IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 46/15

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL

DEVELOPMENT **Appellant**

and

C J C MYBURGH AND OTHERS **Respondents**

Summary: Labour Court making a settlement agreement an order of court – employer disputing entering into a settlement agreement and that State Attorney not having authority to negotiate on its behalf –further that absent a signature on agreement no settlement came to place - State Attorney sending settlement proposal to employees – employees making counter-offer which was rejected by State Attorney – State attorney giving deadline for acceptance failing which proposed offer would lapse – held that it is usually regarded as axiomatic that a counter-offer incorporates a rejection and therefore destroys the original offer. Where the offer is repeated after rejection of the counter-offer, it constitutes a new offer. As there was no proof of acceptance after the employees' offer was made there could not have been, factually, a contract that was concluded on the basis of the principles of offer and acceptance. Further that once the parties have decided

that they will reduce their contract to writing and that they will be bound by their written contract, then the contract comes into existence when, and only when, the written document containing the terms of the informal agreement has been signed by both parties. Labour Court's order set aside and appeal upheld with costs.

Coram: Waglay JP, Tlaletsi DJP and Phatshoane AJA

JUDGMENT

WAGLAY JP

[1] This is an appeal against the judgment of the Labour Court in terms of which the Court *a quo* made a settlement agreement an Order of Court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995.

[2] The basis upon which the Employer (the Minister of Justice and Constitutional Development-- the Appellant), appeals the judgment is that although it is reflected as a party to the written agreement, it never signed it and thus the Employer says that there was no written agreement concluded which could be made an Order of Court.

[3] The litigation that led to the controversy concerned a claim for payment of the sum of R318 537.54 pursuant to the conclusion of the collective agreement which the Employees (the Respondents) alleged were incorporated in their individual contracts of employment.

[4] It is alleged that after the statement of claim was served, the State Attorney representing the Employer and the Employees represented by their attorney attended a meeting on 28 March 2011. Importantly, there is no averment that at this meeting an oral agreement or settlement was concluded between the parties.

Following upon this meeting, the State Attorney telefaxed a settlement proposal to the Employees' attorney.

[5] The settlement proposal which took the form of a "Settlement Agreement" was forwarded on 8 April 2011. In the covering letter accompanying the settlement proposal, the State Attorney requested that the Employees return the signed agreements[1] indicating their acceptance of the terms of the settlement proposal.

[6] The Settlement Agreement prepared by the State Attorney contains *inter alia*:

a. a section at the end of the agreement which indicates that the agreement should be signed *inter alia* for and on behalf of the Employer.

b. it provides in paragraph 2 that this agreement is entered into and signed by the parties without admission of any liability by either party.

c. It embodies a clause recording that the agreement is the entire agreement between the parties and that no representations, terms, conditions or warranties not contained in the agreement shall be binding.

d. a further clause states that no variation or addition or deletion or consensual cancellation of the agreement will be effective unless reduced to writing and signed by and on behalf of the parties; and

e. It has a clause indicating that the signatories to the agreement warrant that they are duly authorised to represent the parties affected by the agreement.

[7] The agreement ends with the customary place for signature by the parties and two witnesses.

[8] The Employees did not sign the agreement but forwarded a counter-offer to the State Attorney for acceptance by the Employer. This counter-offer was rejected by the State Attorney with a caveat that the settlement proposal forwarded to the

[1] There were more than one group of litigants and an agreement was drafted in respect of each matter.

employees on 8 April is still open for acceptance until 12 August 2011 after which it will lapse and the litigation will then continue.

[9] The Employee did not accept the proposal by 12 August 2011 but did so a week later. On 19 August 2011, the employees' attorney advised the State Attorney that the Employees were prepared to accept the settlement proposal forwarded to them by the State Attorney on 8 April 2011.

