THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 257/15

In the matter between:

NATIONAL UNION OF MINEWORKERS **First Applicant**

ML MAPONYA AND 7 OTHERS **Second Applicant**

and

ESKOM HOLDINGS SOC **Respondent**

Heard: **06 - 07 November 2017**

Delivered: **08 May 2018**

JUDGMENT

MAMOSEBO, AJ

Introduction

[1] This is a referral in terms of s 77(3) of the Basic Conditions of Employment Act[1] (BCEA). The nature of the claim is an allegation of breach of contract by Eskom Holdings (SOC) Limited (Eskom).

The parties

[2] The first applicant is the National Union of Mineworkers (NUM), a trade union cited in its representative capacity and acting on behalf of its members, the second and further applicants, who are employed by Eskom in various positions at Kusile Power Station.

[3] The issue that stands for determination by this Court is whether or not there was a breach of contract by Eskom or whether a *bona fide* mistake was made on 10 May 2012.

The relevant facts as presented during evidence are as follows:

[4] Mr A Masango, General Manager at Kulisile Power Station, signed letters dated 10 May 2012 under the head "Salary Review – Salary Adjustment" which were handed over to the applicants. The letters read almost the same except for the difference in the salary amounts. The second applicant's letter reads as follows:

> "I have pleasure in informing you that your basic salary has been increased from R231 300.00 to R265 590.00 per annum, with effect from 01 May 2012. All other conditions of service will remain unaltered. Thank you for your continued contribution. You are one of our Guardians –helping us power this great nation!
>
> Yours sincerely
>
> A MASANGO
>
> GENERAL MANAGER

[1] Act 75 of 1997.

KUSILE POWER STATION PROJECT”

[5] The applicants fell within the ambit of Basic Salary for Bargaining Unit Employees, Grades T04 to T/P13. In terms of this procedure, implementation of individual ad hoc salary adjustments can take place anytime during the year and must be conducted by the responsible E-band Manager with approval from the relevant Managing Director.

[6] The applicants’ contention is that they accepted Eskom’s offers for these salary adjustments dated 10 May 2012.

[7] On 22 May 2012 Eskom issued payslips to the applicants. The amounts appearing on the payslips differed from those as contained in the aforementioned letters.

[8] Subsequent to receipt of the payslips the applicants received revised letters dated 25 May 2012 in which lesser salaries were reflected as compared to those appearing on the letter of 10 May 2012. Aggrieved by the salary discrepancy they lodged a grievance with the Human Resources Department of Eskom. They contend that they had accepted the original offers as contained in the first letters dated 10 May 2012; considered the offer by Eskom; and accepted this as a binding contract between the parties which Eskom has breached. The applicants further contend that Eskom has unilaterally changed the terms and conditions of their employment. They do not regard the letters of 10 May 2012 as an error because they were signed by the general manager who should have picked up the error but did not.

[9] On 30 July 2012 a grievance session was held and it was facilitated by the Industrial Relations Manager, Mr L Mabena and chaired by the General Manager, Mr Masango. Mr Masango’s explanation in that session was to the effect that the salary letters were written and quality checked by the Human Resources Shared Services Unit (HRSSU) staff who are not part of Kusile Power Station and the error occurred between the two groups. He further explained in that meeting that the fact that letters had been issued to the employees with

incorrect figures was brought to his attention before the payment of salaries and the filing of the grievance by the employees. I revert to this aspect later on.

[10] Two witnesses testified on Eskom's behalf. Ms Veronica De Bruin, Kusile HR Manager, and Ms Phumla Nzuza, an Assistant HR Officer. Ms De Bruin outlined the process followed by Eskom when the ad hoc salary adjustments occur. She also testified on the schedule marked Annexure 52A which postulates the salary determination model. However, she admitted that she was not involved in the development or population of that schedule. Neither did she participate in the preparation or distribution of the letters written to the applicants. She could not explain the reasons for the alleged errors. She testified that, due to the pressure experienced, payroll had to be updated by 12 May 2012, which may have caused the letters not to be checked by HR. Mr Masango also signed the said letters without checking the correctness of their content.

[11] Ms Phumla Nzuza typed the letters. She says although she typed numerous similar letters, in this instance, she did not look at the headings but merely looked at the figures when typing.

[12] Eskom raised two defences. First, Eskom claimed that the applicants failed to accept the offers made on 10 May 2012; second, if the offers were accepted, the letters contained reasonable and justifiable errors which were of no force and effect.

[13] Eskom relies on mistake. It is necessary to elaborate on this aspect. In *Sonap Petroleum (SA) (Pty) LTD (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*[2] Harms AJA drew the following distinction:

> "I use the term 'mistake' and not 'error' because, although they may be used interchangeably, 'mistake' rather implies misunderstanding, misinterpretation, and resultant poor judgment, and is usually weaker than *error* in imputing blame or censure'. (*American Heritage Dictionary sv 'error'.)* The law, as a general rule, concerns itself with the external manifestations, and not the workings, of the

[2] 1992(3) SA 234 (A) at 238 H – I.

minds of parties to a contract. *South African Railways & Harbours v National Bank of South Africa Ltd*[3]"

At 239I-240B the Court pronounced:

"In my view therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? See also *Du Toit v Atkinson's Motors Bpk*[4]*; Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd*[5]*.* The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd*[6]*.*"

[15] Strikingly, the explanation by Mr Masango, as captured in the grievance document, seems to suggest that the HR Department dealt with the issue and not only the population of the documents, but also the writing of the offers and checking same.However, Ms De Bruin testified that she had not participated in the process. She added that Mr Masango just signed the letters without reading them first. Mr Masango, undoubtedly, was a material witness, but was not called to testify and neither was his availability or non-availability explained. The making of a negative inference from a party's failure to call a witness or present evidence was considered in *Titus v Shield Insurance Co Ltd*[7] where the Court said:

"It is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon 'the particular circumstances of the litigation' in which the question arises. And one of the

[3] 1924 AD 704 at 715 – 716.
[4] 1985 (2) SA 893 (A) at 906C – G.
[5] 1986 (1) SA 303 (A) at 316I – 317B.
[6] 1983 (1) SA 978 (A) at 984D – H, 985 G – H.
[7] 1980 (3) SA 119 (A) at 133E – G.

