IN THE HIGH COURT OF SOUTH AFRICA

(Witwatersrand Local Division)

Case no: 2004/26311
Delivered: 26/10/2004

In the matter between:

VAN AS, ANDRE Applicant

v

AFRICAN BANK LIMITED Respondent

JUDGMENT

Horn J:

The applicant is the chief executive officer of the respondent. The respondent has instituted disciplinary proceedings against the applicant and has suspended him from duty pending the outcome of the disciplinary hearing. This occurred on 12 August 2004. On 5 October 2004 the respondent forwarded to the applicant an agreement headed retrenchment agreement. The document was signed on behalf of the respondent by Nischal Fsrikais Khandai (Khandai) and was forwarded to the applicant for his consideration and acceptance on 5 October 2004. The extended date of the disciplinary hearing was 6 October 2004. Khandai was, on behalf of the respondent,

directly implicated in the disciplinary proceedings. On 7 October 2004, after the disciplinary hearing had been postponed to 25 October 2004, the applicant having considered the retrenchment agreement signed same indicating thereby his acceptance of the terms of the retrenchment agreement. All of this seems to be common cause.

The applicant's contention is that by the acceptance of the retrenchment agreement, which regulates all aspects of the applicant's termination of employment package, the parties intended that the termination of the applicant's employment and the terms surrounding such termination was hence forth to be governed by the retrenchment agreement. The respondent was not permitted, so the applicant contended, to dismiss him through the disciplinary procedure.

The respondent's answer to these contentions is that the disciplinary procedure was separate and distinct from the retrenchment procedure and consequently the conclusion of the retrenchment agreement between the parties did not override the right of the respondent to still dismiss the applicant depending on the findings of the disciplinary tribunal.

The matter is of some concern, particularly to the applicant. Should he be dismissed, besides the adverse impact such a dismissal will have on his employment record and reputation, he stands to lose considerably from a

financial point of view. In terms of the retrenchment agreement, the applicant's employment with the respondent will terminate in February 2005. Moreover the financial package he receives in such a case will be substantial and it is clearly more beneficial to the applicant for his termination of employment to be governed by the retrenchment agreement. The respondent has however intimated, not withstanding numerous letters which had passed between the respective attorneys of the parties, that it was not prepared to abandon or stay the disciplinary proceedings and insisted that the disciplinary proceedings should proceed. The applicant states that to dismiss him by virtue of the disciplinary proceedings would be in breach of the retrenchment agreement. By reason of this stance adopted by the respondent, the applicant approached this court on an urgent basis for an order:

(a) that the respondent specifically complies with the terms of the written retrenchment agreement concluded between the applicant and the respondent on 7 October 2004.

(b) Interdicting the respondent from dismissing the applicant on the basis of the allegations of misconduct levelled against the applicant in the respondent's notice to attend a disciplinary enquiry dated 21 September 2004 or on any other grounds known to the respondent's prior to 7 October 2004.

For the purpose of this judgement, the accusations and charges which have been levelled against the applicant in the disciplinary hearing are not relevant. Suffice it to say that the applicant denies that he acted untoward in respect of his employment with the respondent and states that he had been made a scapegoat by the directors of the respondent by virtue of severe financial losses which the respondent had occurred. It is however not necessary to consider these allegations.

The relevant clauses of the retrenchment agreement read as follows:

> *"Whereas the company and the employee agree as follows:*
>
> ***Termination of employment.***
>
> *1.1 The company and the employee agree that the employment of the employee with the company will terminate on 28 February 2005 due to the employee having accepted a retrenchment package from the company.*
>
> *1.2 Accordingly, it is certified and agreed that the employee's employment terminates due to retrenchment.*
>
> *1.3 This agreement is entered into by the employee and of his/her own desire and accord. It is recorded that the employee was not in any manner forced or coerced to conclude this agreement*

Settlement.

This agreement is entered into in full and final settlement of all claims of any nature whatsoever arising from or relating to the termination of the employment of the employee with the company and/or the employment of the employee with the company.

The employee specifically agrees to waive all rights of the employee to approach any court, tribunal or similar institution for relieve in respect of the issue of the termination of the employment of the employee and any claim in terms thereof.

