THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FAB17/2019

IN THE RECONSIDERATION APPLICATION OF:

GABRIEL GIDEON CILLIÉ Applicant

and

THE OMBUD FOR FINANCIAL SERVICES PROVIDERS First Respondent

NATIONAL RISK MANAGERS Second Respondent

AFFINITY RETRENCHMENT Third Respondent

Tribunal: L Dlamini (Chairperson), NP Dongwana and GO Madlanga

SUMMARY: Financial Sector Regulation Act, 2017 – interpretation of a voluntary retrenchment exclusionary clause.

DECISION

---

[1] Gabriel Cillé ("Applicant") brought an application in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act") seeking reconsideration of the decision of the Ombud for Financial Services Providers ("the Ombud") dated 10

December 2018. The application proceeded in applicant's absence however, with his knowledge.

[2] The factual background to the matter is, for the most part, common cause. A summary appears below.

[3] The applicant took out an Affinity Retrenchment Insurance Policy with National Risk Managers ("Second Respondent") for a period of three months commencing 1 June 2017 ("the Policy"). In terms of the Policy, the Second Respondent indemnified the applicant in the event of retrenchment.

[4] On 4 August 2017 the Applicant filled in documents to extend the period of cover from three months to six months as provided for in the Policy. His version is therefore that the Policy covered the initial period of three months plus a further three months owing to the extension. The Second Respondent disputes that the period of cover was ever extended and argues that the Policy only covered the initial period of three months. We deal with this dispute more fully below.

[5] The applicant was retrenched on 16 October 2017. He then lodged a claim with the Second Respondent on 19 October 2017 claiming cover for a period of six months.

On 24 November 2017 the Second Respondent made payment to the Applicant of R76 500 (“payment”) which is equivalent to one month’s cover in terms of the Policy. The Second Respondent submitted that payment was made in good faith pending its full investigation of the claim.

[6] Subsequent to payment, the Second Respondent refused to make further payments and rejected the Applicant’s claim altogether. The Second Respondent refused further payment on the basis that its investigations conducted after payment established that first, the Applicant claimed for retrenchment before the expiry of the waiting period prescribed by the Policy; second, the Applicant was not entitled to claim for longer than the initial period of three months in any event, and thirdly, the Applicant accepted voluntary retrenchment which was excluded in terms of the Policy.

[7] Aggrieved by the Second Respondent’s response, the Applicant then referred the dispute to the Ombud on 10 December 2017. The Ombud investigated the matter and dismissed it on 4 May 2018. The Applicant appealed the dismissal which resulted in the reinstatement of the matter. On 10 December 2018 having conducted further investigations, the Ombud once again dismissed Applicant’s claim. The Ombud’s decision to dismiss the claim is the subject matter of this application.

[8] In the circumstances, there are three issues for reconsideration. First, whether the Policy was for three or six months, secondly, whether the Applicant's claim was lodged prematurely before the expiry of the waiting period, and thirdly, whether the Applicant accepted voluntary retrenchment.

[9] These are dealt with in turn.

Period of cover

[10] The Applicant claimed for retrenchment cover for 6 months. The Ombud dealt with the dispute regarding the period of cover in two parts. The first part, relates to the contract of insurance the Applicant entered into with the Second Respondent in terms of which the Second Respondent undertook to insure three months of Applicant's income in the event the Applicant is retrenched ("the initial period"). The initial period incepted on 1 June 2017.

[11] The second part, relates to an extension of the initial period for a further three months ("the extended cover") as alluded to above. It is common cause that the Applicant applied for the extended cover (also referred to as "booster cover" in the Policy) on 4 August 2017. It is also common cause that the Second Respondent replied and gave the Applicant a quotation which he then completed and returned

to the Second Respondent. The quotation is duly signed and dated 7 August 2017.[1]

[12] The Second Respondent refutes the existence of any cover over both periods on various grounds. For reasons that will become more apparent below, we deal with the contentions regarding the period of cover in reverse; we deal first with the extended period and thereafter with the initial period.

[13] There is clear evidence that unlike the initial period, the extended period was not subject to a waiting period.[2] Therefore, the Ombud's decision to not deal with the dispute regarding the extended cover on the basis that it was subject to a waiting period cannot be sustained.[3]

[14] Examined properly, the extended period by virtue of it being an extension, flowed from the existence of the Policy. Strangely however, though the Policy provides for the "booster cover", it makes no provision regarding the method of its inception. During proceedings counsel for the Second Respondent was asked to refer to the

1 See record 73 to 84 of Part B of the (Ombud's) bundle.
2 See record 104 of Part A of the bundle.
3 Refer to record page 75 of Part B of the bundle).

