REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case no: CA19/11

In the matter between:

ESKOM HOLDINGS LIMITED **Appellant**

and

SOLIDARITY **First Respondent**

R.N HUTCHINGS AND OTHERS **Second Respondent**

Heard: **07 November 2013**

Delivered: **10 December 2014**

Summary: Implementation of an early retirement scheme in terms of a management directive - Respondents contending management directive a product of an agreement concluded between parties in a meeting - employer contending that no contract concluded at the meeting. Respondents further averring management directive proof of contract and signed by representative of the appellant. Appellant denying signatory had authority as early retirement had to go through proper internal process before it is capable of being implemented. Respondents raising issue of ostensible authority and Turquand Rule. Labour Court upholding union's contention and ordering implementation of managment directive. Appeal - evidence showing that proposals made at the meeting and further discussion and consultations with relevant stake holders still had to take place. No contract concluded- union knowing that early retirement scheme an interest dispute which needed to go through internal processes before implementation- no application of the Turquand Rule- Labour Court's judgment set aside- appeal upheld with costs

Coram: Waglay JP, Musi and Dlodlo AJJA

JUDGMENT

WAGLAY JP

[1] Eskom, the appellant, appeals against the order of the Labour Court (Steenkamp J) requiring it to comply with Management Directive MD102 ("REV 2") (hereafter "MD102"). The said directive gives licensed operators in the employ of the appellant at its Koeberg Nuclear Power Station an automatic right to early retirement without loss of pension benefits. The order of the Labour Court requires that the Directive be implemented from 1998 and that Koeberg Nuclear Power Station makes good the costs of implementing the early retirement entitlement by making the requisite contribution to the Pension Fund of the licensed operators.

[2] According to the Trade Union Solidarity (the first respondent), an "in principle agreement" was concluded on 10 July 1998 when the appellant made the proposal that licensed operators be allowed to retire without loss of pension benefits after completing a period of retirement service which was about 50 per cent less than the retirement service they were ordinarily required to perform. The "in principle agreement", respondents claim was ultimately finalised and concluded on 2 November 1998 by the adoption of MD102 which was duly signed on behalf of and on the authority of Peter Prozesky, the manager of the Koeberg Nuclear Power Station (Koeberg) who was authorised to sign on behalf of the appellant.

[3] The appellant on the other hand denied that any agreement was concluded on 10 July 1998 or on any other date and also denied that either Prozesky or Crookes who respondents claimed represented the appellant had any authority to conclude an agreement relating to pension benefits of the appellant's staff; that, in any event, the early retirement scheme was erroneously incorporated in MD102. Consequently, and this is common cause, the appellant withdrew the scheme on 14 January 1999.

[4] Before dealing with the evidence, it is instructive to record the relevant clauses of the respondents' statement of claim and what was recorded in the pre-trial minute.

[5] Clauses 5 to 8 of the respondents' Statement of Case contain the following allegation:

> *'5 5.1 On or about 10 July 1998 and at Koeberg, First Applicant (acting in its own name and on behalf of all its members who were licensed operators) entered into an oral agreement with Eskom…*
>
> *5.2 It was an express alternatively an implied alternatively a tacit and material term of the above oral agreement that:-*
>
> *5.2.1 Eskom would pay to licensed operators a yearly once-off non-pensionable payment equal to double his/her basic monthly salary. The payment would take place annually on successful completion of the annual license re-qualification examination.*
>
> *5.2.2 A system of early retirement would be applied to licensed operators whereby:*
>
> *5.2.2.1 Individual licensed operators would – subject to service – qualify for early retirement;*
>
> *5.2.2.2 for the purposes of early retirement, a licensed operator would be credited with condoned service of 6 months service for each year served as a licensed operator, or pro rata for part thereof in addition to the 12 months ordinarily credited.*
>
> *5.2.2.3 The practical implementation of the aforegoing would be referred to a task team for implementation at the earliest possible opportunity.*
>
> *6. Pursuant to the said agreement,*
>
> *6.1 Eskom paid licensed operators their yearly once-off non-pensionable payment equal to double his/her monthly basic salary with effect from 1998, and continue to do so to date hereof;*

6.2` With regard to early retirement, a task team was brought into existence comprising Mr. Derrick Douglas and Mr Raymond Wilczewski (acting on behalf of First Applicant) and Mr Peter Prozesky, Ms Nerina Boshoff, Mr Juri Hanekom and Mr Brian Dowds (on behalf of Eskom).

