REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, AT DURBAN

JUDGMENT

Reportable

Case No: D32/10

In the matter between:-

DEVANAND MALEK **Applicant**

and

TRANSNET BARGAINING COUNCIL **First Respondent**

MUHAMMED DOLLIE N.O. **Second Respondent**

TRANSNET LIMITED t/a TRANSNET RAIL ENGINEERING **Third Respondent**

Heard: **2 May 2012**

Delivered: **31 January 2013.**

Summary: Compromise - in the absence of an express or implied reservation of the right to proceed on the original cause of action, an agreement of compromise bars the bringing of legal proceedings based on such original cause of action even in unfair labour practice matters. Review of an award unsuccessful.

JUDGMENT

CELE J

Introduction

[1] In the absence of an express or implied reservation of the right to proceed on the original cause of action, an agreement of compromise bars the bringing of proceedings based on such original cause of

action. To what extent a party may dispute a signature alleged to be his, on that alleged written agreement, forms the gist of the issues at the heart of this application. The arbitration award dated 11 December 2009 issued by the second respondent under the auspices of the first respondent, holding the applicant to an agreement of compromise, is sought to be reviewed and set aside in terms of section 158 (1) (g) of the Act[1]. The third respondent in whose favour the award was issued opposed the review application, in its capacity as the erstwhile employer of the applicant.

Factual background

[2] The applicant commenced employment with the third respondent or the company in 1981. In May 2005 he held the position of National Customer Service Manager [NCSM] which was a level 110 position, reporting to Mr Richard Mosia. The General Manager Operations was Mr Frederick Potgieter and Mr Vuyo Matsam was the General Manager HC. He had to work closely with Ms Lynette Mangozha, the National Marketing Manager Coach Business and had to submit to her such of the documents as included monthly projected sales plans, various projects and such information relating to marketing functions as she could require of him.

[3] Sometime around August 2005 the company considered the positions of a number of its Customer Service Managers who held level positions 110 as the applicant did and it promoted them to level 109 but with the exclusion of the applicant. He wanted to know why he had not been promoted, contending that up until then he had a clean record and positive remarks. He drafted a letter dated 08 June 2006 as if it was written by Mr Mosia, recommending his promotion to level 109 and forwarded it, by email to Mr Potgieter and Mr Matsam. Mr

[1] The Labour Relations Act No 66 of 1995.

Mosia denied having prior known and having agreed to the drafting of the letter, when he was confronted by Mr Potgieter. The applicant was informed that Mr Mosia was distancing himself from any knowledge or association with that letter, the clear implication of which was that the applicant undermined his supervisor by bypassing hierarchical communications in seeking a promotion. The applicant became so stressed and strained by the developments on the issue that on one day he considered himself unable to continue with his duties. He left the office, leaving his laptop behind and drove to his residence from which he was later that evening, hospitalised for some days.

[4] It was still in June 2006 that he returned to work. He then reported that 10 of the 12 projects he had worked on and had completed, had been deleted from his laptop computer which he had left at his workplace during his sick leave. At some stage Mr Mosia sought to discipline the applicant by suspending him from duty for the promotional letter of 8 June 2006 but the company uplifted that suspension after it had investigated the matter and a decision was taken to rather discipline Mr Mosia. The applicant testified in that hearing. Mr Mosia was found guilty and a 6 months written warning was given to him.

[5] The applicant considered that he had not been fairly treated as he was not promoted to level 109 Manager. When continuous discussions with superiors did not produce the results he desired, he lodged a grievance which the company failed to resolve. He later referred an unfair labour practice dispute relating to promotion to the first respondent for conciliation. The dispute was not capable of a resolution.

[6] The dispute was referred to arbitration, at which hearing the company produced a written document headed: “Letter of Reprimand”. The company

led evidence of its witnesses who testified that:

- the file with 12 projects was never received by Ms Mangozha who said she only received by e-mail the sales plan which was also not completed and needed to be redone.
- Ms Mangozha did not receive from the applicant any other information that had been recorded on the document dated 14 September 2006.
- There were several meetings held by the company with the applicant to urge him to complete his projects. The final meeting was said to have been held on 27 October 2006 where the applicant was represented by the union officials, Messrs Mafikizolo and Meyer, while Mr Brown was assisting Mr Meyer as his secretary.
- At some stage of the meeting the proceedings were halted to allow the applicant and the union officials to have a causus meeting.
- The meeting ended with a letter of repremand being drafted and signed by four people present at that meeting, including the applicant.

