THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 20461/14

In the matter between:

UNICA IRON AND STEEL (PTY) LTD	**FIRST APPELLANT**
MOHAMMED ASIF QASIM	**SECOND APPELLANT**

and

SURESH MIRCHANDANI	**RESPONDENT**

Neutral citation: *Unica Iron and Steel v Mirchandani* (20461/2014) [2015] ZASCA 150 (1 October 2015)

Coram: Lewis, Shongwe, Leach and Zondi JJA and Baartman AJA

Heard: 03 September 2015

Delivered: 01 October 2015

Summary: Contract – written document – whether intended by parties to be binding – conduct of parties post signature showing that they intended to be bound and that their agreement was not subject to another formal agreement being concluded.

ORDER

On appeal from: Gauteng Division, Pretoria (Matojane J sitting as court of first instance): The appeal is dismissed with costs.

JUDGMENT

Leach JA (Lewis, Shongwe and Zondi JJA and Baartman AJA concurring)

[1] The principal issue in this appeal is whether a document signed by the parties is an enforceable contract as alleged by the respondent or whether, as the appellants allege, using the words of Corbett JA in *Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A) at 850C-D, it was merely a proposal made in the process of negotiation while the parties 'were feeling their way towards a more precise and comprehensive agreement'. The high court upheld the respondent's contention that it was a binding agreement and granted relief pursuant to that finding. The appeal to this court is with leave of the court a quo.

[2] The respondent, who has a business background rooted in the steel industry, came to South Africa from India in 2005. After his arrival in this country he met both the second appellant, Mr Mohamed Asif Qasim, a businessman who owned a plastics factory, and Mr Irshad Ul Haq, an accountant. In due course the three of them agreed to venture into business together in a steel manufacturing and smelting operation involving the production of certain steel products from the recycling of metallic waste.

[3] The first appellant, Unica Iron and Steel (Pty) Ltd (Unica), was the vehicle they used to conduct this venture. Mr Qasim was appointed its managing director, Mr Ul Haq its financial director and the respondent its technical director. Premises for a factory were identified in Babelegi, north of Pretoria; meetings were held with the Department of Trade and Industry; and financial backing was procured at a subsidised rate from the Industrial Development Corporation. The respondent thereafter went back to India to seek out the requisite machinery and technical staff. This took some time and it was only some nine months later, on 27 April 2007, that he returned to this country bringing his family with him.

[4] Before he had left for India, the respondent and Mr Qasim had looked at various residential properties for Unica to buy to provide a home for the respondent and his family. Finally they selected the property known as 36 Blesbok Avenue, Centurion (the immovable property). At that stage Unica, although existing on paper, was not in a position to obtain a home loan, and so it was decided that Mr Qasim would purchase the property in his name but that Unica would take over the bond in due course. On that understanding, the immovable property was purchased in December 2006 and the respondent and his family took up residence there when he returned from India in April the following year.

[5] A few weeks after returning to South Africa, the respondent and Unica, the latter represented by Mr Ul Haq and Mr Qasim, concluded a written employment agreement. Backdated with effect to 4 December 2006, it provided:

‘1. That (the respondent) will be working as a technical Director on profit sharing basis. He will be a key person and under his leadership and guidance, Unica will source, commission and run the plant successfully.
2. (The respondent) will be entitled for 17% of the profits of Unica defined herein as follows:
3. Profits will be calculated before tax after providing for depreciation and interest on Shareholders loans.
4. (The respondent) will be drawing a salary of R40000-00 per month which will be deducted from his profit share at the end of the year. If Unica does not achieve profits it will carry to the next years until Unica achieves sufficient profits of which 17% is equal or higher than the total drawings till that date.
5. As (the respondent) is sharing profits in Unica and his association with Unica will be on long term basis and unrestricted.’

