was further specifically recorded that "(t)he parties <u>were not able</u> to reach agreement" (emphasis added) on the cases of Masinga and Komane.

6. The clause dealing with the second applicant reads:

> *"2. L.P Mokgoadi*

It is agreed that though the company contends that Mr Mokgoadi was not dismissed and that he resigned on his own, Mr Mokgoadi may have skills and qualification that the company may find valuable. The company therefore undertakes that upon submission of his Curriculum Vitae, to consider Mr Mokgoadi for any suitable vacancy and to contact other companies in the group. The company further undertakes not to jeopardise Mr. Mokgoadi chances of employment with adverse reference." [*sic*]
(emphasis added)

7. The final sentence of the settlement agreement states: "This agreement is final and binding on all matters referred above except those where the parties were not able to agree." (emphasis added).

8. The second applicant contended that his dismissal dispute was not resolved by the settlement agreement. It appears that he was not offered any vacancy subsequent to the conclusion of the settlement. He then sought to refer his unfair dismissal claim to Tokiso for arbitration. Samancor objected, claiming that the settlement agreement had finalised his dismissal dispute. The applicants then referred a dispute over the interpretation of clause 2 of the settlement agreement to the Metal and Engineering Industries Bargaining Council ('the MEIBC').

9. The MEIBC panellist concluded that the disputed clause was not open to more than one interpretation and that "…the agreement stated what it meant, that is, that the Applicant would be considered for employment if and when a suitable vacancy arises." He ended his ruling by 'dismissing' the application and finding that "…the clause in dispute was clear and unambiguous and needs no interpretation". This concluding section of the ruling is unfortunately worded, but if one has regard to the penultimate paragraphs of his ruling it is clear that the panellist was of the view that the settlement agreement was final and binding and that the applicant was, in effect, seeking to resile from the settlement agreement.

10. Unhappy with the ruling of the MEIBC panellist, and still of the view that the settlement agreement did not resolve his unfair dismissal dispute, the second

applicant referred his unfair dismissal claim to Tokiso for arbitration. Because Samancor was adamant that the settlement agreement had settled the dispute it contended that there was no basis for the matter to proceed to arbitration. Insofar as there had been a collective agreement in terms of which dismissal disputes had been referred to Tokiso in the past, that had lapsed as long ago as 2003, and since then disputes over unfair dismissals ought to have been dealt with by the MEIBC. Samancor contended that only if it consented afresh to refer the matter to arbitration under the auspices of Tokiso would Tokiso have authority to arbitrate, and, in any event, the MEIBC panellist had already determined that the settlement agreement of 2004 had settled the dispute.

11. Because of the issues raised by Samancor, the second respondent was compelled to consider if she had the power to entertain the dispute and, as mentioned, concluded she did not. Her stated reason for reaching this conclusion was that a competent forum in the form of the proceedings before the MEIBC had already determined that the settlement agreement concluded the matter.

12. The issue before the court is simply whether the Tokiso panellist had the power to arbitrate over the second applicant's claim that he was unfairly dismissed. Whether the panellist had the necessary power is an objective matter and does not depend on the reasonableness or otherwise of the panellist's ruling: the panellist either had the legal authority to determine the dispute or she did not.

13. The source of arbitrators' powers when performing statutory dispute resolution functions under the LRA are set out in that Act and, in the case of arbitrators performing dispute resolution functions under the auspices of bargaining councils, may be supplemented with powers provided in terms of dispute resolution agreements concluded in those bodies. In the case of a private arbitration, the extent of an arbitrators' power is derived from the specific mandate of the disputant parties,[1] as supplemented by some of the provisions of the Arbitration Act 42 of 1965.[2] In all instances, action by an arbitrator which is not authorized by

[1] ***Hos + Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others*** **2008 (2) SA 608 (SCA)** at 616, par [30]
[2] Eg, section 27 of the Arbitration Act which empowers an arbitrator to make an order of specific performance unless the arbitration agreement provides otherwise.

the relevant statute or agreements is *ultra vires* because it is performed without the necessary legal authority. Reviewing an arbitrator's action on this basis has nothing to do with the reasonableness of the arbitrator's decision: rather it is concerned with whether or not the decision is a legally competent one for the arbitrator to make. The determination of that issue will often turn on simply asking if the decision made by the arbitrator was, in principle, a permissible one in terms of the arbitrator's powers. Sometimes, as in this case, it turns on determining whether or not a pre-condition for an arbitrator exercising arbitral power was met.