Policy regarding how the extension was supposed to be initiated. It became clear that the Policy makes no reference whatsoever regarding what the Applicant ought to have done to take advantage to extend the policy period. Therefore, requesting documents to initiate the extension seems to have been the only available option to the Applicant. What is clear though is that the Applicant had to apply for it and that he in fact did so.

[15] The Applicant requested and received an application with a quote number (Quote 1) which he completed and the copy of which he thereafter submitted to the Second Respondent. The quote that the Second Respondent signed was undoubtedly not a policy. It states (at the bottom of the page[4]), "the quotation is intended for illustrative purposes only …". Further, it states "… will be subject to the insurer's acceptance procedures".[5] It will be remembered that the Policy does not express such procedures. The Applicant himself accepts that this was not a policy but a quote.[6] It follows that it was incumbent upon the Applicant to ensure that those procedures were met (whatever they might have been) for the extended cover to incept.

4 See record page 36 of bundle B.
5 Ibid, 49.
6 See record 38 paragraph 2 of Part A of the bundle.

[16] It is common cause that both the Applicant and the Second Respondent did not enter into any further correspondence after the Applicant submitted the quote and that the Applicant took no further steps concerning the matter. His response is in essence that he did nothing further because he believed the extended cover had incepted.

[17] The Applicant's argument is untenable in that he applied for the extended cover but did nothing to ensure that it was accepted. He also does not know what the premium for the extended cover is and he accepts that whatever the amount of premiums may have been it was never paid and is still outstanding.[7] Moreover, given that the extended cover flows directly from the policy, we also observe that the Policy stipulates: "Insurance cover shall commence on the Inception Date subject to receipt of the first premium by the insured person …".[8] On this Policy provision alone where the Applicant has admittedly not paid his first premium, the extended cover never incepted.

[18] Further, it is not clear what prevented the Applicant from making enquiries or seeking confirmation that the extended cover had incepted and to pay adjusted

7 See record 38 paragraph 2 of Part A of the bundle.
8 See record 65 of Part B of the bundle.

premiums accordingly. In any event, the Applicant's contention that he believed the extended cover was in place is at odds with his admission that he did not pay premiums on such cover. Applicant simply forgot or neglected to finalise the extended cover that would have met the procedure for acceptance of the intended cover. If he sincerely believed there was cover, he would have followed up on the premiums.

[19] In light of the evidence the extended cover never incepted. We therefore agree with the Ombud that the matter is concerned with the initial period only albeit for different reasons.

[20] We turn now to deal with the lodgement of the claim for the initial cover.

The waiting period

[21] The Policy provides at paragraph 8.1.2 that: "The Insurer shall not be liable to pay the retrenchment cover in respect of any insured person where… the insured person had knowledge, had been informed or had reasonable grounds to believe that he/she would become unemployed, retrenched or redundant before the commencement date of cover". Further, paragraph 8.2 of the Policy stipulates that, the insured person "will not be able to claim if such person was notified of the

retrenchment during the first 3 months of cover as per waiting period".[9] Put differently, the Policy will not cover the insured immediately. The insured would only be covered after the expiry of 3 months providing retrenchment notification is not given during such period. In this context therefore, the "waiting period" meant that 3 months from inception (1 June 2017) had to lapse before the Applicant could enjoy Policy cover.

[22] In light of the above, the Second Respondent submits that it is entitled to repudiate the Applicant's claim on the basis that there is evidence to suggest that within the 3-month waiting period, the Applicant might have known or had reasonable grounds to believe that he would be imminently retrenched and therefore was in breach of the Policy terms.

[23] The Applicant submits that he first became aware of the retrenchment when his erstwhile employer invited him into a meeting on 26 September 2017 which was followed by a notice in terms of section 189(3) of the Labour Relations Act, the next day, on 27 September 2017.[10]

9 See record 68 of Part B of the bundle.
10 Paginated bundle part A, p6, paras15-16; pp 58-71

[24] On 9 November 2017 the Second Respondent made enquiries with the Applicant's erstwhile employer to verify the date on which the Applicant was first made aware about the retrenchment.[11] The Applicant's former manager's reply of 10 November 2017 stated that Applicant "was informed approximately Aug/September 2017 of the operational requirements restructuring"[12] and by implication his impending retrenchment.

[25] The Second Respondent argues that the former employer's statement regarding the date raises serious concerns for it with regards to the veracity and *bona fides* of the Applicant's claim. The concerns, the argument continues, were reasonable given that the Applicant was a senior employee at his erstwhile employer hence it was questionable whether in fact he did not catch wind of his possible retrenchment. Furthermore, the Applicant's request of 8 August 2017 regarding the waiting period in respect of the extended cover reinforces the reasonableness of questioning the *bona fides* of the Applicant's claim.

