IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 81/2022

In the matter between:

WESTON ARTHUR DUDLEY WHEELWRIGHT **Appellant**

and

CP DE LEEUW JOHANNESBURG (PTY) LTD **Respondent**

Heard: **29 November 2022**

Delivered: **21 February 2023**

Coram: **Davis et Sutherland JJA and Savage AJA**

JUDGMENT

DAVIS JA

Introduction

[1] This appeal concerns the interpretation of a settlement agreement concluded by the parties at the Commission for Conciliation, Mediation and Arbitration (CCMA) which the appellant contends extinguished rights enjoyed by the respondent,

pursuant to a restraint of trade agreement which the parties had previously concluded.

The factual background

[2] On 26 April 2007, the parties entered into an agreement of employment for a fixed term automatically terminating on 28 February 2010. Annexure A to the fixed term agreement of employment contained a restraint of trade agreement which, to the extent relevant, provided as follows:

> '1. In the event of the termination of my employment with the COMPANY for any reason whatsoever, I shall not be entitled, for a period of 24 (twenty four) months after date of termination of my employment with the COMPANY to be or become:
>
> 1.1 The proprietor of or partner in any business or firm;
>
> 1.2 A member or director of any company;
>
> 1.3 Connected in any way with any business, firm, company or other organisation (other than as an employee); which competes in any way with the COMPANY or which carries on the practice of quantity surveyor or project manager within a radius of one hundred (100) kilometres from any place of business of the COMPANY at which I was physically employed during the course of the 3 (three) year period which immediately preceded the termination of my employment with the COMPANY.
>
> 2. Neither shall I, for a period of 24 (twenty four) months following the date of termination of such employment, be entitled to conduct any business of the nature of the business conducted by the COMPANY, either on my own or as an employee of another business, with any person who was a Client of the COMPANY during the period of 3 (three) years immediately preceding the termination of my employment with the COMPANY. This shall include being employed by such Client.'

[3] Shortly before the termination of the relevant employment contract on 28 February 2010, the parties verbally agreed that the employment relationship between them would continue on a permanent basis and would be subject to the same terms and conditions as those contained in the written employment contract. In September 2010, the appellant, who had now qualified as a quantity surveyor, was appointed as an associate quantity surveyor by the respondent. When he was so appointed as an associate of the respondent in August 2010, the appellant was required to enter into a further restraint of trade agreement with the respondent which he concluded on 10 September 2010. The terms of this restraint clause, which was signed on 26 April 2010, essentially replicated the first restraint agreement; in particular, clause 2 thereof which is set out in paragraph 2 of the judgment save that the period of the restraint was extended to five years.

[4] In August 2015, the appellant was appointed as a director on the respondent's board of directors. Pursuant thereto, he purchased shares in the respondent and ultimately became the owner of 20% of the issued share capital of the respondent.

[5] In April 2021, the business of the first respondent experienced financial distress which resulted in a management decision that it was financially unviable to increase the salaries of its directors and employees, the parlous financial position having been exacerbated by the Covid-19 pandemic. The respondent thus reduced staff salaries including that of the appellant and his fellow directors.

[6] On 30 April 2021, the appellant generated an email to Mr Gary Andersen, a director of the first respondent, in which he refused to accept a salary reduction and claimed that the first respondent was in breach of the employment contract into which he had entered. After a series of exchanges, Mr Andersen accepted the appellant's proposal to "*move forward with the retrenchment considering that the company can no longer afford my services and I can no longer stomach your behaviour*".

[7] Further correspondence was exchanged between the parties, but, notwithstanding negotiations, the parties failed to reach agreement in respect of the monetary terms of the retrenchment, in particular, the calculation of severance pay due to the appellant. However, the failure to reach agreement did not deter the respondent which went ahead with the dismissal of the appellant based on its operational requirements. It then paid the appellant what it considered to be owed to him.

[8] Dissatisfied with this outcome, the appellant referred a dispute to the CCMA on 30 July 2021, alleging unfair dismissal and failure to pay the correct amount of severance pay which he insisted was due to him.

[9] When conciliation failed, the matter was referred to arbitration by the appellant. At the arbitration proceedings held before the CCMA, the parties settled the referred dispute in terms of a written settlement agreement concluded between them on 21 October 2021. The settlement agreement was contained in two separate documents. The first was in the form of a standard settlement agreement prepared by the CCMA. In this document, the parties "*record the settlement of their dispute in the following terms. By signing this agreement the parties acknowledge that the agreement was read to them and interpreted (where necessary) and that they understand the content hereof. This agreement is in full and final settlement of the dispute referred to the CCMA as well as in full settlement of all statutory payment due to the applicant as reflected at paragraph 5 of this agreement*..."