[6] The year following his return to South Africa was a busy time for the respondent. Not only did he return to India with Mr Ul Haq in order to recruit technicians but he supervised the erection, construction and commissioning of Unica’s factory at Babelegi. Production at the factory eventually commenced in April 2008. As is understandable in a venture of this nature, it took some time for Unica to show a profit. This it did, according to Mr Ul Haq, towards the middle of 2009.

[7] Unfortunately, despite the relatively short period of their business association, the relationship between the respondent on the one hand and his two co-directors on the other, soured quickly. One of the causes of conflict was the calculation of the share of the profits the respondent was due to receive under his contract of employment. For present purposes it is unnecessary to either detail the respondent’s complaints or to decide whether they were justified. Suffice it to say that, on 26 November 2009, when the respondent sent an email to his co-directors commenting on Unica’s management accounts of October 2009, he stated that the calculation of profit was based on ‘unfounded

assumptions and misinterpretations' and that the issue remains 'unresolved and unaccepted'.

[8] On 15 April 2010, the respondent was summoned to attend a directors' meeting at which various disputes he had with his co-directors were discussed. The issues between them were not resolved and, on 12 July 2010, Unica served the respondent with what purported to be a notice of retrenchment under s 189 of the Labour Relations Act 66 of 1995. This recorded that the reason for his retrenchment was that 'the plant has been commissioned and is running successfully and at present there are a surplus of employees of Unica with the necessary technical expertise to run the plant successfully' and that the respondent therefore could be replaced by another employee 'at least cost to Unica'. It went on to propose a severance package of one week's pay for every completed year of service plus a payment of R1 million.

[9] In the light of the terms of clause 5 of the respondent's employment contract and the background difficulties then existing between him and his co-directors, the almost irresistible inference is that this notice was a sham and his co-directors were merely attempting to end his employment due to their conflict. Be that as it may, the respondent refused to accept the severance package offered. He also rejected a further offer that he should resign from Única and, instead, join in a fresh venture with Mr Ul Haq and Mr Cassim, producing oxygen.

[10] In any event, the relationship between the respondent and his co-directors did not improve and matters came to a head at a meeting they held on 28 September 2010. At the outset the mood of the meeting was tense. Mr Ul Haq made it clear to the respondent that he and Mr Qasim could no longer continue working with him and that he either had to settle amicably with them or would

face retrenchment. As inevitably happens in situations such as this, after some initial mud-slinging the parties eventually got down to discuss mutually agreeable terms on which the respondent could leave.

[11] Terms were finally agreed, and Mr Qasim drafted an agreement in longhand which he, Mr Ul Haq and the respondent all signed (for convenience I intend to refer to this document as SM1, that being its annexure number to the particulars of claim). Each term was discussed in turn and only recorded when all parties were satisfied with its content.

[12] On coming to a lump sum for the respondent to be paid as part of what is recorded as being his 'golden handshake', agreement was reached on a cash sum of R 1,42 million. In recording this, Mr Qasim initially inserted the words "tax to be discussed' immediately thereafter. The respondent was not prepared to accept this. He stated that he wanted that sum tax free. As this would oblige Unica to bear the tax burden of such a payment, Mr Ul Haq promptly telephoned the company's auditors to inquire how this could be done, and was told that it would be possible but that a tax directive would have to be obtained from the South African Revenue Service (SARS). On learning this, Mr Qasim deleted the words 'tax to be discussed' and replaced them with the word 'nett'. The suggestion made by the appellants to the court a quo that 'nett' merely meant that the payment was to be in cash can obviously be rejected in the circumstances.

[13] When completed and signed by all three directors the final document read thus:

'**<u>Agreement</u>**

BETWEEN [THE RESPONDENT]

AND

UNICA IRON & STEEL (PTY) LTD

Following was agreed upon:-

1. [The respondent] will be leaving Unica from 30th Sept 2010 and he will not be involved in Unica at all. Subject to signing of Agreement and completion of following
2. Unica will pay him as follows for golden hand shake:
   → R1,420000,00 - One million four hundred & 20 Thousand Rand only (Net) will be paid upon signing of agreement.
   → Car which he is using will be transferred to his name upon signing of agreement.
   → House will be transferred to his name within 3 months of signing the agreement. Transfer & other costs for 3 months will be paid by Unica.