[7] The evidence of the applicant amounted to a total denial that he had not completed the projects given to him. He denied having signed the letter of repremand on the basis that there would be no need for him to accede to being reprimanded. He denied that the signature appearing in the letter of reprimand was his. Accordingly the applicant denied having signed an agreement of compromise, which would have been an acknowledgment that he had yet to meet requirements for a promotion to a level 109 manager.

[8] The arbitrator hearing that matter, Mr Stapelberg found that the probabilities favoured the applicant`s version and he ordered the

company to promote him with retrospective effect. The company applied for the reviewing and setting aside of that arbitration award. It also preferred two charges of gross dishonesty against the applicant in the following terms:

1) In that he, in his capacity as a Profit Centre Manager with intent to mislead the arbitration hearing held on 8 August and 15-16 September 2008, denied any knowledge of the contents of the letter of non-performance, referred to as annexure E1 and further stated that the signature that he endorsed above the name “D Malek” was not his.

2) In that, again with intent to advance his personal interest at the expense of that of the company, he told the said arbitration proceedings held on 8 August and 15-16 September 2008 that he sent the file with the 12 projects to Lynette Mangozha.

[9] After some delay in the matter not being heard, a pre-dismissal arbitration hearing presided over by the second respondent, began in earnest. The company called and led the evidence of 5 witnesses while the applicant was the only witness for his case. The applicant was acquitted on the second charge for lack of sufficient evidence but was found to have committed the first charge. The second respondent considered the transgression to have been of such serious nature that he ordered the dismissal of the applicant with immediate effect. In the meantime this court dismissed the review application filed by the third respondent. The applicant initiated the present review proceedings.

Chief findings of the second respondent

[10] In the absence of a counter review application, evidence on the second count has become irrelevant for purposes of this application

as the applicant was acquitted of it. The findings of the second respondent are, inter alia that:

a) It was clear that the applicant had denied knowledge of his signature in respect of the letter of 27 October 2006 at the unfair labour practice arbitration.
b) There was evidence of two witnesses that the applicant was present in the meeting of 27 October 2006 and had signed the letter of reprimand. Their versions accorded with each other in a fair amount of detail to be considered consistent.
c) The case that the applicant advanced was that:
    I. He could not recall signing the document;
    II. He was very upset on the day and therefore could not recall signing the letter of reprimand;
    III. He did not sign the document and
    IV. There was no reason for him to sign the document.
d) The applicant's allegation that the reprimand was not necessary and therefore was not signed was without basis. There was no evidence to suggest that the reprimand was necessary. That was the applicant's version which fell to be rejected.
e) The effect of the applicant's denial on the previous arbitration award was not within the scope of the pre-dismissal arbitration to determine. The award was being reviewed and it could not be determined with certainty to what extent the arbitrator in that matter had relied on the evidence of the third respondent in respect of the unfair labour practice. Whether the denial of the signature was indeed a material fact in that case was not necessary to consider. It was the applicant's action, in denying with intent to mislead the arbitration, that was critical. There was no doubt that the applicant intended to mislead that arbitration in denying that the signature was indeed his.
f) The most telling evidence in this instance was that of Mr

Greenfield who stated that it was quite possible for an employee to forget signing a document, alternatively would not want to admit that he signed a document which would have had an adverse effect on his case, however a person who sees his signature would recognise it.

g) In considering whether the applicant was guilty of dishonesty, the rule on dishonesty was reasonable. Employees were bound to conduct themselves in a manner that was honest and ethical. It was furthermore, trite that employees would be aware of such a rule and should stand by the courage of their conviction and be honest with their employer.

h) It was clear that the applicant, as reflected in the record of the previous arbitration hearing, denied outright signing the document. There was evidence that that document was handed to him and to his representative and that both had time to consider it and therefore it could be concluded that he breached the company rule of not being honest.