[10] The monetary settlement and all other issues were then set out in annexure A to the standard part of the agreement in which the following appeared:

> '1. Wheelwright referred a dispute to the Commission of Conciliation, Mediation and Arbitration (CCMA) under case number GAJB14739-21, the primary dispute being the calculation of severance pay due and payable to Wheelwright arising from his retrenchment.

2. The parties have agreed to the full and final settlement of all matters between them and wish to record the terms of the settlement of this agreement.

3. The parties acknowledge that they have entered into this agreement freely, voluntarily, without any duress and/or coercion, and after having carefully considered their positions and after having sought and obtained legal advice in respect hereof.

The parties agree to and record the rems of settlement as follows:

Withdrawal of Claim

4.1 Wheelwright withdraws his claims in the CCMA issued under case number GAJB14739-21 against CPDL. Each party shall pay their own costs in respect of the conduct of these matters;

Severance payment by CPDL to Wheelwright

4.2 CPDL will pay Wheelwright the balance of R600 000.00 in respect of Wheelwright's severance pay due and payable, in addition to an initial severance payment made pursuant to SARS tax directive number 30922167 dated 28 July 2021 (Wheelwright's tax number being 2309409144);

5. This agreement is in full and final settlement of all and any claims which the parties may have against each other whether such claim arise from contract, delict, operation of law, equity, fairness or otherwise.'

The appeal

[11] Why was the continued existence of the restraint of trade clause of such importance to the parties in the context of this dispute? The answer turns on the so-called Nigerian Brewery project. Anheuser – Busch In Bev SA / NV, (AB), a multinational drinks and brewing company, decided to construct a new brewery in Sagamu in Ogun State, Nigeria. While the respondent was hired by AB to undertake certain quantity surveyor (QS) services which were required in respect

of the construction of the brewery, the idea was that these were to be undertaken in two phases, the first commencing in 2015 and which continued until October 2018. Phase 2 commenced in August 2019 and continued to completion in January 2021.

[12] In August 2021, the respondent was appointed to perform further QS services on a project, which became known as the 'Gateway PH123 uplift' project, which was aimed at increasing the brewing capacity of the Nigerian Brewery. At that stage, the respondent was approached by High-Tech Processing (Pty) Limited acting on behalf of AB to complete a quotation in respect of these services.

[13] Pursuant thereto, the respondent concluded a framework contract on 20 October 2021 in terms of which it would provide a range of services to AB. Prior to the conclusion of this framework agreement on 16 August 2021, Mr Richard Barrow of High-Tech Processing (Pty) Limited generated an email to the appellant using the latter's email address at his erstwhile employer, being the respondent. He enquired: "*please can you advise if you would be interested in the QS services and if so how would you go about pricing such a thing with such little information?*" The following day on 17 August 2021, Mr Andersen replied to Mr Barrow "*please be advised that Weston has left the company with a restraint of trade in place. I have forwarded your queries to Nicolas in office that was involved in Nigeria as well as Zaakir will shortly reply to your questions and advise you [sic]*".

[14] Notwithstanding the framework agreement which had been entered into in October 2021, Mr Barrow wrote to Mr Andersen on 24 January 2022 in which he said the following: "*the client expressed their desires to continue with the same QS it was contracted at the time of the Greenfields build and specifically requested that we make use of Weston on this one. It is a difficult call for us to make as we had already negotiated and committed to De Leeuw, however we respectfully request that we adhere to the client's request and cancel the PO which has been issued to yourself*".

[15] Mr Andersen replied on 2 February 2022 at which time he pointed out to Mr Barrow that the appellant could not be involved in the project, given the terms of the restraint agreement, nor could he have access to any previous project information belonging to the first respondent. Mr Barrow responded that the appellant had adopted the attitude that the settlement agreement reached at the CCMA had extinguished the restraint agreement and he was therefore free to perform the QS services on the Nigerian Project. It was in this context that the dispute about the continued force of the restraint of trade agreement was heard by the court *a quo*. In summary, the respondent claimed the restraint clause was applicable and thus prevented the appellant from being employed to perform QS work for the Nigerian project.