7. In or about November 1998, the task team aforesaid reached consensus as to the implementation of the agreement referred to in paragraph 5.2.2 above.

8. Eskom duly implemented that consensus by:

8.1 Reducing same to writing in a document known as "Management Directive 102 Revision 2", which document was:

8.1.1 Complied by Mr. J.E. Hanekom, Eskom's training

manager, and signed by him (duly authorised in this capacity) on 2 November 1998;

8.1.2 Reviewed by Mr. B. Dowds, the production manager, and signed by him (duly authorised in this capacity) on 2 November 1998;

8.1.3 Duly authorised by Mr. Peter Prozesky, the power station manager at Koeberg who was duly authorised in this capacity, and signed by Mr AC Van Schalkwyk, the acting power station manager at Koeberg (duly authorised in this capacity) on 2 November 1998.'

A copy of the said document is annexed hereto marked "A";

8.2 Duly implemented as a directive of the management of Koeberg in accordance with Eskom's standard policy with effect from 2 November 1998.'

[6] The pre-trial minute was only helpful insofar as it stated that the licensed operators who totalled 34 were the number of licensed operators employed by the appellant and they were all members of the first respondent.

[7] Annexure 'A', the MD102 document attached to the Statement of Case is headed *"Remuneration Model for Employees who held SRO/RO/NEC Licences and Certificates"* and records as its purpose *"Description of remuneration for holders of SRO/RO and NEC qualifications at Koeberg Nuclear Power Station"* and as to its scope it states *"the organizational posts for which the directive is applicable will be authorised by the Power Station Manager. This list is to be kept current and subject to an annual review by the Power Station Manager".* MD102 deals with (i) the Reward and Recognition Scheme for Operators; (ii) Reward for Operating Training Group Employees and (iii) the Early Retirement Scheme for Licensed Operators.

[8] There is no dispute about that part of MD102 which deals with Reward and Recognition Scheme or the Reward for Operating Training Group Employees: this has been implemented. The Early Retirement Scheme which provides for the second to further respondent to be credited with 1.5 years retirement service for every one year of service rendered to the appellant is the clause which is the subject of the action and the present appeal.

[9] Essentially, the respondents' case is that they concluded an agreement with the appellant on 10 July 1998 in respect of the early retirement scheme for licensed operators. The practical implementation of the agreement was referred to a task team, the task team *"reached a consensus as to the implementation of the agreement"* and this consensus was reduced to writing in the document referred to in this judgment as MD102. That the above notwithstanding the appellant refuses to implement MD102 insofar as it relates to the pension benefits for licensed operators. The respondents thus seek a declarator to enforce the implementation by the appellant of MD102.

[10] The respondents' cause of action is that MD102 is a directive borne out of an agreement between the parties. The Early Retirement Scheme in the said directive was a result of such an agreement and is therefore binding and the appellant should be ordered to implement the provisions thereof. To sum up: for the respondents to have succeeded in the Labour Court, they had to satisfy that court that: (i) an agreement was in fact concluded on 10 July 1998 which agreement was to the effect that a licensed operator would be credited

with condoned service of six months for each year served as a licensed operator, or pro rata for part thereof in addition to the 12 months ordinarily credited; (ii) that the practical implementation of the agreement would be referred to a task team for implementation; (iii) that a task team was established and concluded an agreement on the implementation of the agreement of 10 July 1998; and (iv) that MD102 properly recorded the implementation of the agreement agreed to by the task team.

[11] The respondents disavow any rights flowing from MD102 as a self-standing unilateral directive issued by the employer. Their claim is based on MD102 being a product of an agreement concluded between them and the appellant.

