



IN THE INDUSTRIAL COURT OF SWAZILAND
JUDGMENT

CASE NO.10/2013

In the matter between:-

MANDLA MAMBA

APPLICANT

And

SWAZILAND CIVIL AVIATION AUTHORITY
RESPONDENT

Neutral citation: Mandla Mamba V Swaziland Civil Aviation Authority (10/2013) [2013] SZIC 16 (29th May 2013)

CORAM: D. MAZIBUKO
(Sitting with A. Nkambule & M.T.E. Mtetwa)
(Members of the Court)

Heard: 8th March 2013

Delivered: 29th May 2013

Summary: *Employment contract, employer and employee agree to separate and to settle a separation payment for the employee. Parties agree on the rules regulating the negotiation for separation and the payment.*

Employer purposely acts in breach of the rules and claims to have secured an alternative arrangement with employee contrary to the rules, Court declares rules regulating negotiation are binding on the parties. Unilateral deviation therefrom is invalid.

Settlement agreement: employee applies to Court to have settlement agreement made an order of Court. Court finds agreement to be valid and legally compliant. Court registers agreement as its order.

1. The Applicant, Mr Mandla Mamba has moved an application before Court for an order that;

“1. The agreement of settlement signed by the applicant on the 11th December 2012 and the respondent on the 21st December 2012 which is annexure ‘A’ hereto be made an order of Court in terms of clause 10 of the agreement.

2. Granting the applicant further and/or alternative relief.”

2. The Respondent is Swaziland Civil Aviation Authority, a parastatal organization with power to sue and be sued. The application before Court is opposed. The matter was brought to Court on notice of application without a founding affidavit from the Applicant. The Respondent has filed an opposing affidavit which is accompanied by two (2) confirmatory affidavits. This was followed by a filing of an answering affidavit by the Applicant. The Respondent's opposing affidavit was deposed to by its Director General, Mr Solomon Dube.
3. On or about the 1st October 2010 the Applicant was employed by the Respondent as a Technical Director -Flight Safety Standards. The employment contract was for a period of five (5) years. The Applicant's monthly salary in the year 2012 was E54, 206-20 (Fifty Four Thousand Two Hundred and Six Emalangeneni Twenty Cents).
4. On the 30th May 2012 the Applicant was suspended from work by the Respondent by letter dated the same day. The letter is annexed to the Applicant's affidavit and is marked MM1. The letter is signed by the Director General of the Respondent (aforementioned). It contains a number of complaints and allegations that the Director General had raised against the Applicant. The suspension was for a month. During the suspension the Applicant retained his employment benefits.
5. On the 12th June 2012, the Respondent wrote the Applicant a letter which is marked annexure MM2. The letter reads as follows;

“12th June 2012

“WITHOUT PREJUDICE”

Mr Mandla Mamba
P.O.Box 3121
Manzini

Dear Mr Mamba

RE: YOUR SUSPENSION FROM DUTY

1. We refer to the above matter.
2. Whilst the Authority in no way wishes to waive its rights to take appropriate action, the authority wishes to explore a possible amicable solution vis-à-vis the contents of our letter to you dated 30th May 2012 and yourself.
3. In the circumstances we propose to open the dialogue between yourself and the Authority, duly represented by Attorneys with a view to achieving same.
4. We advise that you appoint an attorney to represent you in this dialogue and the Authority will offer a contribution towards your legal fees to the amount of E5, 000-00.
5. The Authority will be represented by Mr Musa Sibandze of Musa M Sibandze Attorneys
6. Kindly advise us whether you are open to our proposal and if so who your nominated legal representative is within (5)five days of the date hereof.
7. The above proposal is made totally without prejudice to the rights of the Authority and all the rights reserved.
8. We look forward to hearing from you.

Yours faithfully
DIRECTOR GENERAL
SOLOMON DUBE

The contents of this letter will receive more attention later in this judgment.