[10] The entire matter for the Employees was premised firstly upon the averment that, the State Attorney, duly representing the Employer, made an offer on behalf of the Employer which they accepted. The second basis of the Employees' case is that the State Attorney was duly authorised to conclude the Settlement Agreement on behalf of the Employer and did so; although the Employer's signature was required, it was merely a formality not affecting the validity of the contract.

[11] In the answering affidavit, the Employer denied the conclusion of a Settlement Agreement and indicated that he gave no authority to the State Attorney to conclude the Settlement Agreement which committed the Department of Justice and Constitutional Development's (the department) funds to the payments in terms of the drafts. He further denied signing the agreement and mandating the State Attorney to enter into or negotiate the agreement. He indicated that any settlement offer had to be approved by him or his department and pointed out to the delegation of authority in his department indicating that the Chief Litigation Officer could settle claims under R500 000 and the Director General, above R500 000. He also took the view that the department had a good defence to the Employees' claims.

[12] The Court *a quo* seems to have adopted the view that, on the facts, the State Attorney made the offer and the Employees accepted the offer. The Court *a quo* also held that the State Attorney had ostensible authority to conclude the Settlement Agreement. Relying on the decision of *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) at paragraphs 10 to 11, the Court *a*

quo concluded that the State Attorney had the necessary authority to bind the Employer to the agreement.

[13] The Court *a quo* further concluded that since the agreement had already been concluded that, in accordance with the general principles, the written agreement was merely meant to serve as a convenience of record and facility of proof of a prior verbal agreement.

[14] In this appeal, the Employer contended, with reference to the written text of the agreement and the correspondence that passed between the various parties to the proceedings, that the State Attorney did no more than to draft a proposed settlement agreement, subject to the Employer's signature. The Employer referred to e-mails sent to him requesting a signature to the agreement. In one of the e-mails, dated 28 September 2011, the Employer was told that he needed to decide on signing the agreement. Furthermore, it is contended that the Employer's signature was necessary because the Employees were to be paid from the budget of the Employer's department. It is further argued that the text of the agreement made it clear that it would not be binding unless the Employer signed it.

[15] The Employees, on the other hand, contended that the Court *a quo* was correct in all its conclusions.

[16] In my view, the Court *a quo* got the process of offer and acceptance wrong. While it is so that settlement agreements can be concluded orally, the presumption can be rebutted on the facts of the case in accordance with the relevant authorities. (See: **Christie: Law of Contract, 6th edition at 52**). It is usually regarded as axiomatic that a counter-offer incorporates a rejection and therefore destroys the original offer. Where the offer is repeated after rejection of the counter-offer, it constitutes a new offer.

[17] In this matter, the Court *a quo* treated the State Attorney's letter of 8 April 2011 accompanying the settlement proposals as the offer and the Employees' signature on 19 August 2011 on the settlement proposals as the acceptance. There are two

reasons why, on the facts, this was erroneous. First, the proper analysis of the process of signing a written bipartite contract is that the first party to sign makes an offer and the other by his/her/its signature accepts. Second, the Employees' founding papers indicate that after receiving the settlement agreement on 8 April 2011, they made a counter-offer. This meant that the Employees had in fact rejected the offer made by the State Attorney on 8 April 2011. When the State Attorney rejected the counter-offer and said that its original offer remained open for acceptance until 12 August 2011 it meant that the Employer had made a new offer (*albeit* the same offer as before) but the offer was only open until 12 August 2011 after which it lapsed. The Employees in signing the agreement on 19 August 2011, after the expiration of the offer, were essentially now the offerors because they first signed the written agreement; after the offer made by the State Attorney had already lapsed on 12 August 2011; and it was then up to the Employer to accept the offer.

[18] As there was no proof of acceptance after the Employees' offer was made, there could not have been, factually, a contract that was concluded on the basis of the principles of offer and acceptance.