[26] Having considered the evidence before us, we are not persuaded by the Second Respondent's contention that the Applicant had knowledge that he was due to be

11 See record page 59 of Bundle Part B.
12 Ibid.

retrenched within the waiting period. The contention is not based on facts. It is conjecture at best. The argument does not vitiate the Applicant's averment that he first knew of the retrenchment outside the waiting period.[13] The Second Respondent cannot hope to repudiate payment of the Policy claim on the suggested basis. It requires proper proof to succeed, which in this instance, has not been established. The former manager's statement is imprecise but is not incompatible with the Applicant's version regarding when he first knew he would be retrenched. Therefore the Second Respondent cannot hope to rely upon the statement of the former manager to repudiate the Applicant's claim.

[27] In the circumstances it has not been shown that within the waiting period the Applicant had knowledge that he would be retrenched. The Second Respondent's contention in this regard therefore fails.

Voluntary retrenchment

[28] The Second Respondent's alternative basis for repudiating the Applicant's claim arises from the exclusionary provision in the Policy that prevents the insured

[13] See also record pages 58 – 63 of Bundle Part A in this regard.

person from claiming on the Policy where such person accepted voluntary retrenchment.

[29] Paragraph 8.1.5 of the Policy provides: "The Insurer shall not be liable to pay the retrenchment cover in respect of any Insured Person where the Insured person… **accepts voluntary retrenchment**" [14] [own emphasis in bold].

[30] In light of the above Policy provision the Second Respondent repudiated the Applicant's claim on the basis that the Applicant accepted voluntary retrenchment before the retrenchment proceedings were finalized by his erstwhile employer. The argument is substantiated on the basis that between 4 October 2017 and 13 October 2017, the Applicant (acting through his attorneys) and his erstwhile employer exchanged several correspondences consulting on what was then the applicant's potential retrenchment.[15] Such correspondent resulted in the Termination of Employment Agreement signed 16 October 2017 ("the Agreement").[16]

14 Refer to record page 29 of bundle Part A.
15 Refer to record pages 6 – 8 of bundle part A.
16 Refer to record page 93 – 96 of bundle Part A.

[31] The Second Respondent argues further that the Agreement records*, inter alia* that, the Applicant was not in any manner forced or coerced to conclude the Agreement. Further, that both the retrenchment agreement *ex facie* its own terms as well as the circumstances described by the Applicant indicated that the Agreement is clearly in fact a voluntary resignation agreement. In this regard the Second Respondent argues that voluntary retrenchment is an alternative to a potential forced or compulsory retrenchment. Furthermore, the argument continues, in essence the employee agrees to be retrenched and not to sue the employer for an alleged unfair dismissal in return for payment of an amount or receipt of benefits.

[32] The Second Respondent then cites the cases of *South African Transport and Allied workers Union obo Mlotsa and Others v Grindrod (Intermodal)*[17] *and Nthite v Reitzer Pharmaceuticals (Pty) Ltd*.[18] These authorities define what a voluntary retrenchment agreement is. Notably both cases deal with instances in which the employee signs a retrenchment agreement and waives the right he or she may have concerning the fairness or otherwise of the termination. Second Respondent's argument seeks to show that the exclusionary provision of the Policy

17 [2016] ZALCJHB 429.

18 [2014] ZALCJHB 326.

sought to prevent the Applicant from compromising his potential claim against the employer.

[33] In light of the above, counsel for the Second Respondent argued that the examination of the authorities cited clearly shows that the Applicant entered into a voluntary retrenchment agreement. On the basis of the authorities, counsel emphasised the point that voluntary retrenchment terminates the employment agreement, the agreement is in full and final settlement of all claims relating to employment; and the agreement dispenses with all procedural requirements in terms of section 189 of the Labor Relations Act, 1995, and all procedural requirements pertaining to operational requirement terminations.

[34] Counsel argued further that [the Applicant's response to] pressure to avoid litigation in the CCMA and acceptance of a legally strategic retrenchment agreement does not deprive the retrenchment agreement from being a voluntary retrenchment agreement. Therefore, his argument proceeded, having concluded that the Applicant entered into a voluntary retrenchment agreement, the Second respondent was entitled to repudiate the Applicant's claim in line with the Policy exclusions.

[35] In response, the Applicant submits, *inter alia*, that he never opted for his retrenchment voluntarily. He still wanted to be employed;[19] his employer made it clear that the parties would either reach an agreement or he would be retrenched in any event but without an agreement;[20] that a difference exists between signing a voluntary retrenchment package and signing an agreement voluntarily;[21] that the employer confirmed that the retrenchment was not voluntary and that it was in fact a mandatory retrenchment; and also that the Agreement was entered into for strategic reasons to avoid litigating with the Applicant's former employer.[22]

ANALYSIS

[36] The Policy provides no definition or any form of guidance regarding what voluntary retrenchment is. However, the Second Respondent's approach presupposes that the interpretation it gives arises out of a clear provision that reflects what the parties (the insured Applicant and the Second Respondent as the insurer) contemplated at the time the Policy was signed. Approaching the matter in that way oversimplifies the issue.