6. Pursuant to annexure MM2 the Applicant appointed attorney Zweli Jele (of the firm Robinson Betram) as his representative in negotiation with the Respondent. The Respondent was represented by Attorney Musa Sibandze (of the firm Musa M.Sibandze Attorneys). The objective of the negotiation was for the attorneys to assist their respective clients to agree on a separation and an exit package payable to the Applicant. The parties had agreed in principle to separate but had to formalise their agreement and finalise outstanding issues such as the amount payable to the Applicant.

7. The attorneys proceeded to negotiate and further exchange correspondence on the matter with the objective to reach settlement. On the 8th October 2012 the Applicant's attorney proposed that the Applicant be paid the following benefits :-
 - 7.1 18 months salary,
 - 7.2 3 months notice pay, and
 - 7.3 outstanding leave pay.

The Respondent was agreeable in principle to this proposal.

8. It soon became clear to the parties that the settlement proposal aforementioned would be subject to a tax deduction. The goal on either side was to avoid receiving or making a payment that would attract tax liability. As a result the parties sought expert advice on the matter. The expert opinion that was received indicated that tax liability on the proposed payments was unavoidable. That advise led the parties to renegotiate some of the issues which they had agreed upon in principle.

9. The Respondent's attorney drafted a settlement agreement which contained a fresh payment proposal to the Applicant in the following terms:-

9.1	20 months salary	E1,084,124-00
9.2	3 months notice pay	E162,618-60
9.3	outstanding leave pay	E97,556-15
	Total Amount	E1,344,298-75

10. There were two (2) other issues which were of importance to the parties which the Respondent's attorney had incorporated in the written proposal aforementioned, namely -

10.1 the date of termination of the Applicant's employment was recorded as the 10th October 2012, and

10.2 a contribution towards the Applicant's legal fees was offered in the sum of E4, 000-00 (Four Thousand Emalangeni).

The draft agreement was sent to the Applicant's Attorney for signature. Though the Respondent was the source of the draft agreement, it sent the draft to the Applicant's attorney without signing it.

11. The draft deed of settlement aforementioned was accompanied by a letter dated 28th November 2012, annexure SD7. The content of this letter reveals the state of mind of the parties regarding progress made thus far in the negotiation. Annexure SD7 reads as follows;

“28th November 2012

WITHOUT PREJUDICE”

ROBINSON BETRAM
INGCONGWANE BUIDING
MBABANE

ATTENTION: MR ZWELI JELE

Dear Sir

RE: SWAZILAND CIVIL AVIATION AUTHORITY/MANDLA MAMBA

1. *We confirm your communication that your client will accept a further two (2) months remuneration on the initially agreed settlement, in full and final settlement.*
2. *We are most disappointed that your client seeks to “shift the goal posts”, as it where [were].*
3. *Previous correspondence will show that consensus had been reached as early as the 10th October 2012 and the only issue outstanding was the structuring of the package.*
4. *We have sought advice from client and await instructions.*
5. *The preliminary point of view from our client’s legal advisor is that the Board is likely to reject your client’s current offer and that the only way to induce their agreement is to present them with an agreement that has already been signed by your side and only requires client’s signature to close the matter and that the date of Agreement remain the previously agreed date of the 10th October 2012.*
6. *We request that you sign the Agreement attached hereto and return it to our offices in two original copies and we will try our best to prevail on our client to sign the Agreement.*
7. *In the meantime all our client’s rights are reserved.*

Yours faithfully

MUSA M. SIBANDZE ATTORNEYS”

12. According to the Respondent 's attorney, had the Applicant signed and returned the draft settlement agreement, that conduct would have amounted to the Applicant making the Respondent an offer. The Respondent's attorney indicated that upon receipt of that offer he would persuade the Respondent to accept it. That meant that if the Respondent had received from the Applicant a duly signed draft agreement and the Respondent proceeded to sign it, an agreement would have been concluded. The draft which the Respondent's attorney sent to the Applicant's attorney (without signature) served as a guide on the terms which the Applicant was expected to offer the Respondent.