i) The applicant's argument that other employees had done the same or worse cannot be considered as there was no evidence to support it and the issue appeared to be an afterthought in his testimony. By all accounts the rule appeared to have been consistently applied.

j) When action is taken against an employee in respect of which warnings are issued, the employer is attempting to correct such behaviour and to give such employee an opportunity to mend his ways. Actions are taken for very specific purposes which might be reduced to writing for confirmation. The onus rests on the employer to prove, where necessary, that it has acted consistently. In the event of an employee disputing having signed a written warning, the employer would have to lead evidence on the issue.

k) It was therefore unconscionable for a senior manager, in the

presence of his employer, the HR Manager and two representatives to deny that he had signed a document that was presented to him. To maintain that denial, even at the late stage did not bode well for the employee. To have the employer present expert evidence in respect of the document that two witnesses said he signed and the circumstances that confirm that he was at the meeting, to have the employer go through all of the cost and expense, based on his denial, was particularly aggravating. The employer was justified in arguing that such an employee could not be trusted.

l) The level of the employee as a manager and the level of dishonesty that was displayed had to be taken into account in determining whether a future employment relationship was indeed tolerable. No doubt the relationship with the organisation had been severely damaged.

Grounds for review

[11] The applicant outlined a number of the grounds for review in his founding affidavit and in the supplementary affidavit. There is substantial overlap between them, as correctly pointed out by counsel for the third respondent. The applicant identified evidence and a number of factors which according to him were essential but were either ignored or down played by the second respondent. His grounds include submissions that the second respondent committed misconduct and/or a gross irregularity and/or exceeded his powers in that:

a) In finding that there was no evidence to suggest that the reprimand was not necessary, he failed to take into account verbal and documentary evidence placed before him, including that:

i. There were praises by the applicant's supervisors

confirming that he knew his work well;

ii. He was asked to assist the other managers in their duties;

iii. Mr Potgieter had advised him that he would soon be promoted;

iv. The fact that he had an unblemished record of 25 years until the dispute arose regarding the letter recommending his promotion and then his performance allegedly just became intolerable;

v. The testimony of Messrs Meyer, Fikizolo and Mosia all confirming that the projects had been completed. If the projects were completed there would be no reason for the applicant to be reprimanded.

b) He failed to consider mitigating factors showing that the applicant's belief that he had not signed the document was reasonable under the circumstances and was due to the belief that he had not underperformed in any way and therefore it was not an intentional lie with the intent to mislead the arbitration;

c) In finding that the applicant intended to mislead the arbitration, the second respondent failed to properly consider the handwriting expert. He omitted to include in his summary the evidence of Mr Greenfield that it was reasonable for someone to deny having signed a document if it had been a long time ago, as forgetfulness, memory trickery and time all play a role when uncertain about a signature. Mr Greenfield accepted and could not dispute the applicant's version that he did not recall having signed the document, which should have cast severe doubt on the second respondent that the applicant was intentionally dishonest;

d) There were suspicious circumstances surrounding the meeting allegedly held on 27 October 2006, a day on which

his projects were produced;

e) In finding that the rule was consistently applied the second respondent failed to properly consider the evidence that other employees in similar positions had not faced pre-dismissal arbitration hearings and that Mr Mosia had blatantly lied to his superiors about the letter but he was only reprimanded with a six months warning notwithstanding him occupying a position higher than that of the applicant. The third respondent had failed to discharge the onus of proving consistency in matters of dishonesty in its workplace, especially with regards to the sanctions imposed.

Grounds in opposition to the review application

[12] The third respondent contends that the review application is in every sense an appeal under the guise of a review. What the applicant is said to have done was to provide court with a subjective and inaccurate summary of both the evidence at arbitration and the import of the commissioner's award. The submission is that the award is immune from a challenge on review. The submission goes on to say that the applicant at no stage introduced cogent and reliable evidence to say that he did not commit any wrong doing. On the contrary he changed his evidence from saying he did not sign the document to saying he did not recall signing it, in an apparent afterthought upon the production of the document and as a consequence of the opinion of his handwriting expert. The contention is that, even in the event court finds against any of the commissioner's findings of law and fact, it will not follow that the award is to be set aside on review, as the result of the arbitration proceedings was eminently reasonable and unassailable. Specific submissions of the applicant were then individually disputed.