19 See record page 35 of bundle Part A.
20 Ibid.
21 See record page 36 of bundle Part A.
22 Refer to record 34 of bundle Part A.

[37] The lack of clarity on how the parties intended for paragraph 8.1.5 of the Policy to operate is evident from the correspondence forming part of the record. As opposed to what voluntary retrenchment is, the enquiry must therefore be redirected to the proper question which is: what did the parties mean by "**accepts a voluntary retrenchment"**?

[38] In full, paragraph 8.1.5 of the Policy reads: "The Insurer shall not be liable to pay the retrenchment cover in respect of any Insured Person where: the Insured person finishes the job he/she was specifically employed to do, resigns, retires or accepts voluntary retrenchment."

[39] In the endeavour to establish the intention of the parties at the time of signing the Policy, the ordinary rule relating to the interpretation of contracts must be applied. Such intention must be gathered from the language used, which if clear, must be given effect to. The enquiry involves giving the words used their plain, ordinary and popular meaning unless the context indicates the contrary. Further, any provision purporting to limit an obligation to indemnify must be restrictively interpreted

because it is the insurer's duty to ensure it makes clear what particular risk it seeks to exclude. [23]

[40] Bearing the above in mind, the exclusions contemplated in 8.1.5 of the Policy arise from an employment relationship. They are notably events that flow naturally from what the employer and employee determine from the start would be effected by effluxion of time and the employee's choice. None of the events excluded seem capable of being controlled by the employer's need or compulsion once the Policy is signed, hence the employee had to accept retrenchment where it was not compulsory for the exclusion to operate. The implication is that the [insured] employee must have a choice to not accept the operation of the event.

[41] The above interpretation appears to be exactly what the Second Respondent had in mind. On 9 November 2017 the Second Respondent wrote to the Applicant's former employer and asked: "I see on the documentation provided that the company considered voluntary retrenchment – please could you advise if this specific retrenchment of Gabriel Gideon Cillié was a voluntary retrenchment or not". To elucidate on the question lest it was not clear, the Second Respondent asked: "was he offered another position and opted to take the retrenchment route

23 **Witbooi v Leandra Transport CC 2010 JDR 1507 (WCC).**

instead?." The former employer's response was that "The retrenchment of Mr Cillié was not voluntary, it was a mandatory retrenchment … no suitable alternative positions were available …"[24]

[42] It must be emphasised that the former employer's response is not what decides whether or not the Applicant entered into a voluntary retrenchment with his former employer. Such approach would be incorrect. The correct approach visits the intention of the parties at the time of signing the Policy.

[43] The Second Respondent's questions to the former employer quoted above highlight the fact that the Second Respondent's enquiry was directed at the Applicant's former employer to establish whether or not the Applicant had a choice to not accept that he was being made redundant. In other words, the Second Respondent sought to establish if the Applicant did not opt to voluntarily leave employment before honouring the Applicant's claim.

[44] Having satisfied itself that the Applicant's retrenchment did not vitiate the original intent of the exclusion and having received answers to its question on 10

24 See record page 99 of bundle Part A.

November 2017, the Second Respondent on 24 November 2017 then paid the Applicant the first month's retrenchment cover in terms of the Policy. Making payment after its enquiry reinforces the belief that the Second Respondent considered the claim and was satisfied that the Applicant was compelled to leave his employment and that he did not accept voluntary retrenchment as contemplated in paragraph 8.1.5 of the Policy.

[45] In the circumstances, both the Applicant and the Second Respondent did not intend the words "accepts voluntary retrenchment" to exclude cover in instances in which the Applicant was retrenched without any choice of accepting another position within his former employ. We do not accept the argument that the payment the Second Respondent made for the first month of cover was merely a good faith payment (that does not carry any meaning in any event). Such payment was made because the Policy provides for it. There was nothing preventing the Second Respondent from repudiating the claim if it was not satisfied that the conditions for payment had not been met.

[46] Therefore, the Second Respondent does not have a valid basis on which to repudiate payment of the Applicant's claim for the remaining two months of the initial period.

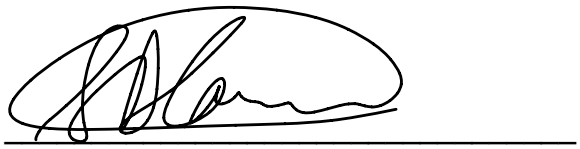
CONCLUSION

[47] The following order is made:

47.1. Matter is remitted to the decision maker for reconsideration.

47.2. No order as to costs.

Signed on behalf of the Tribunal on this 05 December 2019 at Pretoria.



Langa Dlamini (Chairperson)