13. On the 21st December 2012 the Applicant's attorney delivered a signed draft agreement to the Respondent's attorney. This draft amounted to a written offer made by the Applicant to the Respondent. However, that offer was not couched in the same language which the Respondent had suggested. There were two (2) significant changes in the Applicant's offer as compared to the model which the Respondent had suggested, namely;
 - 13.1 the agreed date of termination of the Applicant's employment was amended from the 10th October 2012 to the 1st December 2012, and

- 13.2 the Respondent's contribution towards the Applicant's legal fees (to settle this matter) was amended from E4, 000-00 (Four Thousand Emalangi) to E5,000-00 (Five Thousand Emalangi).
14. The Respondent received the Applicant's aforementioned written offer on the 21st December 2012. That offer was not acceptable to the Respondent. The Respondent proceeded to make a (handwritten) counter offer on the Applicant's draft, particularly on clause 7 thereof. The only detail which was altered by the Respondent was the termination date of the Applicant's employment. The Respondent cancelled the words *1st December 2012*, and replaced them (hand written) with the words *10th October 2012*. The Respondent together with the two (2) witnesses initialled the alteration, signed the counter offer and initialled all the other pages. The document was sent back to the Applicant's attorney the same day.
15. When the Applicant received the signed counter offer from the Respondent with the alteration in clause 7, he was faced with two (2) options. The Applicant could either accept the Respondent's proposal on the termination date as being the 10th October 2012 or reject it. The Applicant could indicate his acceptance of the counter offer by initialling the alteration in clause 7 of the counter offer. The Applicant accepted the counter offer and proceeded to initial the alteration in clause 7 as required.

Ordinarily, the effect of the Applicant's acceptance of the Respondent's counter offer meant that a contract had been concluded on the terms and conditions as embodied in the document.

16. The Respondent has correctly captured this principle in paragraph 26 of his affidavit as follows:-

“I submit that the purpose of sending the Agreement back to Mr Jele was for him to take instruction from his client on our amendment of clause 7 of the proposed Agreement and in the event his client agreed with our amendment he was required to endorse his initials on clause 7 and return the Agreement to our Attorneys. Likewise, in the event this was unacceptable to the Applicant then there was no Agreement”.

(Record page 11)

17. The Applicant had also confirmed this principle in paragraph 47 of his affidavit when he stated the following;

“ I did apply my mind to the changes when I met with my attorney on the 16th January [2013] and I reluctantly signed the amendments. Accordingly therefore, I accepted the counter proposal made by the respondent. At no stage was the counter proposal ever withdrawn nor was there any indication that the agreement was now being suspended.”

(Record page 51)

18. It is common cause that the Respondent's attorney forwarded the counter offer to the Applicant's attorney on the 21st December 2012. The Applicant initialled his acceptance of the Respondent's counter offer on the 16th January 2013. The duly signed agreement (annexure A) was delivered to the Respondent's attorney on the 16th January 2013. Between the period 21st December 2012 and 16th January 2013 certain developments took place which have caused the Respondent to challenge the prayer sought by the Applicant.
19. In the intervening period the sitting Minister for Public Works and Transport Honourable Ntuthuko Dlamini (Minister) made contact with the Respondent regarding progress made in the negotiation. The Minister expressed to the Respondent that he would engage the Applicant on the Respondent's behalf. The Respondent agreed to the Minister's proposal. The Applicant was thereupon summoned to the Minister's office.
20. The Applicant testified that he received a telephonic message on the 9th January 2013 calling him to a meeting at the Minister's office which was scheduled for the following day. The agenda was not disclosed to him. The Applicant's attorney was still on Christmas vacation. The Applicant could not therefore reach his attorney to report about the proposed meeting since the attorney's office was also closed for business.
21. On the 10th January 2013 the Applicant reported at the Minister's office in response to the summons.