[12] As the claim is a contractual one, the *onus* was upon the respondents to satisfy the Labour Court that a contract was in fact concluded between them and the appellant relating to the Early Retirement Scheme. There is no written memorial that can evince this contract. The starting point to establish whether an agreement was concluded on 10 July 1998 is perhaps to record what transpired prior to and at the faithful meeting of 10 July 1998 as testified to by the parties and from the correspondence presented at the Labour Court.

[13] In 1995, Mr Willem Jungshläger, a Psychologist at Eskom, compiled a report concerning early retirement for licenced operators and other workers in stressful jobs at Eskom. He proposed that they be considered for early retirement and that licensed operators be taken off shift work five years before retirement. The proposal was not accepted.

[14] About two years later on 10 February 1997, licensed operators under the hand of one Hutchings, wrote to Mr Crookes the appellant's Executive Director: Generation and requested that Koeberg follow the common international practice of allowing early retirement or secondment to a less stressful position on day work hours for licensed operators.

[15] On 1 April 1997, Mr Crookes responded to the letter from the licensed operators. With respect to the issue of early retirement he said:

'EARLY RETIREMENT

A decision has been made at Executive Director level during April 1995 not to systematically introduce early retirement to any category of Eskom employees. This was following a study undertaken into various categories of employee, in particular Koeberg operators and other shift workers, by Willem Jungschlager.

This study suggested strongly that the practice of moving away from shift work in the latter years of one's career should be facilitated by Eskom. Your specific inputs would be appreciated.

I am informed that this is indeed the intention of Koeberg. This will be achievable once the training is complete for current SRO [licensed operators] *candidates. In addition, the principles described below will facilitate movement from shift work to support organisations at Koeberg.'*

[16] About a year later in June 1998, Prozesky was asked to prepare power point slides on certain topics that were to be discussed at a meeting to be held on 10 July 1998. One of the topics on which he was to prepare the slides was the early retirement proposals for licensed operators.

The meeting of 10 July 1998

[17] The trial was held nearly 14 year after this meeting; memories had faded and testimony unhelpful, however, it was common cause that no agreement was concluded at this meeting. Evidence on behalf of the respondents was that an "in principle agreement was concluded" whatever that means. What it does not mean is that an agreement was concluded.

[18] There is not a single witness who testified to the fact that an agreement as alleged by the respondents in their Statement of Case was concluded. The repeated mantra was to the effect that an "in principle" agreement was concluded on 10 July 1998. An "in principle" agreement is not a contract binding on the parties.

[19] In the absence of any clear evidence or minutes of the meeting pointing to the conclusion of an agreement in respect of the Early Retirement Scheme, the

letters which are quoted hereunder are the closest to having the minute of the meeting.

[20] In a letter dated 13 July 1998 (three days after the meeting), Prozesky addressed a letter to the staff of the operating department of Koeberg, reporting on the meeting of 10 July 1998. Although neither of the parties called Prozesky to testify both parties placed reliance on this letter, the relevant part of the letter records:

> *'2* ***Early retirement proposal***
>
> *For licensed operators a system would [apply] whereby the individual would qualify for additional condoned service according to the following formula:*
>
> *For each one year of active licenses duty, or part thereof on a pro-rata basis, the individual would be credited with (for example) 1.33 years service. This would enable the licensed operator to qualify for early retirement, depending on the number of years service at this level.*
>
> *The business unit* [Koeberg] *would then make contribution to the Eskom pension fund that would match the normal pension penalties that would be applied to the individual for the early retirement.*
>
> *The scheme would be able to be exercised on a voluntary basis by each individual.*
>
> *You are hereby requested to consider these proposals and to provide your comments to the Operating Manager before the end of July, in order to ascertain whether we have a mandate to proceed with the design and implementation of the proposed changes. The changes would still need to be detailed and discussed at the local Business Unit Forum to ensure that all Trade Unions have had the opportunity to meaningfully influence the proposals.*
>
> *Should you have any alternate proposals, I would welcome these for further consideration and discussion.'*

