IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.: 16/94

In the matter between:

JOB MATSEBULA S OTHERS	APPLICANTS
AND	
INTERCON CONSTRUCTION	
(PTY) LIMITED	RESPONDENT

CORAM

C. PARKER	: JUDGE
R.C.M. BHEMBE	: MEMBER
D.P.M. MANGO	: MEMBER
For applicant	- Mr. M. Mnisi
For Respondent	- Mr. P. Flynn

RULING

The respondent in this matter has raised an objection in limine in the following terms, which appear in the respondent's amended reply –

1. Applicants have no legal right to receive further payments because they received and accepted all benefits from Respondents in full and final settlement of all their claims arising out of their employment as appears more fully in the signed receipts which are attached hereto marked annexures "A1" - "A5".

2. ALTERNATIVELY, in law the termination of Applicants' contracts of employment was fair because such termination was done for operational reasons and proper notice was duly given.

At the outset of the hearing on 29 July 1997, Mr. Flynn, counsel for the respondent, conceded that the alternative point raised in limine could properly be dealt with during the hearing on the merits, that is the objection cannot be raised as a preliminary or threshold issue.

Then from the record of the Court of an earlier call of the case on 5 December 1996, it was not clear if the respondent had abandoned altogether the remaining point raised in limine

The apparent confusion was cleared up in Chambers the following day, i.e. 30 July, by Mr. Flynn (for the respondent) and Mr. Mnisi, counsel for the applicant. From the explanations given by Mr. Flynn and Mr. Mnisi, (pointedly Mr. Mnisi appeared for the applicants on the aforementioned 5 December 1996, too), I was satisfied as follows: First, that what both counsel on 5 December 1996 consented to was that the hearing should proceed straight on to the merits of the case. Second, that the respondents' preliminary objection could be raised during the trial, i.e. during the hearing of the matter on the merits. Third, that it was not the understanding of both counsel that the respondent had abandoned altogether its preliminary objection. Finally, that what respondent's counsel withdrew was his position that arguments on the point raised in limine should be concluded first before the hearing

of the matter proceeded on the merits.
In my view, in a matter like the present one where a party raises any proper objection in limine, it is convenient and indeed sensible that the objection should be cleared out of the way, so to speak, by arguments by counsel (and oral evidence, if that is necessary) and a ruling of the Court thereon, if

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the preliminary objection is live, before proceeding to the hearing of the matter on the merits. The simple reason being that the case falls or stands for either party depending upon the ruling of the Court on the preliminary objection. In short, a preliminary objection is an issue that has to be determined before proceeding to the merits.

It was for this reason that the first point raised in limine which was live was argued on the aforementioned 29 July.

I now proceed to deal with the arguments on the point raised in limine. It must be pointed out that counsel's arguments were on the grounds of law only, and based primarily on the papers filed of record, namely the applicants' application and the respondent's amended replying answer.

In his argument, Mr. Flynn submitted that each of the applicants appended his signature or affixed his mark (being probably a thumbprint) to one of the five documents, namely A1 , A2,
A3, A4, and A5 (A1 to A5) which are annexed to the respondent's reply. He stated further that each document was, in addition, witnessed and dated .

A1 is signed by the first applicant, "Job Matsebula". A1 bears the signature of a witness, and is dated 16/07/93. A2 bears what appears to be a thumbprint, that of "Elias Ngwenya", one of the applicants. A2 also carries the signature of a witness and is dated 16/7/93. A3 also bears what appears to be a thumbprint, that of "Zacharia Ngwenya", one of the applicants. A 3 also carries the signature of a witness, and is also dated 16/7/97. A4, like A2 and A3, bears what appears to be a thumbprint, that of "Shadrack Ncube", one of the applicants. A4 also carries the signature of a witness, and is dated 16/7/97. A5 also bears a thumbprint, that of "Sandanezwe Dlamini". A5 also carries the signature of a witness, and is also dated 16/7/93.

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Against these facts, Mr. Flynn contended that the documents should be taken to be what they stand for. That is to say, each one of them is a compromise of any claim that each of the applicants may have had against the respondent. Each document, he submitted in argument, represents a full and final settlement which therefore brings to an end any claim the applicant may have had against the respondent.

It must be pointed out that all the five documents, i.e. A1 to A5,contain identical textual provisions. I shall set out hereunder A1 so as to illustrate the point –

"1726 JOB MATSEBULA

I HAVE RECEIVED THE SUM OF E1599.51 BEING FULL AND FINAL SETTLEMENT OF ALL CLAIMS ARISING FROM MY EMPLOYMENT.

I CONFIRM, I HAVE NO FURTHER CLAIMS.

SIGNED .....

WITNESS .....

DATE: 16/7/93"

The text is produced on the letter-head of the respondent's. The document is signed by one of the applicants and dated, and duly witnessed.
So it was Mr. Flynn ' s contention that all that this Court need do is to peruse each document, and

consider the terms contained therein and then determine whether those terms constitute a compromise on the part of each signatory applicant. He submitted that the Court need not go further than that

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In. sum, each of the documents speaks for itself. That is to say, having acknowledged receipt of the relevant amount indicated on the document applicable to him, the applicant in question agreed that the amount constituted a "full and final settlement of claims arising from my employment."