The Minister was with his Principal Secretary Mr Cyril Kunene. The Minister's account differs from that of the Respondent concerning what was discussed and /or concluded at that meeting. According to the Applicant the following issues were mentioned at that meeting:

- 21.1 The Minister informed the Applicant that due to financial constraints the Respondent will not be able to meet its financial obligation arising from the separation agreement which the parties were negotiating. A decision had been taken not to continue negotiating the separation agreement but that Applicant should return to work.
- 21.2 The Minister went further to castigate the Applicant for failing to register an aircraft which he had been directed to register. The Applicant admitted to failing to register that aircraft but explained that there were procedural or technical obstacles beyond his control that stood in his way, he could not therefore register the aircraft.
- 21.3 The Applicant raised an objection concerning the discussion of matters relating to his work with the Minister. The Minister was not his employer. The Minister was neither in the Management Committee nor in the Respondent's Board of Directors. The Minister had no authority to discuss matters relating to the Applicant's employment with the Respondent.

The Minister's reply was that the term of office of the Respondent's board had expired, he was then going to handle the matter.

21.4 The Applicant further objected to the Minister's departure from the rules of engagement. The parties had agreed at the inception of the separation agreement that the negotiation would be done through their respective attorneys. The Minister's conduct was a complete disregard of a crucial procedural rule. The Applicant reserved his right to consult his attorney on the proposals that would be tabled by the Minister at that meeting.

21.5. Out of respect for the Minister the Applicant remained in attendance and politely listened to the Minister's presentation and proposal. The Applicant however stated that he would defer to his attorney for advice on critical issues.

21.6 The Minister pleaded with the Applicant to return to work. The Applicant however resisted any prospect of returning to work. In the Applicant's view it would have been suicidal to return to work in light of the treatment he had received from the Respondent and the circumstances under which he had been suspended.

21.7 According to the Applicant, no agreement was concluded at that meeting with the Minister.

Instead, the parties agreed to postpone the discussion for another day. The parties made two other attempts to meet but failed. They eventually met on the 16th January 2013.

- 21.8 On the 16th January 2013 the Minister repeated his request for the Applicant to return to work. The Applicant refused to return to work, but insisted on the separation. That meeting ended without an agreement. The Applicant went to see his attorney.
22. The Applicant met his attorney on the 16th January 2013. The Applicant learnt about the counter proposal which the Respondent's attorney had delivered to the Applicant's attorney on the 21st December 2012. It was then that the Applicant accepted the counter proposal as mentioned in paragraph 15 above. The signed document (annexure A) was returned to the Respondent's attorney the same day. According to the Applicant, an agreement was concluded between the parties (annexure A) the day he initialled clause 7 of the Respondent's counter offer and communicated his acceptance to the Respondent's attorney.
23. Thereafter, the Applicant brought an application before Court and prayed that the agreement (annexure A) be made an order of Court. In filing that application the Applicant acted in accordance with clause 10 of the agreement which reads as follows;

“This Agreement may be made an Order of Court by either party upon notice to the other”.

(Record page 5)

24. The Respondent has a different version regarding the effect of the discussion that took place between the Applicant and the Minister. The Minister’s version is stated as follows:

24.1 It is common cause that the 1st meeting took place on the 10th January 2013. The Minister’s version is that he informed the Applicant that *‘the Respondent had since changed its position and was now offering that the Applicant should remain in employment and resume work. The Applicant was agreeable’* to this proposal.

24.2 The Applicant however feared that he might be victimized if he returned to work. In order to allay the Applicant’s fear the Minister undertook to arrange a meeting involving the Respondent’s Executive Management and the Applicant. The purpose of that meeting was to give the Applicant assurance that he would not be victimized if he were to return to work. The Applicant agreed to meet both the Minister and the Respondent’s Executive Management for a further discussion.

