IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: D465/20

In the matter between:

AUTOMATION TECHNIQUES (PTY) LTD Applicant

And

WERNER ROELOF PRETORIUS First Respondent

PRECISION CONTROL (PTY) LTD Second Respondent

Heard: **03 March 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email by the Registrar. The date and time for handing-down is deemed to be 10h00 on date on which the email is sent to the parties by the Registrar.**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Schumann, AJ

1] The Applicant has filed submissions motivating an application for leave to appeal against the judgment in this matter delivered by me on 26 November 2020. In that judgment I held that the Applicant had failed to discharge the onus of proving that a restraint of trade clause formed part of the employment contract between the Applicant and the First Respondent. The Applicant has applied for condonation for a delay in delivering the application for leave. The delay was brief and condonation is granted.

2] On the merits, the sole argument raised by the Applicant when the matter was initially argued was that because only pages 15 and 16 of the employment contract put up by the Applicant as an annexure to its Founding Affidavit had been crossed out, clause 17.7 (on page 17 of the contract) remained applicable and, therefore, the whole of clause 17 applied, notwithstanding the deletion. The argument was clearly wrong and did not warrant mention in my previous Judgment.

3] The Applicant now raises different issues which it contends indicate that the Appeal Court may come to a different conclusion. While conceding the "Plascon-Evans rule" the Applicant suggests that I should, nevertheless, have rejected the First Respondent's version as to the manner in which the various contacts were signed. The Applicant raises alleged anomalies in the version of the First Respondent but loses sight of two important factors. The first is that, while there is a dispute as to the order in which the parties signed the final contract and where this occurred (paragraph 10 of the Founding Affidavit and paragraph 28 of the Answering Affidavit) the remaining aspects of the First Respondent's version are not placed in dispute by the

Applicant. The second is that, whatever the order of signature may have been, the Applicant attempted to rely on a clause which had clearly been deleted without any indication, at all, in its affidavits, as to why the Court should find that the deleted terms were part of the agreement between the parties.

4] Moreover, the probabilities do not favour the Applicant's version as it contends in its current argument. While the Applicant suggests that it is unlikely the First Respondent would have only crossed out pages 15 and 16 and not page 17 of the contract, it is evident from the copy of the contract put up by the Applicant that this is precisely what he did. No contrary version as to the manner of the deletion has been put up by the Applicant.

5] The absence of the initials of either party on pages 15 and 16 of annexure "KB1" to the Founding Affidavit is not dealt with in the affidavits and is raised for the first time in the current argument. The Applicant contends that this is a factor which should persuade me to reject the First Respondent's version despite the Plascon/Evans rule. The anomaly certainly does not support the Applicant's version that it sent a duly signed and initialled copy to the First Respondent for signature. (If it is suggested that the contract had only been signed by the Applicant and the pages not initialled when it was sent, then this begs the question as to how the initials of the Applicant's representative subsequently appeared on every page other than pages 15 and 16.)

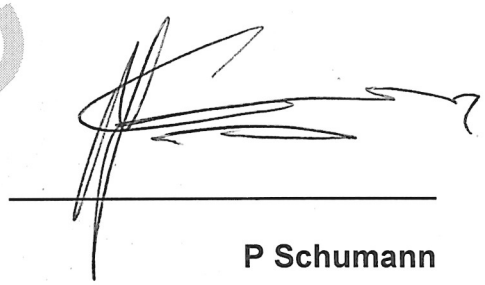
6] In my view the absence of any initials on pages 15 and 16 tends to support the First Respondent's version. The most probable inference is that the First Respondent did not initial the pages because he had deleted their contents. The most plausible explanation for the absence of the Applicant's representative's initials on those pages is that such person signed after the First Respondent (as the First Respondent contends) and did not initial the 2 pages because of the deletion and the absence of the First Respondent's initials. Without any of these issues being raised and dealt with fully in the papers, however, this is nothing more than largely meaningless speculation. To the extent that the absence of the initials creates confusion as to precisely what occurred, then this is confusion which should have been resolved by the Applicant in its affidavits, as the party who bore the onus to prove that the relevant portions of clause 17 were agreed to.

7] Continuing from this incredibly shaky factual premise, the Applicant then contends that, in the circumstances, I should have found that the doctrine of *quasi mutual assent* applied and that the Respondent was bound to the original provisions of clause 17. This appears to be an opportunistic submission based on the fact that I mentioned such doctrine in my previous judgment but loses sight of the fact that the purpose of doing so was to point out that absolutely no factual basis for the application of the doctrine had been made out by the Applicant. The very authorities cited by the Applicant in its submissions demonstrate that the doctrine cannot be applied in this case. As previously pointed out, the clear deletions in the contract which the Applicant itself put up and relied on are simply ignored in the Applicant's papers. It does not allege that it was unaware of the deletions and/or that it believed the First Respondent had assented to

the restraint, nor does it set out any factual circumstances from which it might be inferred that such alleged ignorance of the deletion or belief was reasonable.

8] I am accordingly of the view that there is no prospect of the Appeal Court reaching a different conclusion. There is no indication that the First Respondent has incurred any costs in opposing the application for leave and I therefore make the following order:-

8.1] The application for leave to appeal is dismissed.



P Schumann

Acting Judge of the Labour Court of South Africa