[19] The principle that an informal contract that was not intended to be binding until reduced to writing and signed does not constitute a contract, was adopted by the Appellate Division in *Goldblatt v Fremantle,*[2] in which Innes CJ said:

> 'Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement**, unless it is clear that the parties intended that the writing should embody the contract.** (Grotius 3.14.26 etc). At the same time it is always open to parties to agree that their contract shall be a written one (see *Voet* 5.1.73; V. *Leeuwen* 4.2, sec. 2, *Decker*'s note); and in that case there will be no binding obligation until the terms

[2] 1920 AD 123 at 128–9.

have been reduced to writing and signed. The question is in each case one of construction.' (my emphasis)

[20] The above *dictum* indicates that a factual enquiry must be undertaken to determine which situation is applicable.

[21] Once the parties have decided that they will reduce their contract to writing and that they will be bound by their written contract but not by any earlier informal contract, then the contract comes into existence when, and only when, the written document containing the terms of the informal agreement has been signed by both parties. (See: *Richmond v Crofton* (1898) 15 SC 183 189; *Hadingham v Carruthers* 1911 SR 33 38; *Goldblatt v Fremantle* 1920 AD 123 129; *Patrikios v The African Commercial Co Ltd* 1940 SR 45 56–7); *Mervis Brothers v Interior Acoustics and Another* 1999 (3) SA 607 (W) and *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA) at 83 F.

[22] In the present case, this controversy is resolved by examining the pleadings and adopting the approach to be taken in motion proceedings. There is nothing to indicate in the founding papers that, at the meeting preceding the drafting of the agreement, an oral agreement was concluded. This militates against applying the presumption that the written agreement was merely to afford facility of proof of a prior verbal agreement. The founding papers did not make out a case for a prior verbal agreement.

[23] An application of the well-known principles established *in Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (A) should have resulted in a dismissal of the application because the State Attorney's mandate, both actual or implied, was disputed by the Employer on grounds which could not be viewed as untenable given that the State Attorney did not sign the Agreement as the representative of the Employer nor for and on behalf of the Employer. In addition, the Employer's authority in the form of his signature to the Agreement was necessary as he was in control of the budget from which payment had to be made.

[24] This is a case where the objective facts show that the parties intended the contract to be in writing and the application of the principles that apply in motion proceedings could only result in this conclusion.

[25] The text of the written agreement prepared by the State Attorney also indicated that writing was essential to the validity of the Settlement Agreement. This much is plain from the terms of the agreement referred to above. The fact that the parties concluded a non-variation clause makes it all the more probable. The e-mail that I referred to earlier demonstrates that the Employer did not conduct himself in a manner from which one could infer that he was merely requested to sign a written agreement to serve as proof of an oral agreement that preceded it.

[26] It appears further that the Court *a quo* misapplied the decision in *Hlobo v Multilateral Motor Vehicle Accidents Fund* (*supra)*. The facts in that case demonstrate that the State Attorney concerned in fact concluded an agreement. The facts of this case are materially distinguishable because the State Attorney only prepared an agreement for signature by the Employees and his client.

[27] There is nothing that objectively showed that the State Attorney had ostensible or actual authority to conclude the Settlement Agreement. The fact that he prepared an agreement with the clauses that I have mentioned and such agreement was furnished to the Employer for consideration and signature demonstrates that this was a case where no agreement could be concluded until such time as it was signed.

[28] In the circumstances, the Labour Court erred in granting the relief sought by the Employees.

[29] The appeal should therefore be upheld with costs and the judgment should be set aside and substituted with an order dismissing the application with costs.

[30] In the result, I make the following order:

1. The appeal is upheld with costs;

2. The order of the Labour Court is substituted as follows:

"the application is dismissed with costs".

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Waglay JP

I agree

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Tlaletsi DJP

I agree

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Phatshoane AJA

APPEARANCES:

FOR THE APPELLANT:	Adv M Rip SC with Adv T Williams
	Instructed by Mpoyana Ledwaba Inc
FOR THE RESPONDENTS:	Adv F Van der Merwe
	Instructed by Weir-Smith Inc