24.3 The meeting with the Respondent’s Executive Management was scheduled for 14th January 2013.

However that meeting did not take place as scheduled. It was postponed twice without success (as aforementioned).

- 24.4 The Minister eventually met the Applicant on the 16th January 2013. The Minister was in the company of his Principal Secretary (aforementioned). The Respondent's Executive Management was absent. The Applicant was by himself. At that meeting the Applicant informed the Minister that he has changed his mind and was not interested in being employed by the Respondent.
- 24.5 After the meeting with the Minister the Applicant proceeded to his attorney where he signed the counter offer and thereby executed the agreement. The agreement duly signed and executed was returned to the Respondent's attorney same day (16th January 2013.)
25. The Respondent's argument is that the intervention by the Minister, especially the offer of continued employment which the Minister mentioned to the Applicant, had the effect of revoking the counter offer which the Respondent had delivered to the Applicant's attorney on the 21st December 2012. After the Minister had offered the Applicant continued employment, it was no longer open to the Applicant to accept that counter offer and execute the agreement.
26. It is apposite to first examine the effect of the Minister's intervention on the ongoing negotiation between the parties.

On the 21st December 2012 the Respondent made a counter offer to the Applicant which was delivered the same day. The only issue which the Applicant had to decide was whether or not to accept the 10th October 2012 as the date of termination of his employment with the Respondent. The Applicant could only indicate his acceptance by initialling clause 7 of the Respondent's counter offer and delivering same to the Respondent's attorney.

27. The Respondent is not challenging the manner the agreement was signed or initialled. The Respondent's argument is that the signing took place after the intervention by the Minister on the 10th January 2013. The intervention by the Minister allegedly had the effect of revoking the Respondent's counter offer of the 21st December 2012.
28. About the 12th June 2012 the Respondent wrote the Applicant a letter (annexure MM2) in which the former proposed to the latter that while the Applicant was under suspension the parties should negotiate a separation agreement. The Respondent stated further that communication should be done through the attorneys. The Respondent introduced their attorney and invited the Applicant to instruct an attorney for this matter. The letter (annexure MM2) has been reproduced in paragraph 5 above. The Applicant accepted the Respondent's proposal by letter dated 17th June 2012 (annexure MM3).

28.1 In that letter (annexure MM3) the Applicant introduced Mr Zweli Jele as his attorney. An extract from annexure MM3 reads thus;

“On the notion of an amicable solution, I have carefully considered your suggestion, but have been constrained by the lack of details as to the nature of the proposed solution. For this reason, I do accept with reservation the invitation to discuss the matter and nominate Mr Zwelethu [Zweli] Jele of Robinson Bertram Attorneys to be my representative at such discussions”.

(Record page 76)

28.2 There was therefore an agreement that was concluded in June 2012, in terms of which the parties agreed to regulate their negotiation for a separation agreement. The rule was that communication should be conducted only through the respective attorneys for the parties. This agreement was confirmed by the Respondent by letter dated 28th June 2012, annexure MM2B. That agreement is valid and binding on the parties.

28.3 Both parties stood to benefit from their agreement to conduct their communication and negotiation only through the attorneys. Attorneys are professional in the manner they discuss and handle legal issues, they are skilled in drafting correspondence and agreements, and further they are guided by ethics when executing their duties.