It is further agreed that this agreement is considered to be in full compliance with all procedural requirements in terms of section 189 of the Labour Relations Act 1995 and all procedural requirements pertaining to operational requirement terminations."

The agreement continues to deal with the method of severance payments and other aspects regarding employment in general and then in clause 4.8 and 4.9 states the following:

"4.8 This agreement constitutes the required statutory written notice of the termination of the employment of the employee.

4.9 This agreement shall constitute the entire contract between the parties who by their signatures hereby acknowledge that no

representations have been made or warranties given or conditions or stipulations attached to any of the matters referred to in this agreement, save as set out in this agreement. No variation of this/other agreements shall be of any force or effect unless recorded in writing and signed by or on behalf of the parties by the representatives, duly authorised thereto."

It is the contention of the applicant that the nature of the retrenchment agreement is to affect a compromise between the applicant and the respondent of all disputes or claims that may have arisen between them arising from the applicant's employment with the respondent. The applicant states that the retrenchment agreement specifically makes provision for the procedure regarding the termination of his employment will ensue and consequently that the respondent had, by the signing and entering into the retrenchment agreement, abandoned the right to dismiss the applicant in any other manner. The effect of this is that the respondent, whilst it would be free to continue with the disciplinary hearing, would not be permitted to dismiss the applicant based on the findings of the disciplinary tribunal.

Mr Kennedy, who appeared on behalf of the respondent, argued that it could not have been the intention, particularly of the respondent, to take away from it the right to dismiss the applicant should the disciplinary

tribunal make such a finding. He argued that the retrenchment agreement was a separate and distinct procedure and had to be seen as standing apart from the disciplinary procedure.

I cannot agree with these contentions. If Mr Kennedy's contentions were to be correct, it would mean that one would have to read a condition into the retrenchment agreement making it subject to the right of the respondent to nevertheless proceed with the disciplinary dismissal against the applicant. In my view, such an interpretation is untenable.

Upon a reading of the retrenchment agreement the rights and obligations of the parties are stated in clear and unequivocal terms. No argument was forthcoming from Mr Kennedy that the terms of the retrenchment agreement were either ambiguous or unclear. The retrenchment agreement states in unequivocal terms that the applicant will be employed by the respondent until 28 February 2005, and that his employment could only be terminated in the terms as expressed in clauses 1.1, 1.2 and 1.3. The retrenchment agreement also states in unequivocal terms that the parties had settled, not just any disputes, but importantly all employment disputes between them. Clause 2 specifically states that the agreement is in full and final settlement of all claims of any nature whatsoever arising from or relating to the termination of the employment of the employee with the company and/or the employment of the employee with the company.

The agreement goes further to say that all termination procedures had been properly followed and that section 189 of the Labour Relations Act 1995 had been complied with. One cannot read into these provisions any suggestion that the parties had intended that the agreement was conditional. In fact the agreement by virtue of clause 4.9 in effect excludes any extrinsic or tacit terms and conditions, representations or warranties. The agreement expressly states that it is the entire agreement between the parties and that no alteration of whatsoever nature will have any effect unless recorded in writing and signed by the parties. I do not believe that the agreement can be any clearer than that. There can be no doubt, and Mr Kennedy did not argue to the contrary, that the parties must have intended the consequences of the agreement expressed in terms which were unequivocal and unambiguous.

It is common cause that the agreement was prepared and drafted by the respondent. It must have known what it intended when the agreement was drafted. Moreover, Khandai, who was directly implicated in the disciplinary proceedings, signed the agreement and offered it for acceptance to the applicant at a time when he was fully aware of the pending disciplinary hearing against the applicant and had direct insight to the charges that were being contemplated against the applicant. He must therefore have been fully aware of the implications of the retrenchment agreement *vis-a-vis* the pending disciplinary hearing and the dismissal