In support of his contention, Mr. Flynn referred the Court to Eric Mthandazo Mahlalela v Ubombo Ranches Ltd, Civil Appeal No. 32 of 1995. I shall revert to this case shortly.

Mr. Mnisi met Mr. Flynn's argument by pointing out that the respondents did not furnish its previous attorneys in this matter, before their withdrawal, with the documents A1 to A5.. This, he contended, meant that at the time that the previous attorneys filed the respondent's reply (i.e. on 19 September 1994) A1 to A5 did not exist. Had they been in existence, he added, they would have been part of the respondent't papers before the Court when the matter was to have been heard on 30 March 1995.

Mr. Mnisi submitted that no prejudice would be sufferred by the respondent if the hearing of the matter proceeded on the merits.

For the reason I gave earlier on in this ruling, I would respectfully disagree with Mr. Mnisi. I do not think it is proper for a hearing to proceed on the merits before a preliminary objection has been disposed of, so long as the preliminary objection is live.

Mr. Mnisi in his argument sought to introduce evidence from the bar. The effect of which was that when the applicants were called upon to sign or append their marks on the documents, they thought they were signing for their wages because the documents they signed were similar to those they usually signed when they received their wages.

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With respect, Mr. Flynn was correct in objecting to Mr. Mnisi introducing evidence from the bar containing issues that are not averred in the applicants' papers before the Court. (See Dodo v Dodo 1,990 SA 77 (w.).)

Even if Mr. Mnisi was right in doing so, as I say he was not, with the greatest respect I have considerable difficulty with that. In fact, I cannot accept that. From the applicants' own papers filed of record, it was absolutely impossible for any of the applicants to have earned as his basic wages and overtime pay for any given month the kind of money that was paid to him as shown in A1 to A5.

In addition it is highly unlikely that any time each of the applicants signed for his monthly (or other periodic) wages, such an acknowledgement of receipt of the wages was witnessed individually.

From the foregoing, I am of the view that when each applicant signed the document concerning him, he knew at the time that he was not signing for his wages or suchlike remuneration.

A fortiori if what Mr. Mnisi submitted in his argument has always been the case and therefore the contention of the applicants, I fail to see why the applicants by their attorneys did not convass this contention in a replication within seven days or any period at all after receiving the respondent's amended reply which raised the issue of A1 to A5.

In this connection it is significant to point out that the respondent's reply was served on the Applicant's Attorneys on 5 November, 1996, and moved in this Court on 13 November, 1996. Infact, by the consent of both counsel, i.e. Mr. Simelane for the respondent and indeed Mr. Mnisi for the applicants, the Court granted respondent's application to amend.

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It goes without saying that the applicants had eight days between the serving of the respondent's amended reply on the applicant's attorneys on 5 November 1996 and the date the application was moved on 13 November 1996 to have filed a replication. Neither did the applicants' attorneys thereafter pray for an extention of time to enable them file a replication if they were minded to attack the factual position purportedly engendered by A1 to A5, if they felt they needed time to obtain relevant instructions from the applicants.

As matters stand, the applicants have not filed any replication. In essence they have not raised any objection relating to the fact that each one signed the document concerning him and that the acknowledgement of what they were signing for was duly witnessed and dated. Seminal to this is the fact that the applicants have not raised any credible issue as regards the nature of the document that each one of them signed. I am therefore entitled to conclude that the documents and the terms they contain are not in dispute.

If that is the case, then what remains to be done so as to determine the objection raised in limine is for the Court to interpret A1 to A5. That is to say, I have to decide whether, as Mr. Flynn contended, A1 to A5 constitute a compromise, binding on the applicants and having the effect of an abandonment or waiver of any claim on the part of the applicants against the respondent arising from the former's employment in the respondent's undertaking.

As I mentioned earlier on, Mr. Flynn referred the Court to the case of Mahlalela in support of his contention. There the appellant Mahlalela sued the respondent in the High Court claiming E406,406.00 by way of damages for repudiation or breach of a contract of employment.

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The respondent raised by way of special plea an allegation that on 3 May 1991 the appellant entered into an agreement with it wherein the appellant agreed that having received E2.869.08 he would have no further claims arising from his employment or the termination of the contract.

I will not attempt to paraphrase the text of the document which was said to set out the contract because of its present relevance. I shall reproduce it here –

UBOMBO RANCHES LIMITED SHORT RECEIPT

I, E. Mahlalela do hereby certify that I have this 3rd day of May 1991 received the sum of E2.869.08 (two thousand eight hundred and sixty nine Emalangeni and eight cents) from Ubombo Ranches Limited which is in full and final settlement of all that was due to me up to and including the 15th day of March 1991.

I also certify that having received the above stated amount, I shall have no further claims against the abovenamed Company arising from my employment or the termination of my employment.