29. At all times material hereto the Respondent was accordingly aware that the Applicant is legally represented in the matter. The Applicant did not waive his right to legal representation. The respective attorneys for the parties were in frequent contact with each other and regularly exchanged correspondence on the matter. The parties did not amend their June 2012 agreement.
30. Before the Minister intervened in the matter, he mentioned to the Respondent that he would engage the Applicant on behalf of the Respondent. That statement meant that the Minister offered to intervene as the Respondent's representative. The Respondent agreed to that proposal. The Applicant was not consulted. The Minister did intervene as promised. Since the Minister intervened on a mandate from the Respondent as aforesaid, that would mean that both the Minister and the Respondent had breached the rules of communication, since the Minister lacked the capacity to legally represent the Respondent. The Minister did not claim to be an attorney.
31. While the agreement of the 17th June 2012 subsists, the parties could only be represented by their attorneys when communicating on the matter. They divested themselves of their power to communicate directly with each other or be represented by any person other than an attorney. This is what was meant by the Respondent when he stated as follows in annexure MM2;

“ In the circumstances we propose to open the dialogue between yourself and the Authority [Respondent,] duly represented by Attorneys with a view to achieving same.”

(Underlining added)

(Record page 5)

The June 2012 agreement was the basis upon which the Applicant agreed to commence negotiating a separation agreement.

31.1 The Respondent did not create an exception to the June 2012 agreement, that would allow her to be represented by a Cabinet Minister or any other person who is not an attorney.

31.2 The Minister’s intervention in the matter on the 10th and 16th January 2013 was accordingly irregular, inter alia, for lack of capacity on the part of the Minister. The Respondent cannot derive any benefit from an irregular ministerial intervention.

31.3 The Respondent cannot predict what the outcome of the meeting of the 10th January 2013 could have been, had the Applicant been permitted to exercise his right to be represented by his attorney. The Applicant suffered prejudice due to the absence of his attorney at that meeting.

32. It is further noted that the Applicant was not legally represented in any of the meetings with the Minister. Again the Minister and the Respondent were in breach of the rules of communication. Neither the Minister nor the Respondent could deny the Applicant his right to legal representation. Any meeting held in the absence of the Applicant's attorney was irregular. It had no legal effect on the ongoing negotiation between the attorneys for the parties. The Respondent's argument that, that meeting had the effect of revoking the Respondent's counter offer of the 21st December 2012 is rejected. At best that meeting could be described as an informal talk between the Minister and a subordinate citizen.
33. Where parties who are engaged in negotiation, agree on the rules of communication and one party unilaterally decides to communicate contrary to the rules, he cannot thereafter claim to have properly communicated to the other party by such alternative means. There would be no point in the parties agreeing on the rules of communication if one party can break such rules as and when it suits him. Parties therefore who agree on the rules of communication to regulate their negotiation are bound by those rules, any deviation therefrom is irregular save where it is done by mutual consent. The discussion between the Applicant and the minister on the 10th and 16th January 2013 is accordingly irregular and unenforceable.
34. The meeting between the Applicant and the Minister is irregular for another reason.

The Minister called the Applicant to a meeting without giving him an agenda. The Applicant therefore went to meet with the Minister not knowing what the meeting was about.

35. By his conduct the Minister denied the Applicant a chance to prepare for that meeting and to arrange legal representation. The Minister knew that he was going to raise crucial issues at that meeting relating to the Applicant's continued employment with the Respondent, but hid that fact from the Applicant. The Minister was aware that those crucial employment issues are subject to negotiation between the attorneys for the respective parties but purposely avoided inviting the Applicant's attorney to that meeting. The Applicant was ambushed into the meeting of the 10th January 2013 by the Minister. The Respondent cannot predict how the Applicant would have responded had he been given an agenda, in time. In the circumstances the Minister's conduct was unprofessional, unfair and legally unacceptable. For this reason as well the Court sets aside any discussion that proceeded in that meeting.

36. The details of what transpired at the meeting of the 10th January 2013 between the Minister the Applicant are of crucial importance. The parties differ in the versions which they presented.

36.1 The Minister's account of the discussion of the 10th January 2013 is captured in the Respondent's affidavit as follows;

“30. *The Honourable Minister informed the Applicant that the Respondent had since changed its position and was now offering that the Applicant remain in employment and resume work.*

31. *The Applicant was agreeable and after some discussion it was agreed that in order to allay the Applicant’s fears that he may be victimized or that some form of action may be taken against him on his return, the Minister would facilitate a meeting with the Respondent’s Executive Management together with the Applicant to re-assure the Applicant.”*

(Record page 12-13)

The Minister filed a confirmatory affidavit to verify the contents of the Respondent’s affidavit concerning himself.