14. The applicants seek to set aside the panellist's ruling on the basis of grounds that she misconstrued the issue before her or the MEIBC ruling, or that she failed to consider certain evidence. These grounds are framed as an attack on the reasonableness of panellist's ruling, but in essence attack the correctness of her jurisdictional ruling.

15. The applicants claim that the previous collective agreement was not the only basis on which Tokiso had jurisdiction to arbitrate over the unfair dismissal claim. They contend that because the dispute was referred to Tokiso for conciliation and arbitration and since both parties participated in the Tokiso proceedings, Tokiso acquired jurisdiction to deal with the dispute when it accepted the referral of the dispute to it. The difficulty with this is twofold. The first referral led to the settlement agreement of September 2004. The meaning of that agreement is central to the question of whether there remains a live dispute which could still be referred to arbitration. If it settled the dispute once and for all, there was no referral to arbitration which could have followed the initial referral. As far as the arbitration before the second applicant is concerned, that referral was clearly accepted by Tokiso on a provisional basis, namely that there was a dispute over Tokiso's jurisdiction to hear the matter. It can hardly be seriously suggested that Tokiso accepted jurisdiction to arbitrate over the dispute, particularly where the employer party vigorously contested its power to do so.

16. Insofar as the applicants sought to rely on the previous collective agreement in terms of which disputes were referred to Tokiso, reliance on that document is

further complicated by the fact that the agreement was not part of the record before me and appears not to have been before the panellist, though she was obviously aware of it. It is true that it was common cause that such an agreement existed and no longer applied to new dismissal disputes between the parties. However, the effect of the termination of the collective agreement on disputes which had arisen before the termination date, is not something that can be settled with any certainty without having sight of that agreement and what replaced it.

17. Nevertheless, in this instance, the matter can be determined not by considering whether or not the panellist had the legal authority to entertain such a dispute by virtue of whether the collective agreement still applied, but by considering whether there was still a dispute in existence when the applicants sought to pursue the second applicant's unfair dismissal claim afresh. If in fact the dispute had been settled in terms of the settlement agreement then other considerations which might have had a bearing on the Tokiso panellist's legal authority to hear and determine the applicant's unfair dismissal dispute do not need to be considered. In other words, a jurisdictional fact which had to be established before the panellist could conceivably entertain the unfair dismissal dispute was whether or not there was still such a dispute to determine.

18. The panellist decided that this issue had been settled by the ruling of the MEIBC panellist. Because this review application turns on a jurisdictional question, it is not necessary to consider the correctness of the MEIBC arbitrator's reasoning as such, but to decide objectively if the matter was settled or not. If it was, the Tokiso panellist would have no jurisdiction to entertain the matter even if the previous collective agreement giving Tokiso jurisdiction to determine unfair dismissal disputes between the parties still applied.

19. The applicants advance a number of reasons why the settlement agreement did not end the second applicant's dismissal dispute. Firstly, it was argued that the parties were in dispute about whether or not the second applicant had in fact resigned or not. The second applicant contended he had been constructively dismissed and Samancor claimed he had resigned. The first sentence of clause 2 of the settlement agreement (above), which dealt with the second applicant's case, effectively

recorded these unresolved and conflicting contentions. This, so it was argued, was evidence that clause 2 recorded an unresolved dispute. In argument before me, Mr Faku, for the applicants expanded on this by explaining that the unfair dismissal dispute could not be considered finalised until there was an outcome which resulted in an award of reinstatement or compensation or, presumably, a finding that there was no dismissal or the dismissal was fair.