Evaluation

[13] In setting out the standard of review, the court in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*[2] stated that:

> 'The standard of review
>
> [105] .....
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> [106] The *Carephone* test, which was substantive and involved greater scrutiny that the rationality test set out in *Pharmaceutical Manufacturers* , was formulated on the basis of the wording of the administrative justice provisions of the Constitution at the time, more particularly, that an award must be justifiable in relation to the reasons given for it. Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse section 145 of the LRA.
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> [107] The reasonableness standard was dealt with in *Bato Star*. In the context of section 6(2) (h) of PAJA 3 of 2000, O`Regan J said the following :"(A) n administrative decision will be reviewable if, in Lord Cooke`s words, it is one that a reasonable decision-maker could not reach".
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> [108] This Court recognised that scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny. However, the distinction between appeals and reviews continues to be significant.
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> [109] Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in "judicial overzealousness in setting aside administrative decisions

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[2] [2007] 12 BLLR 1097 (CC) at para 106 to 109.

> that do not coincide with the judge`s own opinions."This court in *Bato Star* recognised that danger. A judge`s task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

[14] The award being assailed is of a bargaining council and its review is permissible in terms of section 158(1) (g) of the Act which states that:

> 'The Labour Court may subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law.'

[15] Section 145 of the Act, as referred to in section 158 (1) (g), has now been suffused by the constitutional standard of reasonableness. That standard is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach[3]. In judging the decision of the second respondent for reasonableness, it will be impossible to separate the merits from scrutiny. However, the distinction between an appeal and a review will continue to be of significance.

[16] It remained common cause between the parties that certain documents relevant to this matter disappeared mysteriously and were not timeously available for the first arbitration hearing. One such document was what the parties have referred to as the letter of reprimand allegedly executed on 27 October 2006. Until it is challenged, it purports to be an agreement of compromise.

[17] In civil proceedings, in the absence of an express or implied reservation of the right to proceed on the original cause of action, an agreement of compromise bars the bringing of legal proceedings

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[3] See paragraph 110 in the Sidumo decision.

based on such original cause of action[4]. There is no legal basis why this principle of law should not hold good, where appropriate, in labour disputes. Accordingly, I hold that but for the challenge on the authenticity of the letter of reprimand, the applicant would in law, be debarred from referring an unfair labour practice dispute in circumstances where he would have compromised any of his rights to a promotion. Like novation, a compromise is a substantive contract which has an independent existence from the cause which gave rise to the compromise. It can therefore be enforced without the necessity of proving a prior cause of action or establishing a legal right pre-existing the compromise[5].

[18] As correctly submitted by Mr Hulley for the third respondent, by attacking the authenticity of the letter of reprimand, the applicant stands a chance of attaining the very right on promotion which the parties had by their signatures, (for a moment assuming their authenticity), acknowledged and agreed he would not be entitled to. The issue of whether he had been reprimanded would accordingly fall outside the scope of the probe of the honesty of his denial of the contested signature, with the exception to show his bona fides when he denied the authenticity of his signature.

<u>The contested signature on the letter of reprimand</u>

[19] From the beginning of the first arbitration hearing, almost until its end, the letter of reprimand was nowhere to be found. The applicant took an uncompromising position in denying having signed any such letter. Until its production, witnesses of the third respondent were testifying about a document allegedly signed by the applicant which was not

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[4] See Mothle v Mathole 1951 (1) SA 785 (T) and Jonathan v Haggie Rand Wire Ltd and Another 1978 (2) SA 34 (N).
[5] See Jonathan case pages 38E to 38A.

before the commissioner. At the second arbitration hearing the applicant took the position that he had no memory of having signed the letter of reprimand. In his founding affidavit the applicant stuck to the version that he could not remember signing the document and therefore that if he did, his denial at the first arbitration hearing was bona fide. In his supplementary affidavit and in the supplementary heads of argument the applicant has gone back to the original position of distancing himself from the signature on the document. The lack of memory is then the alternative position, in the event it is found that the signature purporting to be his is genuine. What could have been a simple matter has accordingly become compounded and voluminous, necessitating a protracted reading of the record. Separating the merits from scrutiny became impossible.