36.2 The Minister stated that he informed the Applicant at the meeting of the 10th January 2013, that the Respondent has changed its position, the Respondent is now offering that the Applicant should return to work. According to the Minister the Applicant was agreeable to the Minister’s proposal, that means that the Applicant was willing to consider that proposal but it does not mean that he actually agreed. The Minister as well as the Respondent is aware of the difference between these two (2) words (*agreeable and agreed*) as he has used both words differently in the same sentence, in the same quotation. The Applicant has already stated that he did not agree to the Minister’s proposal.

37. According to the Minister, the statement he made to the Applicant on the 10th January 2013 was a notification to the Applicant that the Respondent has revoked its counter offer of the 21st December 2012.

37.1 This aspect of the Minister's evidence should be considered together with annexure MM4 to the Applicant's affidavit. Annexure MM4 reads thus

“

22nd January 2013

Mr Mandla Mamba

P.O.Box 3121

MANZINI

REINSTATEMENT TO YOUR POSITION AT SWACAA

Reference is made to the above matter

I wish to advise you that the Minister for Public Works and Transport has requested that the Authority reinstates you to your position before your suspension. Accordingly, your suspension is hereby lifted.

SWACCA will immediately pay you all salary arrears and other benefits that are due to you from the time of your suspension.

By this letter, you are kindly requested to report for duty or on or before the 4th February 2013.

Yours faithfully

SOLOMON DUBE
DIRECTOR GENERAL

37.2 Annexure MM4 is a letter written by the Respondent to the Applicant. According to this letter, it is the Minister who requested the Respondent to reinstate the Applicant to the position before suspension. The Respondent merely complied with the Minister's decision. The Respondent proceeded to convey the Minister's proposal to the Applicant to return to work.

37.3 The letter (annexure MM4) is dated 22nd January 2013. That means that the Respondent purported to communicate its decision to reinstate the Applicant on the 22nd January 2013 (or shortly thereafter). At that time the Applicant had already initialled and executed the settlement agreement (annexure A). The Applicant had communicated to the Respondent its acceptance of the counter offer on the 16th January 2013.

37.4 The legal position regarding acceptance of an offer is expressed by the authorities as follow;

“The acceptance itself must be communicated to the offeror, and until it has been so communicated no contract is constituted. The communication must be made in the manner indicated by the offeror, ”.

GIBSON JTR: WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW 6TH edition (Juta) 1970 at 307,(ISBN not available)

37.5 The Applicant did comply with the agreed means of communication. The acceptance was communicated by the Applicant's attorney to the Respondent's attorney. The offer was accepted within a reasonable time (less than a month). As a result of that communication a binding contract (annexure A) was concluded between the parties on the 16th January 2013.

37.6 On the 22nd January 2013 the Respondent purported to revoke the counter offer which it gave the Applicant on the 21st December 2012. At that time it was too late for the Respondent to revoke that offer. Once an offer is accepted, a contract is thereby concluded. There is no longer an offer that can be revoked. Legal authorities are in agreement on this point;

“Since no contract is constituted unless and until the offer is accepted, the offeror may (except as stated directly) revoke or withdraw the offer at anytime before it has been accepted, visa versa, if the offer has not been revoked it remains open for a reasonable period , but if accepted within such time, the offeror can no longer revoke it for the contract has been concluded.

GIBSON JTR: ibid pages 307-308

“An offer does not bind the offeror until acceptance, and may lapse or be revoked at anytime before acceptance.”