20. It is obvious that what the parties agreed in respect of the second applicant did not guarantee a certain outcome. What they agreed to was merely that the employer would give consideration to finding employment for him, and would not damage his prospects of employment by issuing an adverse job reference. If the employer had then provided an adverse reference or had not reasonably considered the second applicant's suitability for other employment, this might conceivably have given rise to another dispute over whether or not the employer had complied with the settlement agreement. However, there is nothing in the wording of the clause 2 which suggests that the parties anticipated the possible initiation of unfair dismissal arbitration proceedings if the second applicant was not employed. The mere fact that finality in the form of a finding about an unfair dismissal dispute was not included as part of the settlement agreement concerning the second applicant does not necessarily mean that agreement did not dispose of the dispute. In the cut and thrust of negotiations over a dispute settlement it is not improbable that the settlement agreement eventually arrived at is one that does not meet all the initial expectations of the parties. The outcome can often be far short of what a party had hoped for but is the best that can be achieved in the circumstances. It may also have a contingent character that does not guarantee the result a party hoped, when the agreement is subsequently implemented. This does not mean it cannot constitute a final resolution of the dispute.

21. Further, it is telling that in clause 5 of the settlement agreement the parties specifically singled out those dismissal disputes on which they could not reach agreement, namely those of Masinga and Komane. The final sentence of the settlement agreement confirms that it is final and binding on all matters mentioned in it except those on which the parties were unable to agree. If clause 2 was not intended to signify a final and binding agreement in respect of the second

applicant's unfair dismissal case, surely the parties would have expressly noted that in clause 5 as well? Their failure to do so suggests that clause 2 dealt with the full extent of the second applicant's dispute and was the final agreement even though its execution did not guarantee him eventual re-employment. Although the *exclusio unius est exclusio alterius* ('specific inclusion of one implies the exclusion of the other') rule is not a rigid rule of interpretation[3] its application here seems appropriate given the parties clear intention of identifying in clause 5 those dismissal disputes on which they had not reached an agreement.

22. Mr Faku further pointed out that the settlement agreement was described as "final and binding" but not as "in full and final settlement" of all matters in dispute. Ms Savage for Samancor responded by referring to the case of ***PPC Cement (Beestekraal) v Khunounal*** **[2000] 2 BLLR 153 (LAC)**, in which the Labour Appeal Court had to determine the meaning of the words "final and binding" contained in a private arbitration agreement. Zondo, AJP, as he then was, held as follows at 159, par [25]:

> *'In my view the phrase "final and binding' when used by the parties in an agreement where they appoint a third party to make a decision to put an end to their dispute, as was done by the parties in this case, means that once such third party has decided the dispute, the dispute comes to an end and none of the parties can initiate litigation if unhappy with that decision except, where applicable, by way of review proceedings. I hold that this is what the phrase "final and binding" meant and was intended to mean in the agreement of the parties in this case.'*

23. Although the phrase "final and binding" in the arbitration agreement in that matter referred to the effect of an arbitrator's decision, there is no reason in my view for interpreting it to have a different meaning where the parties use the phrase in a document which is styled as an "agreement of settlement" to encapsulate their intention that the dismissal cases mentioned in it are brought to an end and they are legally bound by the terms of the settlement agreement. Accordingly, I do not

[3] ***National Director of Public Prosecutions and Another v Mohamed NO and Others*** **2003 (4) SA 1 (CC)** at 17, par [40]

think that by omitting the phrase "in full and final settlement" makes the settlement agreement any less conclusive of those disputes.

24. In the light of the above, I conclude that however unsatisfactorily the settlement agreement might have worked out for the second applicant when it was implemented, clause 2 of the document was intended to be a full and final settlement of his dispute. Accordingly, there was no live unfair dismissal dispute for the Tokiso panellist to entertain even if the previous dispute resolution agreement between the parties still applied to his claim. Consequently, the second respondent had no power to arbitrate over the second applicant's unfair dismissal claim.

Order

25. The review application is dismissed.

26. The applicants are jointly and severally liable for payment of the third respondent's costs, the one paying the other to be absolved.

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing : 2 June 2010
Date of judgment: 30 July 2010

Appearances:
For the Applicant:
T Faku of ES Makinta Attorneys

For the Respondent:

K Savage of Bowman Gillfillan Inc.