procedure there contemplated. If Khandai, or the respondent for that matter, intended that retrenchment agreement should be conditional on the basis that it was subject to the right of the respondent to continue with the disciplinary proceedings and to dismiss the applicant in terms thereof, the respondent could easily have said so. Applying the bystander test, I must say that reading the retrenchment agreement I have no hesitation in concluding that the parties intended that the retrenchment agreement would be in full and final settlement between the parties of all the disputes and claims between them. The agreement says so and it expressly sets out the circumstances as to how their employment relationship was to be governed in the future. Nowhere in the retrenchment agreement is anything mentioned of a disciplinary hearing or that the effect of the retrenchment agreement was subject to such a hearing. Where a contract is clear and unequivocal, effect must be given to it. Where a party alleges that provisions which are not clear in the agreement should be implied or read into it, the onus is on that party to show in what circumstances such an interpretation should be adopted. In African Realty Trust Limited v Holmes 1922 ad at p 396, Innes CJ said the following:

> *"It was strenuously contended, however, that such an alteration was not within the contemplation of the parties. But their intention must be gathered from the language they used. No doubt they did not at the time anticipate the particular change which had taken place. But that*

would not justify the Court in not giving its ordinary meaning to their perfectly plain language."

Whatever the respondent aimed to achieve by concluding the retrenchment agreement at a time when it was aware of the pending charges and disciplinary hearing against the applicant, is neither here nor there. Motive is not a consideration in a case such as this. In the African Realty case De Villiers JA at p 389 said:

"But now as a court we are after all not concerned with the motives which actuated the parties in entering into the contract..."

In my view there is nothing in the agreement or the papers which suggest that the parties intended anything else but that the retrenchment agreement should be the sole memorandum of the dismissal terms which would govern the future employment relationship between the parties. The effect of a compromise has been stated as follows by Leach, J in Carson v Minister of Public Works 1996 (1) SA 887 (E) at 893F-H:

"It is well settled that the agreement of compromise, also known as transactio, is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party

receding from his previous position and conceding something, either by diminishing his claim or by increasing his liability…It is thus the very essence of a compromise that the parties thereto, by mutual ascent, agree to the settlement of previously disputed or uncertain obligations."

In the present matter the dispute between the parties is the charges which have been brought against the applicant and the disciplinary hearing which could lead to his dismissal. By entering into the retrenchment agreement with full knowledge of the existence of the disciplinary hearing and the charges related thereto, the respondent intimated that it wished to change the situation. By accepting the terms of the retrenchment agreement the respondent in unequivocal terms agreed that the agreement was in full and final settlement of all claims of whatsoever nature arising from or relating to the termination of employment of the applicant. The retrenchment agreement is after all the respondent's agreement. The respondent could not have intended its clear and unambiguous terms to be regarded as *verba non scripto*. It is significant that on the 5th of October 2004, the day when the settlement agreement which had been signed by Khandai, was presented to the applicant for his consideration, acceptance and signature, the applicant's attorneys wrote a letter to the respondent stating *inter alia* the following:

"Our client has also been sent a document entitled retrenchment

agreement. This records an agreement that our client and yours agree on the termination of our client's employment with effect from 28 February 2005. The document also records further items purportedly agreed. Our client fails to understand how on the one hand your client can require his attendance at the disciplinary enquiry and on the other purport to record an agreement on his retrenchment."

From this it is clear that the applicant, when he received the retrenchment agreement, understood it to be a final settlement of the employment dismissal conditions between the parties. This letter was not replied to by the respondent. It was only some days later after several letters passed between the respective attorneys, that the respondent for the first time intimated that it insists that the disciplinary hearing should continue and that it regarded the disciplinary procedure as being separate and distinct from that of the retrenchment agreement. This, to my mind, appears to have been an afterthought. It was only after the retrenchment agreement had been concluded between the parties, that the representatives of the respondent must have realised that they had, when they entered into the retrenchment agreement, effectively contracted out of the dismissal of the applicant by way of disciplinary procedure. In Wilson Bayly Homes (Pty) Ltd v Maeyane and others 1995 (4) SA 340 (T) at 345E, Nugent, J as he then was, said the following:

"The contract in the present case was one of compromise. The nature of such a contract is that it is concluded because of rights of the parties are uncertain, and they choose not to resolve that uncertainty. By the very nature of such a contract, there can be little room for finding that the parties must have intended their contract to depend upon the existence of one or other of the factors relevant to their respective rights. It is precisely to avoid testing them that they compromise."