[20] The evidence of Mr Greenfield is crucial in this matter. He was an independent and unbiased witness who had no personal interest in the matter. His evidence was that he entertained no doubt that the contested signature was of the applicant. A handwriting expert instructed on behalf of the applicant came to the same conclusion. Mr Greenfield's evidence at page 97 of the transcript, the typed page is 36, includes the following:

> 'Ms Ndlovu Now you have testified that your opinion was based on a copy? ... Initially, yes. I formed an opinion, but I had to qualify it because I hadn't seen the original document. Mr Chairman, I ...[indistinct] a very important point forward. The spontaneity of the writing is the biggest individual characteristic if that person writes spontaneously normally. If the signature lacks the spontaneity of the genuine signatures that is very indicative that it wasn't written by that particular person. But the line detail of a copy is not clear, a photocopy, it's made up of toner or whatever and you can't see detail. Hence my notation in my report of the limitation. However later I was able to see the original and under a microscope I could see the fluency of the line of that signature. There was no indication of

> hesitation tremor that comes with say a person who is trying to trace a signature where the line is a solid line and not a fluency moving line that varies in pressure....But having seen the original I was quite happy to underline my opinion as to authenticity.'

[21] The second respondent then asked him about the circumstances under which a person who signed a document could forget having done so. Caution need to be exercised in this respect as the witness is not an expert on matters of brainwork. At page 102 of the transcript Mr Greenfield is recorded as having said:

> 'Then there is a specific document and on a specific document there are four signatures you know. And what was the first, second and third and fourth signature, we don't know. I don't know. However if the document required four signatures and one of them is Mr Malek, I don't think he would have forgotten. I mean my own view on this is that he signed the thing. I don't think this is one of those glibly written signatures on a document that was unimportant, it's important".

[22] There is no evidence of the applicant which had any significant challenge of the expert witness, which incidentally was confirmed by an expert instructed at his instance. On the evidence before me, the second respondent had to find that the applicant executed the disputed signature. In that respect, he committed no defect as defined in section 145 of the Act.

[23] The final probe turns on the bona fides of the applicant in denying his signature. There was only one version presented at arbitration of when the applicant appended his signature on the document. The applicant was, understandingly hamstrung by the defense he relied on to propose any other occasion when he could have executed that signature. While the nitpicking of discrepancies in the case of the third respondent may be justified, in my view, it will not disturb the overwhelming probabilities in favour of the third respondent's case.

That nitpicking amounts to no more than listing the grounds of appeal as opposed to those of review.

[24] The approach I have adopted in this matter makes unnecessary therefore that each and every so called ground of review should be individually dealt with. Suffice to say that none of the review grounds is meritorious, including one on consistency of the sanction, which was clearly an afterthought. The applicant signed the contested document with full knowledge and understanding of what he was about. He compromised his position to a promotion with the hope that he would improve his position to the point that he would be promoted. Interestingly enough, there is a similar instance where he again compromised his position in order to qualify for a bonus which he realised his peers had been given to his exclusion. His performance was found wanting. To get the bonus, he had to make certain concessions. While it is not necessary to examine the circumstances under which the applicant compromised his position on promotion, curiosity makes one wonder why, in the first place, he left the laptop, as opposed to the desktop, behind when the walls of his office crumbled on him. He remembers locking the office and driving away home. The normal action was to take the laptop away with him, in which instance there would be no allegations of the projects having been deleted.

[25] In the circumstances, the following order will issue:

1. The review application in this matter is dismissed.
2. No costs order is made.

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Cele J.

Judge of the Labour Court

APPEARANCES

FOR THE APPLICANT:	Adv K Allen
	Instructed by Henwood Britter & Caney
FOR THE RESPONDENT:	Adv. G I Hulley with Adv. T Manchu
	Instructed by Maserumule Inc.