[21] On 19 August 1998, Prozesky sent an almost identical letter to Ms Boshoff (nee Begg), the Group HR Manager except that the example of "1.33 years

services" had been amended to "1.5 years service", he stated that "*details would be negotiated and included in the Koeberg Management Directive No 102*"

[22] A day later on 20 August 1998, Boshoff wrote to the National Union of Mineworkers (NUM), the other union that had a presence in Koeberg. This letter reported about the meeting of 10 July 1998. The letter was headed *"Proposed Koeberg Award/Reward System and Proposed Change in Retirement Age of Licensed Employees".* It said:

> *'Koeberg has been researching issues in conjunction with the Generation Group HR Manager and external Professional bodies, relating to two major areas of concern.*
>
> *Koeberg Management in conjunction with the Executive Director (Generation) invited stakeholders to a meeting at Koeberg to discuss some proposals. (NUM did not attend).*
>
> *The intent is to allow local employees to influence the proposals before they are directed through the appropriate routes (Executive Director (Generation) and Corporate Remuneration Manager) and dealt with according to Eskom Policy and Procedures.*
>
> *Everyone would be given reasonable time to comment, after which management will direct it to the next process step.*
>
> *Your co-operation will be appreciated.'*

[23] Two important issues are evident from the above correspondence: firstly, Prozesky's letter makes it clear that only proposals were made at the meeting of 10 July 1998 and that the proposals were still open for comment and secondly, the letter states that further consultations with other stake holders with respect to the issue of early retirement of licensed operators will take place. The letter from Boshoff complements that of Prozesky and adds that "proposals" are open to be influenced before going through "the appropriate routes" and dealt with according to the appellant's "Policy and Procedure".

[24] The contents of the above quoted letters both of which relate to what transpired at the meeting of 10 July 1998 in my view indicate that the appellant was seriously dealing with the demands of the licensed operators and that the discussions were on-going and yet to be finalised. The letter from Boshoff to NUM, which had no members who were licensed operators, also points to the fact that the consultation that was to commence to deal with the issues relating to the licensed operators was not confined to licensed operators, or their union (the first respondent) but had to be discussed on a much broader basis.

[25] My view is fortified by the evidence of Douglas who testified on behalf of the first respondent. Douglas was the chairperson of Solidarity, the Trade Union that represents all the licensed operators. His evidence was not that at the meeting of 10 July 1998, an agreement was concluded in respect of early retirement but that there was a discussion on early retirement at the meeting *("spoke about early retirement")*. In fact, he concedes that the early retirement issue was not one of the principal issues that the meeting of 10 July was to consider and regarded the discussion on early retirement as *"a brainstorm"* and of *"throwing ideas"* around.

[26] Neither Hutchings nor Wilcenski the other witnesses who testified on behalf of the respondents stated that an agreement was in fact concluded at the meeting of 10 July 1998. Wilcenski spoke of "an understanding" being reached and an "in principle" agreement being concluded. Hutchings went further he regarded the whole discussion on the Early Retirement as just talk because according to him, he knew it had to be in writing and had to go through a proper process. The evidence led on behalf of the respondents established as a fact that no agreement was concluded on 10 July 1998 and that the proposals which the appellant did make had to go through a proper "process".

[27] The evidence led on behalf of the respondents also supported the evidence of Boshoff who testified for the appellant. Boshoff was at the meeting of 10 July 1998 and said that no agreement was concluded at that meeting: that discussions were open ended; that further discussions still had to take place;

that other interested parties- trade unions – had to be consulted; that the scheme had to go through the process in terms of the recognition agreement concluded between the appellant and the trade unions operating at Eskom; and, that the early retirement policy had to go through the Pension Fund Advisory Council before being referred to the Pension Fund Board of Trustees for consideration.

[28] The oral evidence supported by the letters evinces that proposals were made at the meeting of 10 July 1998 and all staff were called to comment on them. The fact that no agreement was concluded is further evident from Prozesky's statement contained in his letter of 13 July 1998 that: *"the changes would still need to be detailed and discussed at the local Business Unit Forum to ensure all Trade Union had an opportunity to meaningfully influence the proposals."* This is in line with what Boshoff wrote to NUM stating that comment will be called for before further steps are followed as provided in "Eskom Policy and Procedures."