The key dispute

[16] It follows that the essential dispute between the parties was the meaning and implications of clause 2 of the settlement agreement as set out in annexure A namely: "*the parties have agreed to the full and final settlement of all matters between them and wish to record the terms of the settlement in this agreement*", which was required to be read with clause 5 which reads thus:

> 'This agreement is in full and final settlement of all and any claims which the parties have against each other whether such claims arise from contract, delict, operation of law, equality, fairness and otherwise.'

[17] The appellant contends that reference to 'full and final settlement to all matters between them' (clause 2) and the further reference to 'full and final settlement of all and any claims which the parties may have against each other' (clause 5) included all claims between the parties arising out of the restraint of trade agreement which meant that the first respondent was prohibited from enforcing any rights which it might have had in terms of that agreement.

[18] By contrast, the respondent contended that it had not waived its rights in terms of the restraint of trade agreement and that the settlement agreement brokered by

the CCMA was meant only to cover matters that were referred specifically to the CCMA, which manifestly did not, in its view, include disputes concerning the restraint of trade agreement.

The judgment of the court *a quo*

[19] Sitting in the court *a quo,* Mkwibiso AJ accepted the submissions of the respondent that the claim based on a breach of the restraint of trade only arose after the signing of the settlement agreement and accordingly was not a claim in existence at the time that the settlement agreement was concluded. In the view of the learned judge, the reliance by the appellant on a judgment in *Toerien v University of Witwatersrand Johannesburg*[1] (*Toerien*) that the phrases employed in the settlement agreement covered any claim of whatsoever nature made in the future arising from the employment of the appellant was misplaced and thus inapplicable to the present case.

[20] The court held that in the *Toerien* case, the parties had specifically agreed to settle both current claims and claims that would arise in the future. By contrast, in the present case, "*the respondent had not waived its rights in terms of the restraint agreement. The surrounding circumstances demonstrated that the respondent wished to enforce its rights in terms of the restraint agreement by reminding the appellant of his obligations in terms of that agreement and that 'the terms of the CCMA settlement agreement are not enough to upset this conclusion of the employer's intention. Had the parties intended to include such future claims, it would have said so in the CCMA settlement agreement. Unlike in Toerien, they decided not to do so*".

[21] As it was not in dispute that, were the restraint agreement to have remained alive after the conclusion of a settlement agreement, the court *a quo* found that the appellant had breached clause 2 of the restraint agreement. It found further that his conduct was prejudicial to the protectable interests of the respondent to the

[1] (2021) 42 ILJ 2010 (LC).

extent that the respondent had lost work on the Nigeria Brewery upgrade project and the revenue that flowed therefrom.

[22] Ms De Witt, who appeared most ably on behalf of the appellant, referred to the fact that the settlement agreement included a standard form as well as a bespoke annexure. It is clear from the standard form agreement that the actual dispute which was referred to the CCMA, namely the appellant's claim for unfair dismissal following the fact that he had been retrenched, in his view, without consultation and absent justification and that the severance pay had not been properly calculated had been fully and finally settled in terms of the standard agreement. This provided clearly that "*this agreement is in full and final settlement of the dispute referred to the CCMA"*.

[23] Ms Dewitt went on to submit that, had this been the only issue which had been settled, there would have been no need for a further bespoke agreement as set out specifically in annexure A. Reading clause 2 and clause 5 of annexure A together, it was clear that the intention of the parties was to conclude an overall settlement agreement to settle all matters between the parties as well as "*all and any claims which the parties may have against each other whether such claims arise from contract, delict, operation of law, equity, fairness or otherwise*".

[24] Ms De Witt contended that, if clauses 2 and 5 had merely repeated that which was already provided in the standard form, these clauses in Annexure A would have been rendered entirely superfluous and without any purpose.

[25] By contrast, Mr Pincus who appeared on behalf of the respondent, contended that Annexure A to the settlement agreement could not be regarded as a self-standing agreement. It had to be read as an annexure to the standard formal agreement. Accordingly, clause 2 of annexure A had to be read with clause 1 thereof which provides "*the parties have agreed to the full and final settlement of all matters between them and wish to record terms of the settlement in this agreement*". In his view, the reference to a 'full and final settlement' of all matters between them "*could only be a reference to the two disputes which had been*

referred to arbitration and in which the primary dispute was the calculation of severance pay due and payable by the respondent to the appellant as specifically recorded in clause 1 of Annexure A".

[26] Regarding the email exchange between Mr Andersen and Mr Barrow, Mr Pincus submitted that it was only at this time, that the respondent became aware that the appellant could be employed as a quantity surveyor in terms of the Nigeria project and would therefore be in breach of the restraint of trade agreement. This occurred on 24 January 2022 and was confirmed on 3 February 2022. Only on the latter date could the respondent have been made aware that a dispute might arise in terms of the restraint of trade agreement; that is a considerable amount of time after the relevant settlement agreement had been concluded.