3. All other expenses for [the respondent] currently paid by Unica will be transferred for account or will be cancelled as agreed upon:-
   - Car insurance.
   - Telephone. (all cell incl.)
   - Medical Aid.
   - Life insurance.
   - Petrol Card.
   - DSTV.
   - Car tracking system.
4. He will not be engaging himself in any business directly in competition with Unica Steel or/Unica plastic.
5. [The respondent] will inform all our associates local/overseas including suppliers about this development and will introduce Mr Asif.'

[14] According to the respondent, after signing this agreement the mood of the meeting changed and became light-hearted. Mr Ul Haq handed him a file containing various documents relating to the house in which he was living as well as the registration documents for the Dodge motor vehicle, and told him to arrange transfer of both. The appellants denied this had occurred but it was common cause that the registration papers for the vehicle were given to the respondent at some stage soon thereafter and that the vehicle was then registered in his name, so nothing really turns on precisely when this took place.

[15] Importantly, as agreed in clause 1 of SM1, by the end of the workday on 30 September 2010 the respondent had cleared his desk, collected his belongings and left the factory, never to return. Before he left, in compliance with his obligations under clause 5, he had sent an email, approved by Mr Ul Haq, to Unica's Indian suppliers (and copied to Mr Qasim and Mr Ul Haq). After acknowledging the support and contribution the suppliers had made to Unica, he stated:

'I have decided to accept the golden handshake package and move on to another project. In my absence, Mr Asif Qasim, managing director of Unica Iron, will be handling the technical, imports and purchase. Mr Asif is touring India for seven days from today to shortlist the vendors, suppliers and exporters of above ref. items. Those who wish to continue their supplies in future are requested to meet or invite Mr Asif in India for their personal introduction and future business.'

As envisaged in this letter, Mr Qasim indeed thereafter proceeded to India and met with the suppliers to whom the respondent had introduced him.

[16] Thus far, all had proceeded to plan as envisaged by SM1. However, problems arose on 11 October 2010 when Mr Ul Haq requested the respondent to accompany him to the offices of SARS to obtain the necessary tax directive relating to his 'golden handshake'. According to the respondent, Mr Ul Haq met with several SARS officials and, when they left the meeting, had told him that the tax liability on the package was close to R1 million and was much bigger than he had anticipated. Mr Ul Haq then proposed to the respondent that he should pay half of this, but he refused to do so. Mr Ul Haq then told him that Unica was anxious for the agreement to be completely in order and asked if he had any objection to Unica having its attorneys draw up a formal agreement. He agreed to this proposal on condition that none of the terms of the written agreement were changed.

[17] A draft agreement was thereafter prepared by attorneys, but the respondent was told that it was not in order and that a revised copy would follow. A revised agreement was presented to him early in November 2010 but the respondent refused to sign it, stating that it deviated from what had been agreed upon in SM1. At that, Unica again served him with a notice of retrenchment under s 189 of the Labour Relations Act 66 of 1995. In the light of the history of the matter this, too, appears to have been a sham.

[18] In November 2010, after the respondent made contact with Mr Ul Haq, Unica transferred R100 000 into his account. The respondent alleged this was part payment of what was due to him under SM1. The balance remained unpaid and when Unica refused to pay it or transfer the immovable property to him, the respondent instituted action for specific performance in the court a quo.