[29] The above demonstrates as a fact that no agreement was concluded on 10 July 1998. All that happened at the meeting of 10 July 1998, was that the appellant made certain proposals with respect to early retirement for licensed operators which proposals remained under discussion and no final conclusion was arrived at nor could a final decision be arrived at until such time that all stake holders were consulted and appellant's policy and procedure were complied with.

[30] In the circumstances, based on the allegation made in the respondents' Statement of Case its action is liable to be dismissed.

[31] Respondents however aver that MD102 is proof that an agreement was concluded. Clearly MD102 deals *inter alia* with early retirement for licensed operators and records what Prozesky referred to as proposals in his letter of 13 July 1998. But again, there is no evidence of any agreement that was concluded by any task team nor is there any evidence of any consultations that gave birth to MD102. Reliance was initially placed on the letter addressed

by Boshoff to Prozesky dated 2 November 1998 to bind the appellant to the provisions dealing with early retirement in MD102. The letter states:

> ***'PROPOSED RECOGNITION SYSTEM FOR LICENSED OPERATORS***
>
> *You may proceed to negotiate and implement the above system at BU level.*
>
> *Please ensure that you document the process and establish the necessary BU Procedure.*
>
> *Regards'*

[32] Respondents however, themselves conceded that the above letter *"pertained exclusively to the reward and recognition aspect"*. In fact, respondents go on to state: *"We will not dispute that insofar as Prozesky wished to get endorsement and consent of head office for what he was doing, that he operated in error when he thought that document [above letter] produced consent to the early retirement scheme."*[1]

[33] There was thus nothing before the Labour Court to indicate any agreement that was concluded between the appellant and the respondents. Insofar as MD102 constituted an offer made to the respondents, there is no evidence of any acceptance of this offer. Insofar as MD102 was a management directive and not an agreement, it was withdrawn and there is no challenge by the respondents to it being withdrawn as such.

[34] In the circumstances, the respondents had failed to prove that a contract was concluded between them and the appellant in respect of early retirement benefits for licensed operators.

[35] The appellant's explanation as to why the early retirement scheme provision found its way in to MD102 was that Prozensky misconstrued the letter referred to above from Boshoff. He understood the letter to say that the early retirement for licensed operators had also been agreed upon and must be incorporated into MD102. That this must be so is evident from the fact that the early retirement scheme provisions were withdrawn by the appellant from

[1] Record page 247 lines 5-12.

MD102. The reasons proffered by the appellant why the early retirement scheme was not supposed to be part of MD102 and why it was withdrawn when it discovered that it was included in MD102 was that the early retirement provisions for the licensed operators had to be dealt with according to appellant's policy and procedures and this had not happened. Also correspondence produced before the Labour Court indicates that the discussions in respect of the early retirement scheme were on-going as late as middle November 1998.[2]

[36] Furthermore, the correspondence that followed the meeting of 10 July 1998 indicated that the head office and other unions had to be consulted on this issue. Hutchings on behalf of the respondents testified that Koeberg could not have its own process without the approval of the head office and in line with his evidence Douglas testifying for the respondent conceded that NUM had to be consulted about the early retirement policy for licensed operators. There was no evidence that this had been done by 2 November 1998.

[37] As against the respondents' evidence, the evidence of the appellant was that the early retirement policy affected an employees' condition of services (this was conceded by the respondents) and, as such, a specific process had to be followed in accordance with recognition agreements concluded with the trade unions that operate within the appellant's organisation as well as the appellant's own organisational policy. None of which was done.

[38] Also, it was instructive to note the correspondence from one Jan Olkers, copied to Ms Boshoff stating that while there was empathy for the licensed operators, the early retirement scheme had to get the support of the *"Pension Fund Regional Advisory Council in Bellville…who will then refer it to the Pension Fund Board of Trustees for consideration."* The date bandied about or rather mentioned to make representations to the Pension Fund Regional Advisory Council in Bellville was 17 November 1998, which was days after MD102 was issued. This demonstrates the on-going nature of the discussion on early retirement scheme for licensed operators.