These comments, in my view, clearly illustrate how the respondent must be taken to have approached this matter. It wanted to settle a dispute which had arisen with the applicant concerning certain aspects or charges which had been levelled against him. It is not denied that the applicant disputed those charges and, in my view, it must have been the intention of the respondent once and for all to settle those disputes between them. In the Wilson Bayly case at pg 345H-J Nugent, J continues as follows:

"The appellant's counsel has submitted that the parties would not have settled the dispute had the true position been known to both of them. This is probably so. There would be few agreements of compromise at all if both parties were fully informed of the facts and the law relating to the dispute. However the question is not whether the appellant would have compromised had it been aware of one or other circumstance which excused it from liability. If the parties would have contracted

even if they had known that the particular state of affairs did not exist, then clearly it cannot be said that they intended their contract to be dependant thereon, but the converse is not equally true. The real enquiry in each case is whether this was a risk which they took. The appellant's counsel submitted that the only risk which was taken in the present case was whether an unfair labour practice was committed. I can see nothing in the agreement itself or in the surrounding circumstances to support that submission. There is nothing to suggest that when the parties reached their agreement they were ad idem that only one element of the dispute was to be compromised. What was in dispute was whether the appellant was liable to reinstate the respondents. It was that entire dispute which they compromised, and not merely one aspect thereof. In my view the possibility that there was no employment relationship, even if it had not occurred to them, was one of the risks assumed by the parties by the very nature if the agreement which they reached."

The aforesaid comments are apposite in this case. The dispute between the parties was clearly whether the applicant could be dismissed at the enquiry. That was a distinct possibility and was that dispute which the parties wanted to settle by virtue of the retrenchment agreement. There was no obligation on the respondent to have the retrenchment agreement signed up prior to the disciplinary enquiry. The Labour Relations Act only

requires that where retrenchment was contemplated that negotiations had to be initiated with the employees. It was not a prerequisite that the retrenchment agreement had immediately to be concluded. Knowing that the disciplinary proceedings were pending and dismissal of the applicant was a distinct possibility, the respondent could have held back the retrenchment agreement. By setting it up and signing it and then offering it for acceptance to the applicant with full knowledge of all those facts, the respondent in my view manifested its intention to be bound in terms thereof and consequently no longer to rely on dismissal provided for in the disciplinary procedure.

Mr Kennedy referred me to the authorities where the principle is enunciated that a court will not easily interfere with the disciplinary process. This may be so, but the problem for the respondent is that once it acceded to the terms of the retrenchment agreement, it expressly contracted out the normal disciplinary procedure which could have culminated in the dismissal of the applicant, and replaced it with the termination of employment procedure in terms of the retrenchment agreement.

Having regard to all the facts in this matter, I am satisfied that the applicant has established a clear right and that the respondent's continued persistence to implement the disciplinary proceedings which could lead to

the applicant's dismissal in those proceedings infringed upon the rights of the applicant set out in terms of the retrenchment agreement. In my view the applicant has met all the requirements for the obtaining of final relief.

Mr Koek, who appeared for the applicant, has asked that the respondent be ordered to pay the costs on the scale as between attorney and client. I do not believe that such an order is warranted in this matter.

In the result I make the following order:

1. The respondent is ordered to comply with the terms of the written retrenchment agreement concluded between the applicant and the respondent on 7 October 2004, identified as annexure A in the founding papers.

2. The respondent is interdicted from dismissing the applicant on the basis of the allegations of misconduct levelled against the applicant in the respondent's notice to attend a disciplinary enquiry dated 21 September 2004 or on any other grounds known to the respondent prior to 7 October 2004.

3. The respondent is ordered to pay the costs, included is the costs for the employment of two counsel.

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J.P. Horn
Judge of the High Court
Witwatersrand Local Division

Applicant's counsel	:	A Cook, SC
Applicant's attorneys	:	Bowman Gilfillan Inc
Respondent's counsel	:	P Kennedy, SC
Respondent's attorneys	:	Perret van Niekerk & Woodhouse Inc