[27] On the basis of this reading, Mr Pincus submitted that there was no justification for the conclusion that the respondent had explicitly abandoned rights which it enjoyed in terms of the restraint agreement or that the respondent had exhibited any intention to waive such rights pursuant to an agreement concluded long before being aware of a potential breach of the restraint agreement.

[28] As noted, much was made of the judgment in *Toerien.* In this case, Coetzee AJ examined the meaning of the phrase "*payment had been made in full and final settlement of any claim of whatsoever nature against the university arising after the above mentioned matter and the employment of Marcus Toerien whether now or in the future*". The learned judge referred to the argument that this phrase meant that only if and when a claim arose from his employment and the matter was referred to conciliation and the determination of his employment had occurred. To this Coetzee AJ said[2]:

> 'This interpretation does not make sense. If that was the case then there was no need to refer to anything else but the matter before the CCMA. The matter before the CCMA was the termination of the applicant's employment. The phrase in 1.4 "and the employment" would be superfluous. In order to give any meaning to this

[2] *Toerien* at para 26.

phrase, “the employment” must mean something else than the matter before the CCMA or the termination. It cannot mean that only claims that arise from the termination of the employment and the employment of the applicant conjunctively. The wording indicates that claims arising of the termination of the employment have been settled. The wording further can only mean that apart from that, any claim arising from the employment of the applicant has been settled.’

[29] In the present case, the wording employed in annexure A went beyond a mere repetition of the words used in the standard form. In particular, as set out in clause 5, the wording referred to “*all and any claims which the parties may have against each other whether such claims arise from contract, delict, operation of law, equity, fairness or otherwise*”. Manifestly, this clause extends beyond the specific referral to the CCMA which is expressly covered in the standard clause. How else can one explain the reference in annexure A to claims based on delict, operation of law, equity, fairness or otherwise? None of these causes of action were relevant to the specific issues which have been referred to the CCMA and which were covered expressly in the standard form.

[30] As Unterhalter AJA reminds us in *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others,*[3] the task of judicial interpretation of contract is not to divine a meaning of a contract which the court considers to be the contract that the parties might or ought to have entered into or which may be ethically preferably. The interpretative process cannot eschew a careful examination of the words and sentences that have been employed in the contested provision to determine how these words lead to the intended purpose of relevant clauses.

[31] It is significant that annexure A was specifically constructed by the parties and their representatives who chose the express words which they considered would represent the purpose they had in mind in reaching a settlement agreement. That the specific words chosen in this agreement (annexure A) were included by the

[3] 2022 (1) SA 100 (SCA).

parties provides the clearest possible indication, when the text is read in context, of the purpose for which the agreement was concluded.

[32] In this case, an agreement was concluded subsequent to the termination of the appellant's employment. On the facts as set out, it was clear that the respondent was aware that the appellant may not adhere to the restraint agreement. There was thus the possibility that the respondent's proprietary interest would be infringed. Accordingly, clause 5 referred to all and any claims which the parties 'may have' and whether the source thereof would be in delict, operation of law, equity and fairness'. A sensible interpretation of the meaning of this phrase cannot be confined to the specific claims which were brought about the intervention of the CCMA.

[33] Aware as it was of the existence of the restraint agreement; it behoved the representatives of the respondent, if the latter was so concerned, to carve out an exclusion so that the restraint of trade agreement continued to be operative, notwithstanding the conclusion of annexure A. The absence of any attempt in this regard and the use of the words to which I have made reference, namely 'all and any claims' which the parties may have which was sourced in causes of action extended way beyond the contractual relationship between the parties. This conclusion is fatal to the interpretation sought to be placed on annexure A by Mr Pincus on behalf of the respondent.

[34] It must follow therefor that the court *a quo* erred in finding that the settlement agreement did not include a dispute that might arise out of the restraint of trade agreement.

[35] For these reasons, the following order is made:

Order

1. The appeal is upheld with costs.
2. The order of court *a quo* of 30 May 2022 is set aside and replaced with the following order:

"The application is dismissed. There is no order as to costs."

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Davis JA

Sutherland JA and Savage AJA concur.

APPEARANCES:

FOR THE APPELLANT:	Adv C De Witt Instructed by Webber Wetzel Attorneys
FOR THE RESPONDENT	Adv S Pincus SC Instructed by Assenmacher Brandt Attorneys