[2] See particularly correspondence from Jan Olkers at pages 133- 134.

[39] Finally, the respondents took the view that MD102 was duly signed by Prozesky's delegatee on his instructions and the appellant was therefore bound by it. This argument, for reasons already stated, is misconceived. A signature on a document by one party cannot as a matter of course evince a contract between two or more parties. The parties must meet the requirements essential for the conclusion of a contract before a contract can come into being. There is no evidence here that the appellant and the respondents had met the necessary requirements to bring about an agreement between them in respect of the early retirement for licensed operators.

[40] In any event, appellant avers that Prozesky, who delegated MD102 to be signed on his behalf, had neither the power nor was he authorised to do so. The respondents' response to this was that the appellant had in fact authorised him to sign MD102 and could therefore not question his authority to do so. The respondent's view is not borne out by the evidence presented at the Labour Court.

[41] The evidence on behalf of the appellant was, as stated earlier, that the issue of early retirement related to an employee's conditions of service and, as such, was an issue of interest not of a right. Since the appellant and the trade unions including first respondent, have a recognition agreement which sets out how issues of interest must be dealt with, neither party may by-pass the recognition agreement. It is common cause that the process set out in the recognition agreement, with respect to the early retirement scheme for licensed operators, was not followed by 2 November 1998. That being so, an early retirement scheme could not be agreed to without following the proper process. Prozesky could therefore not have had actual authority or any other kind of authority to conclude an agreement by by-passing the established bargaining relationship.

[42] Knowing the above circumstances, for respondents to argue that Prozesky had ostensible authority to conclude the agreement is of no merit. The first respondent, as a party to the recognition agreement, could therefore not be misled into believing that Prozesky was entitled to by-pass collective

bargaining structures, nor could the first respondent ever have believed that because there was a separate budget at Koeberg (it being common cause that Koeberg as a business unit had its own budget) that this meant that, that budget could be utilised to conclude an agreement on an interest dispute outside the collective bargaining structure and relationship.

[43] On 10 July 1998, the parties had agreed to discuss the proposals in a structured manner and in accordance with the policies and procedures which were in place at the appellant and to consult all the stake holders. The agreement contended for by the respondents is manifestly at odds with what was agreed to at the meeting of 10 July 1998.

[44] In these circumstances, there is also no basis for the operation of the Turquand Rule, as contended for by the respondents. The Turquand Rule does not apply where the party contending for its application is aware that internal processes and procedures have not been met. The issue of the early retirement scheme for licensed operators was what was being dealt with. As this related to pensions which was a condition of service, it had to be sanctioned by the head office after proper consultation had taken place as required by the recognition agreement. This did not happen. Respondents are aware of the process that had to be complied with and the fact that it was not, that being so there was no basis for them to rely on the Turquand Rule.

[45] The respondents have failed on every level; they have failed to established that an agreement had in fact been concluded on 10 July 1998, as stated in their Statement of Claim; they have further failed to prove that MD102 constitutes an agreement which they concluded with the appellant; and, finally that Prozesky was duly authorised to conclude an agreement as evinced by the early retirement provisions of MD102.

[46] This then leaves the issue of costs. I see no reason why costs should not follow the result. There was simply no basis for the respondent to seek the relief they did based on a contract they alleged was concluded on 10 July 1998. They themselves were of the view at the trial that no such contract was

concluded as they had alleged. They persisted with their claim and raised other spurious grounds in an attempt to justify their claim.

[47] In the result, I make the following order:

(i) The appeal is upheld with costs which include costs of two counsel;

(ii) The order of the Labour Court is set aside and replaced with the following:

"The action is dismissed with costs including costs of two counsel".

_____

Waglay JP

I agree

_____

Musi AJA

I agree

_____

Dlodlo AJA

APPEARANCES:

FOR THE APPELLANT: P Pretorius SC with M. Lekoane

Instructed by Perrot, Van Niekerk Wood

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FOR THE RESPONDENTS: MSM Brassey SC

Instructed by De Lange Attorneys.