> circumstances that must be taken into account and given due weight, is the strength or weakness of the case which faces the party who refrains from calling the witness. It would ordinarily be unsafe to draw an adverse inference against a defendant when the evidence of the plaintiff, at the close of the latter's case, was so vague and ineffectual that the Court could only by a process of speculation or very dubious inferential reasoning, attempt to find the facts. (See *Marine & Trade Insurance Co Ltd v Van der Schyff* "[8]

[16] In respect of individual ad hoc salary adjustments, Mr Masango, in his capacity as the General Manager, had authority to approve them in terms of the procedure agreed to between Eskom and the unions. In terms of paragraph 3.12(a) of the Basic Salary for Bargaining Unit Employee, the ad hoc adjustments are determined by the Divisional R & B Manager and agreed to by the respective Managing Director.

[17] The argument presented on behalf of the applicants that the adjustment of salaries involves vigorous quality checks by various departments and that Eskom should have picked up the so-called mistake prior to issuing the letters dated 10 May 2012 is, in my view, sound.

[18] There was no set method of accepting or rejecting the offer of the salary adjustment. The fact that the letters dated 10 May 2012 were signed by an Executive Member, Mr Masango, gives credence to the assertion that due process was followed. The fact that Ms Maponya in her testimony testified that she went through a similar salary adjustment process in 2010 where she was called in to a manager's office and handed a letter of salary adjustment and was subsequently paid the amount that appeared on the letter at the end of the month. This part of her evidence was not challenged. She maintained that she was not required to react after receiving the letter. This testimony, in my view, supports the applicants' version that the contract was indeed accepted.

[8] 1972 (1) SA 26 (A) at 40E, 49F - H).

[19] The Appellate Division has clarified the relationship between unilateral mistake and quasi-mutual assent in *George v Fairmead (Pty) Ltd*[9] where Fagan CJ said:

> "When can an *error* be said to be *Justus* for the purpose of entitling a man to repudiate his apparent consent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? (*vide Logan v Beit 1890 (7) SC 197; I. Pieters & Company v Solomon, 1911 AD 121 esp at pp. 130, 137; Van Ryn Wine and Spirit Company v Chandos Bar,* 1928 TPD 417, esp. at pp. 422, 423, 424; *Hodgson Bros., v South African Railways* 1928 CPD257 at p. 261). If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

[20] *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board*[10] concerned an attempt by the Board to escape from a contract which resulted from its manager mistakenly writing to inform the company that its tender had been accepted when he should have written to one of the other tenderers. Schreiner JA expanded on what he pronounced earlier in the *George v Fairmead* (*supra*) as follows:

> "If the respondent had been a natural person who had accepted a tender according to its terms, there is no doubt that a contract would have been made when the acceptance was communicated to the tenderer, as by posting it. It would not be possible for such a natural person, if he repudiated, to escape liability by proving that he had posted the wrong letter or the like. That follows from the generally objective approach to the creation of contracts which our law follows. (See *Van Ryn Wine and Spirit Co v Chandos Bar,* 1928 TPD 417 at pp.

[9] 1958 (2) SA 465 (A) at 471.
[10] 1958 (2) SA 473 (A).

> 424, 425; *Irvin and Johnson (S.A) Ltd v Kaplan,* 1940 CPD 647 at pp. 650, 651; and the cases therein cited.) No other approach would be consistent with fairness or practicality. Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake *(error)* would have to be reasonable *(Justus)* and it would have to be pleaded."

[21] The applicants were under the impression that Mr Masango was offering them a market-related ad hoc salary adjustment which was equivalent to the minimum salaries earned by persons within their specific field and positions. There was no misapprehension. They did not make any misrepresentations to him. They could not have known at the time of receipt of those letters that there was a mistake. They also did not cause that mistake. In my view, Eskom cannot escape from the contract because the alleged mistake is due to their fault of not thoroughly verifying the correctness of the contents of the letters by not only the person who typed them but its entire HR Division. Clearly, Eskom's personnel failed to carry out their duties and their fault cannot be placed at the doorstep of the applicants. It is inconceivable that Mr Masango did not even bother to read the letters before appending his signature thereon. In my view, Eskom cannot claim that the *error* is *Justus.* I am not satisfied that Eskom has discharged the onus to show that its mistake was reasonable. I am therefore not persuaded by Eskom's defence of mistake. It is my view that the applicants stand to succeed in their claim.

[22] Counsel for the applicants, Ms Jackson, made submissions relying on the Turquand Rule which was not pleaded by the applicants. In view of my conclusion above it is not necessary to deal with that argument.

[23] I am now left with the question of costs. In my view, it will be in accordance with the requirements of the law and fairness that Eskom to pay the costs of suit.

[24] I accordingly make the following order:

Order

1. Eskom Holdings (SOC) Limited, the respondent, is ordered to comply with the terms and conditions of the contract entered into on 10 May 2012 with the applicants;

2. The respondent is to pay arrear salaries in adjustment of the difference that the applicants received for the period 01 May 2012 to date.

3. That the respondent is to pay costs of suit on a party and party scale.

M C Mamosebo
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate S Jackson
Instructed by:	Finger Phukubje Inc
For the First Respondent:	Advocate K Tsatsawane
Instructed by:	Geldenhuys Malatji Attorneys