



IN THE INDUSTRIAL COURT OF ESWATINI

RULING

Case No. 107,108
&109/2019

In the matter between:

ANDREW ROSE

Applicant

And

VITAL TISSUE (PTY) LTD

Respondent

Neutral citation: Andrew Rose v Vital Tissue (Pty) Ltd [2020] SZIC 09 (11 February 2020)

Coram: **S. NSIBANDE J.P.**

(Sitting with N.R. Manana and M.P. Dlamini
Nominated Members of the Court)

Date Heard: 05 June 2019

Date Delivered: 11 February 2020

Summary: *Point in limine taken on full and final settlement clause on CMAC Agreement and arrears wages agreement – Respondent claiming applicants are barred by same from making any further claims*
Held – where a party makes a material misrepresentation to the other to induce agreement such agreement can not stand where the party that is a victim of the misrepresentation resiles from it – Point of law is dismissed.

RULING

[1] The facts of these matters are largely common cause. The pertinent common cause facts are as follows:

1.1 On or about 10th September 2018, the Respondent, in writing, advised its employees of its intention to permanently close its plant at Nhlambeni on 12th October 2018, as a result of having suffered irrecoverable business losses. The employees were told that the 12th October 2018 would be their last day of work.

1.2 By letter dated 9th August, the Commissioner of Labour was notified of the Respondent's intention to close its business on 12th October 2018.

1.3 On 12th October 2018, the Respondent and 5 employees entered into an arrears wages agreement. It appears that the Respondent had not paid the 5 employees their full wages since July 2017 and sought to settle their

arrear wages claim by paying each of the employees 50% of the wages due to them. The employees agreed to the settlement and appended their signatures on the agreement. The Applicant herein and two others (**Xolile Doreen Simelane and Precious Simelane** were a part of the 5 employees mentioned above and in fact agreed to the arrear wages settlement and were each to receive the specific sums agreed to. They agreed that they would not institute any litigation against the Respondent for the recovery of any further sums provided that the Respondent complied with the agreement.

1.4 Xolile Doreen Simelane (Applicant in case 107/2019) and Precious Simelane (Applicant in case 109/2019) reported a dispute with the Conciliation Mediation and Arbitration Commission regarding what they viewed as an automatically unfair dismissal by the Respondent. The two Applicants settled the dispute with Respondent on 1st November and 22nd October 2018 respectively. As part of their settlement, the Applicants asserted that their dispute with the Respondent has been resolved in full and that no further dispute involving unfair dismissal would arise.

[2] The Applicants have now each brought an application for the determination of an unresolved dispute in terms of which they claim to have been unfairly

dismissed by the Respondent on 12th October 2018 following that, contrary to the notices communicated to the Applicants, the Commissioner of Labour and CMAC, the Respondent's business continued to operate beyond 12th October 2018. In other words, the business did not close at all in terms of the Respondent's notices.

[3] Having received the applications the Respondent raised a number of points *in limine* in its reply. The two points that remain for consideration are as follows:

3.1 That the dispute of unfair dismissal between the Respondent and Xolile Simelane; Precious Simelane was settled by the parties in full and final settlement on 1st November 2018 and 22nd October 2018 respectively. Consequently there is no dispute between the parties and the applications ought to be dismissed with costs; and

3.2 With regard to the claim of Andrew Rose (case No. 108/2019); that in terms of clause 3 of the Arrear Agreement, the Applicant agreed on a waiver of litigation and undertook not to institute litigation against the Respondent for the recovery of any payment in excess of the amount agreed upon provided the Respondent complied with the Agreement. It was the Respondent's submission that, having complied with the

agreement by making full payment of the agreed amount to the Applicant he was then barred by the agreement from making any further claims against it.

[4] The Applicants concede that ordinarily a party to a dispute who voluntarily enters into an agreement not to bring any further claims against an opposing party is precluded from approaching the Court for redress simply because they are bound by the agreement entered into by the parties in good faith.

[5] The Applicants however submitted that the agreements at CMAC firstly had to do with enforcement of the arrear wages agreement and nothing to do with unfair dismissal and secondly and more importantly, that the Respondent deceived the Applicants into signing the agreements on the basis that the company was closing down yet it was not; that the Respondent acted in bad faith with a calculated intention to avoid paying Applicants terminal benefits due to them or simply to get rid of them from the work place. This they say is borne out by the fact that a select number of employees, most of whom were employed after the Applicants have remained in Respondents service carrying on the business that was said to be closing.

[6] It is common cause that the Respondent's business never closed and that at the time the matter was heard the Respondent was continuing to carry on same.

[7] It appears to us that the Respondent represented to the Applicants as well as to CMAC and the Commissioner of Labour that it would be closing down its business on 12th October 2018 and thus induced the Applicants to sign the arrear wages agreement as well as the CMAC agreement forms. The business was not closed and continues to operate. It appears to us that the representation made by Respondent was material and that it induced the Applicants to enter into the aforesaid agreements and that this was the Respondents intention at the time of the agreements.

[8] It is trite that "*a party induced to contract by the material and fraudulent misrepresentation of the other party may either stand by the contract or claim rescission thereof*". (**Bowditch v Peel and Magill 1921 AD 161**).

It is trite that the Applicants, by letter dated 23 January 2019 derived rescission of the agreement in particular the arrear wages agreement. By reporting a dispute at CMAC in respect of unfair dismissal claim based on the Respondents material misrepresentation, the Applicants further indicated their stand of rescinding the agreement.

[9] In the circumstances of this case we find that the point *in limine can not stand*.

We therefore make the following order:-

(a) The point raised *in limine* is hereby dismissed.

(b) Each party to pay its own costs.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Ms. M.J. Hillary (M.J. Hillary Attorneys)

For Respondent: Mr. S.B. Dlamini (Labour Law Consultant)