Signature of Recipient: E. Mahlalela Date 3.5.1991 Signature of witness: Illegible Occupation: Salaries Accountant "

In that case Schreiner JA (at p.2) had this to say –

"If the document is a receipt and nothing more it would not constitute a final bar to further proceedings: it would have evidentiary value only. However, if notwithstanding its designation by the Respondent as a receipt, it constitutes

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by its terms a binding contract of waiver or acceptilatio the special plea must be upheld and the appeal dismissed.

Like the Court in Mahlalela, this Court has to decide whether there was a contract giving rise to an abandonment or a waiver. It is significant to point out that for a few sementic differences the text of the document in Mahlalela are identical to that of each of A1 to A5. It is equally significant to point out that

the documents in the present case have no title similar to the one in Mahlalela , namely "SHORT RECEIPT". For this reason,coupled with what I said earlier on in this Ruling to the effect that , it is not correct that A1 to A5 were receipts . acknowledging the payment of wages, the question as to whether A1 to A5 were mere receipts does not arise in the present case.

In any case as the Appeal Court in Mahlalela observed (at p.4), "(A)s a matter of principle there should be no objection to a document constituting a simple receipt and, additionally, a contract of abandonment, acquiescene, release,renunciation, surrender or waiver."

In Mahlalela, after interpreting the terms of the document, the Appeal Court came to the conclusion that a contract was concluded between the appellant and the respondent whereby the appellant abandoned any futher claims against the respondent arising from the appellant' employment on the termination of his employment

In the present case the amount received by each applicant was acknowledged by each applicant as being in "full and final settlement of all claims arising from my employment". The clause "arising from my employment" is also used in the document

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in Mahlalela except that that clause is used as disjunctive to the clause "arising from the termination of my employment".

I am therefore entitled to assume that if the words "arising from the termination of my employment" were not present in that document that would not have made the Appeal Court come to a different conclusion and decision.

I am aware of the danger inherent in an uncritical acceptance of the argument such as the one submitted by Mr. Flynn, that a court should not hear a matter on the merits because it has been settled and therefore there is no dispute between the parties. Doubtless, an acceptance of such an argument without question can easily be exploited and abused by employers. It is probably for this reason that the court in PPWAWU & Others v Delma (Pty) Ltd (1980) 10 ILJ 424 (IC) refused to accept the respondent employers' argument the the applicant's employees could not approach the court because they had accepted a monthly payment "in full and final settlement" of their claims.

It is significant to point out that in this South African Industrial dispute case, the Industrial Court there rejected the idea that the common-law principle relating to the termination of obligations through compromise applied to a statutory claim such as this. (See le Roux and van Niekerk, The South African Law of Unfair Dismissal, p. 92 and fn 52.)

This, I presume, is the common law principle which Mr. Flynn relied upon in his argument when he referred the Court to van der Merwe, et al, Contract: General Principles,p. 365.

With respect I cannot agree with the thinking of the court in the case of PPWAWU & Others
"The common law can only be regarded as having been amended or repealed by the legislature by very clear language." (Per Will CJ in Ubombo Ranches Ltd v President of the Industrial Court and Another (High Court) 1982 - 11986 (I) SLR., at 269,)

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Indeed, as the learned authors of The South African Law of Unfair Dismissal have stated, in South Africa "in most decisions where the issue (of full and final settlement) has arisen, the court has been prepared to consider the merits of this type of argument." (See p. 92 and the cases there cited.) So even in South Africa where PPWAWU & Others was decided, the door has not been closed permanently to the argument of full and final settlement in industrial disputes.

In any case it seems to me to be the correct approach because to reject the argument out of hand is to maintain that in termination of services disputes there cannot be an ex-curia settlement. One must not lose sight of the fact that one of the objects of the Industrial Relations Act, 1996 (Act No. 1 of 1996) is to encourage the settlement of disputes through negotiation and settlement rather than

determination "in the more formal surrounds of a court." (See Swazi land Fruit Canners (Pty) Ltd v Phillip Vilakati and Barnard Dlamini, Industrial Court of Appeal Case No.: 2/87, at p.2.)

In my view in cases where the full and final settlement argument is set up the Court must arcertain whether there has been a settlement and whether the agreement which led to the settlement can stand up in law.

As I have said, in the present case we have only the applicants' papers and the respondent's papers filed of record. From the text of each of A1 to A5, there is no doubt that a contract was concluded in each case. The terms of each of A1 to A5 are to the effect that the applicant in question is abandoning any rights which he may have and making his abandonment clear in a final document.

In addition the words "I confirm, I have no further claim" in each of A1 to A5 means the signatory applicant makes it definitely valid the earlier statment that the receipt of the amount of money is in full and final settlement of any claim he may have arising from his employment. "Confirm"in the document means "make definitely valid (statment, evidence,

provisional arrangement)." (See Concise Oxford Dictionary, 8th ed.)

From the foregoing, it is my view that each of A1 to A5 is a written contract by which each applicant contractually abandoned all claims against the respondent arising from his employment, including the respondent's decision to terminate the services of the applicant.

In my view therefore the respondent's objection in limine is well founded. I would therefore uphold the point in_ limine.

Accordingly the applicant's application is dismissed. There will be no order as to costs.

Dr. Collins Parker

Judge of the Industrial Court