[19] The appellants' defence to the respondent's claim was threefold. It was argued, first, that SM1 contained a suspensive condition that had never been fulfilled; second, that SM1 did not constitute a binding agreement; and third that as the respondent had failed to perform his reciprocal obligations under SM1, he could not claim specific performance on their part. And as the appellants contended that SM1 had never had contractual effect, they argued that the R100 000 the respondent had paid had not been due and the Dodge motor vehicle ought not to have been transferred to him. In a counter-claim they sought repayment of that sum plus interest and return of the motor vehicle.

[20] The first two legs of this defence are to a large measure inter-twined. The argument at the outset was founded on the term in clause 1 of SM1 that the agreement was 'subject to signing of agreement'. Relying upon authorities such as *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* [2005] ZASCA 95; 2006 (1) SA 488 (SCA) para 5, the appellants contended that the phrase

'subject to' can denote either a suspensive or a resolutive condition, or a material term in the contract. All three of these possibilities, so the argument went, have the result that SM1 required the signing of a further agreement in the form of a formal document drawn up by attorneys and signed by the parties; and until that was done, the condition in SM1 remained unfulfilled. Accordingly, as the respondent had refused to sign the formal agreement prepared by attorneys, the fact that SM1 had been signed was in itself insufficient for its terms to become binding.

[21] In considering the validity of this argument, it is unnecessary to deal in any depth with the principles applicable to the interpretation of contracts. They must now be regarded as well settled, particularly in the light of recent judgments of this court in cases such as *KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA), *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA), *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) and, most recently, *Novartis South Africa v Maphil Trading* [2015] ZASCA 111. As Lewis JA stated in *North East Finance*:[1]

'The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded.'

All that needs to be added is that it can be accepted that the way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term – see eg *Rane*

[1] Para 24.

Investments Trust v Commissioner, South African Revenue Service [2003] ZASCA 60; 2003 (6) SA 332 (SCA) para 27. As is stated in R H Christie's *The Law of Contract in South Africa* 6 ed (2011) at 117, relying upon *Breed v Van den Berg* 1932 AD 283 at 292-293, this is because the parties' subsequent conduct 'may be probative of their common intention at the time they made the contract'.[2]

[22] Applying these principles to SM1, there is no reason to conclude that the phrase 'subject to' in clause 1 necessarily connotes that a further agreement – let alone a formal agreement drafted by attorneys to which no mention whatsoever is made in the document – needed to be signed before it became binding. It is necessary to remember that SM1 was written by a businessman, not a lawyer skilled or trained in the drafting of contracts, and that allowance must be made for that in construing its terms – see *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 (1) SA 7 (A) at 15C-D. This is all the more so in the present case where, as appears not only from the terms of SM1 but from the evidence given by the respective parties, the language in which the document was drafted was not their mother tongue. In these circumstances, the phrase 'the agreement' may readily be understood as meaning no more than 'this agreement', particularly in the light of SM1 having been signed by the parties. Had SM1 been intended to be no more than a memorial of what was later to be incorporated in a formal agreement, signature by the parties would have been entirely superfluous. But it was so signed by all three of the relevant role players, and this is a clear indication that they intended it to be binding. Indeed Mr Qasim stated in evidence that he had made provision for signature of the document as he wanted the respondent to be bound so that, in any subsequent agreement formalised by an attorney, 'the terms and the amount

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[2] See further authorities collected in Christie at 226 fn 361 and *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) para 91.

should be the same.' Clearly then SM1 was 'subject to' it being signed, and not some further agreement being signed.

[23] Moreover, and importantly, immediately after SM1 was signed Unica, through Mr Ul Haq and Mr Qasim, proceeded to implement its terms. I have already mentioned how the respondent ceased work at the end of September 2010 as agreed; how the Dodge motor vehicle he was using as a company car was transferred to him; how he sent an email approved by Mr Ul Haq to suppliers in fulfilment of his obligation under clause 5; and how Unica paid him R100 000. The appellants' suggestion that it made this payment in order to persuade the respondent to sign the agreement their attorney had prepared, rings hollow and is inconsistent with their counter-claim in which they alleged that it was paid on the assumption that the suspensive condition they contended for would be fulfilled.