LEE AND HONORE: THE SOUTH AFRICAN LAW OF OBLIGATIONS, 2nd edition (Butterworths) 1978, ISBN 0409 04000 2 at page 24

37.7 The purported letter of revocation (annexure MM4) was written after the contract was concluded. It is therefore invalid and has no effect on the application before Court. The legal position on revocation has been aptly stated as follows;

“The revocation of an offer takes effect only when it reaches the offeree. So in the case of offer and acceptance made by correspondence, the offer is revoked only if the revoking letter reaches the offeree before he has posted his letter of acceptance. The same principle applies where offer and acceptance are made by telegram.”

Gibson JTR: ibid page 308

“An offer can be revoked at any time by the offeror provided there has been no acceptance. Once acceptance has taken place, however, there can be no revocation. In the absence of revocation, and of any stated time limit, the offer remains open for a ‘reasonable’ period (Dietrichsen v Dietrichsen 1911 TPD 486 at 496). What is reasonable will depend on the type of contract and the peculiar circumstances of each case.”

GIBSON: SOUTH AFRICAN MERCANTILE AND COMPANY LAW, 7th edition (Juta) 1997, ISBN 0 7021 4058 9 page 34

- 37.8 As at the 16th January 2013 there was nothing that prevented the Applicant from accepting the Respondent's counter offer. The Court reiterates that the agreement (annexure A) was therefore lawfully executed and is binding on the parties hereto. The Applicant is entitled to bring the agreement to Court to have it registered as an order of Court.
38. On the 10th January 2013 the Minister purported to communicate to the Applicant a decision that allegedly was made by the Respondent's Board of Directors or its Executive Management. There is however neither assertion nor confirmation in the Respondent's affidavit that a decision to revoke their counter offer was taken on the 10th January 2013 or before. If the Respondent had taken such a decision it should and would have disclosed that fact in its affidavit and further state the date of that resolution. There is no evidence before Court to suggest that such a decision was taken. The Respondent's Director General has simply related in his affidavit the allegations which were reported to him by the Minister, concerning the meeting of the 10th January 2013. The Director General has not however confirmed the truthfulness of the Minister's report. The Minister purported to communicate to the Applicant a decision which did not exist. The Minister clearly misrepresented facts to the Applicant at the meeting of the 10th January 2013.
39. Common sense dictates that an offer can only be revoked by the offeror. Likewise the counter offer in this case could only be revoked by the Respondent (its maker).

The Respondent did not exercise its right to revoke its counter offer until 22nd January 2013. The Minister cannot revoke an offer it did not make.

40. The Minister has not disclosed how he gained knowledge of the assertion that he made at the meeting of the 10th January 2013 namely: *that the Respondent has changed its position and was now offering the Applicant continued employment.* The Minister has not claimed that he sits or sat in the Respondent's board meeting/s. He has further not claimed that he is part of the decision –making body in the Respondent's management. In the absence of confirmation by the Respondent, the Minister's assertion is either hearsay or speculation. In either case such an assertion is inadmissible.

41. The intervention of the Minister is of no consequence to the agreement which the parties concluded on the 16th January 2013 (annexure A). The Respondent's defence fails for this reason as well. The Respondent could have handled this matter in a professional and less expensive manner with the assistance of their attorney, but did not. The Respondent allowed the Minister to interfere in a matter which was being competently handled by attorneys. With due respect to the Minister, he may be skilled in other areas of work, but not necessarily legal work. It is advisable that legal issues be left in the hands of attorneys. It is fair that the successful party in litigation be compensated in costs. This is the general rule in our legal system.

42. Wherefore the Court orders as follows;

42.1 The agreement of settlement, annexure A to the Applicant's notice of motion is hereby made an order of Court.

42.2 The Respondent is ordered to pay the cost of suit.

Members agree

D. MAZIBUKO
INDUSTRIAL COURT-JUDGE

Applicant's Attorney: Mr Z. Jele

Robinson Bertram

Respondent's Attorney: Adv. P. Kennedy

Instructed by Musa Sibandze Attorneys