

EMPLOYMENT

You cannot have your cake and eat it: Lessons from J 1233/20 – Busisiwe Khumalo vs IDC of SA & Bongani Luthuli

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The facts of this case are simple and straightforward. Ms Khumalo was employed by the IDC. Allegations of misconduct were brought by the IDC against her and she was subjected to a disciplinary hearing. Ms Khumalo was represented by Mr Luthuli, the second respondent, in the disciplinary hearing.

When the disciplinary hearing became protracted the IDC and Ms Khumalo, through their attorneys, entered into a mutual separation agreement. Mr Luthuli represented Ms Khumalo during the course of these negotiations.

Eventually the parties agreed to a mutual separation. After agreeing to the mutual separation agreement Ms Khumalo accused Mr Luthuli of acting without a mandate and on a frolic of his own. Mr Luthuli disputed this allegation – instead arguing that he had acted within his mandate.

It is important to note that Ms Khumalo was paid in accordance with the mutual separation agreement. She kept the money and never tendered to return it. She later withdrew her pension benefits.

Ms Khumalo then brought an urgent application before the Labour Court seeking *inter alia* that the court declare that she is still an employee of the IDC and that the mutual separation agreement be declared null and void *ab initio*. The urgent application was dismissed.

Notwithstanding, Ms Khumalo then brought another application before the Labour Court. She persisted that the “mutual separation agreement” should be declared void *ab initio* and for it to be set aside on account that Mr Luthuli acted outside his mandate and without authority when he agreed to a six months settlement agreement.

The issue before the court was whether Mr Luthuli had a mandate to settle the dispute on behalf of the Ms Khumalo and to accept the mutual separation agreement, offering 6 months’ compensation and whether or not the agreement entered into between IDC and Khumalo is valid and binding.

The long and short of it is that the court found in favour of the IDC and Luthuli.

The following lessons can be drawn from this decision:

Reduce the mutual separation agreements to writing

In this case, the mutual separation agreement had not been reduced in writing as yet at the time when Khumalo sought to renege from it. As the court found, this was not a requirement for a valid mutual separation agreement as the offer was made (by the IDC) and the offer was accepted (by Ms Khumalo). But this could have gone a long way in proving the terms of the agreement and Ms Khumalo’s signature would have put paid to her allegation that Mr Luthuli acted without mandate and/or exceeded his authority.

Peremption is very much part of our law

The court confirmed the principle of peremption which dictates that a litigant cannot blow hot and cold, cannot probate and approbate – simply put cannot hold two positions. In short the Court found that Ms Khumalo could not accept monies paid to her pursuant to mutual separation agreement, act in accordance with the terms of the mutual separation agreement only to turn around and contend the mutual separation agreement should be declared void and is liable to be set aside. The Court re-affirmed the principle that a litigant in Ms Khumalo’s position ought to have paid or at least tendered to pay back as a first step.

Confirm the specificity of your instructions

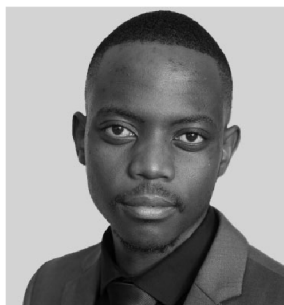
This is more for the lawyer. The lesson here is that one should confirm their instructions in writing and keep the client in the loop at every step of the negotiation process.



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