[24] Not only do those facts in themselves indicate that the appellants regarded the agreement as binding, but as from 1 November 2010 Unica commenced paying the bond instalments on the respondent's residence in order to comply with its obligation under clause 2 of SM1 to make the property available to him. Furthermore, pursuant to the provisions of clause 3, the respondent took over the insurance for the motor vehicle and the monthly payment of its car-tracking system as well as payment of his monthly telephone account and satellite television subscription, all of which had been paid by Unica before SM1 was signed. At his choice, his medical aid and life insurance that Unica had also been carrying were cancelled.

[25] All of this points to the appellants regarding SM1 not merely as part of their negotiations towards a final agreement, but as binding upon them. Any doubt about this is removed by both Mr Ul Haq and Mr Qasim having

confirmed in their testimony that the terms of SM1 were those that they had agreed upon and could not have been departed from in any formal agreement subsequently drawn up on their behalf by an attorney. As already mentioned, Mr Qasim provided for SM1 to be signed in order to bind the respondent to its terms. He also stated that none of the clauses of SM1 needed to be changed and that the 'only thing was to formalise this thing in a proper wording and proper document'.

[26] All of this is irreconcilable with SM1 having been conditional upon a subsequent, formalised agreement being concluded and signed. As the appellants readily conceded, and as the respondent pertinently testified, they all regarded the agreement as binding and proceeded to implement its terms. The inference is irresistible that it was only once the appellants realised that they had underestimated the respondent's tax liability that they sought to evade their contractual obligations. The court a quo therefore correctly concluded that SM1 was not subject to the suspensive condition suggested by the appellants and was binding between the parties.

[27] That is still not the end of the matter, as the appellants also argued that on the respondent's own version there was insufficient consensus in regard to the terms of the restraint of trade clause contained in clause 4 of SM1. This was advanced on the strength of the respondent having testified that he was only prepared to accept a restraint as far as the plastic industry is concerned, that he knew that a restraint should be subject to a specific geographical area and time limit and that he would not have agreed to a restraint applying to the whole of South Africa as, effectively, was provided in clause 4 of SM1. Thus, so the argument went, there had been no consensus in regard to the restraint terms, that this was a material provision relating to the 'termination package' that

indicated that a more comprehensive contract was contemplated being reached in due course.

[28] The fact remains that the parties signed SM1 with the intention of being bound by its terms. Whether the respondent, with the benefit of hindsight, acted rashly to agreeing to the restraint or whether that clause would withstand judicial scrutiny had the appellants sought to enforce it against him, is neither here nor there. The restraint, such as it was, was severable from the balance of the contract. It thus cannot be said that SM1 was inchoate. As I have stressed, the appellants' own case is that it encompassed all the terms of the agreement that had been reached and merely had to be put into 'a proper document'.

[29] It was also argued by the appellants that the respondent was not entitled to an order of specific performance as he was in breach of his reciprocal obligations under clause 4 in that he had been a director and shareholder of one of Unica's competitors. The argument is without substance. It is unnecessary to speculate on the enforceability or otherwise of clause 4 or to consider whether the respondent had acted in breach thereof. It was never Unica's case as pleaded that it had been entitled to withhold performance due to the respondent's failure to perform. Its case was, quite simply, that SM1 lacked contractual force. That was the defence to the respondent's claim that the court a quo was called on to decide and in respect of which it reached the correct conclusion.

[30] In all the circumstances the court a quo did not err in finding that SM1 had binding force. It correctly upheld the respondent's claim and dismissed the counter claim of the appellants. The appeal must fail.

[31] The appeal is dismissed with costs.

L E Leach
Judge of Appeal

Appearances:

For the Appellants:	N Davis SC
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	Symington & De Kok, Bloemfontein
For the Respondent:	B C Stoop SC
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