IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 25/2021

In the matter between:

JOHANNES MARA **Applicant**

and

TEMS MEAT WHOLESALERS **First Respondent**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 19 January 2024.

JUDGMENT

MAHOSI, J

Introduction

[1] The issue in this matter relates to the applicant's claim of automatically unfair dismissal, as provided for in section 187(1)(f) of the Labour Relations Act[1] (LRA), by the respondent. In essence, the applicant claims that the respondent unfairly discriminated against him when it dismissed him because of his age.

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[1] No. 66 of 1995, as amended.

[2] The respondent denied any dismissal and averred that the applicant voluntarily entered into an early retirement agreement. Although the applicant conceded that he had signed the agreement above, he averred that the respondent coerced him into signing it.

[3] The parties sought that this Court determine, *inter alia*, whether the agreement entered into on 27 August 2020 was valid and binding. On the one hand, the applicant testified in support of his case and filed heads of arguments. On the other hand, the respondent's representative cross-examined the applicant and only filed heads of arguments.

Background

[4] The applicant commenced employment with the respondent as a driver in November 2009. Before that, the applicant was a Temporary Service Employee placed at the respondent. At the time of his dismissal, the employee earned a salary of R8 000.00 per month.

[5] On 01 July 2020, whilst at work and offloading a truck, the applicant sustained injuries which rendered him unfit for work. As a result, the applicant attended various medical evaluations, reports of which he submitted to the respondent. Whilst the medical report dated 15 July 2020 showed that the applicant was likely to be fit to do light duty from 17 July 2020, the one dated 04 September 2020 revealed that the applicant was fully recovered and had been fit for work from 01 September 2020.

[6] The applicant subsequently returned to work. On 27 August 2020, the applicant and the respondent signed a Mutual Separation Agreement titled "Early Retirement". The circumstances surrounding the signature of the aforementioned agreement are in dispute. The respondent paid the applicant in terms of the agreement and the latter withdrew his funds from the Provident Fund.

[7] Dissatisfied with the amount of money he received as per the agreement and from the Provident Fund, the applicant referred an unfair dismissal dispute to the Bargaining Council for the Meat Trade Gauteng (the bargaining council) for conciliation. The bargaining council could not resolve the dispute through conciliation. As a result, it issued a certificate of outcome certifying that the matter remained unresolved as of 17 November 2020. The ruling directed the applicant to refer the matter to the Labour Court for adjudication. Accordingly, the applicant launched this application.

The evidence

[8] The applicant testified that after recovering and resuming his duties, the respondent's director, Mr Steven de Pina (Mr Steven), offered him early retirement and showed him the settlement agreement. He requested to take the agreement to his children for their advice. However, Mr Steven refused, told him he had no time, and pointed him to where he was supposed to sign. When asked how he was forced to sign the agreement, the applicant stated that Mr Steven shouted and told him that he had no time.

[9] Under cross-examination, the applicant conceded that he withdrew his funds from the Provident Fund on 15 September 2020. Thereafter, he instructed a firm of attorneys to refer, on his behalf, an alleged unfair dismissal dispute to the bargaining council. Further, the referral form disclosed that the respondent offered him early retirement and a severance pay that was less than what he was entitled to. Furthermore, the respondent failed to allow the applicant to return to work after the proposed early retirement.

Applicable law and analysis

[10] The dispute between the parties mainly turns on the validity or otherwise of the settlement agreement, and the finding in the affirmative settles the matter.

[11] It is an established principle that contracts are binding on parties and are therefore enforceable unless it can be shown that the parties were not on an equal footing when entering into the contract, or that the contract was invalid *ab initio*, or that it is contrary to public policy or it is an illegal contract. In *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another*[2] the Labour Appeal Court (LAC) held that:

> '[12] Contractual principles apply to any agreement entered into between an employer and employee, including an agreement of compromise in terms of which parties agree to settle any dispute, or claims, that may exist between them.
>
> [13] It is not in issue that the appellant and respondent signed the mutual separation agreement. Neither is there any dispute that the agreement records that it was entered into "*in full and final settlement of all claims of whatsoever nature and however arising between the Parties*"; that the appellant waived his right to notice pay and his right to approach both the Commission for Conciliation Mediation and Arbitration (CCMA) and any court for relief against the respondent "*emanating from his Employment, his resignation and/or* [the] *[a]greement."*
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> [14] The appeal against the judgment of the Labour Court turns, in the first instance, on whether the separation agreement was signed under duress by the appellant and is, as a consequence, invalid *ab initio* and whether the Court *a quo* erred in finding that it was not.
>
> [15] A contract may be vitiated by duress where "*intimidation or improper pressure renders the consent of the party subjected to duress no true consent*". Compulsion may be exercised by way of physical force, or indirectly, by way of a threat of harm. In order to obtain an order setting aside a contract on the grounds of duress, actual violence or reasonable fear must be shown. The fear must be caused by the threat of some

[2] (2016) 37 ILJ 902 (LAC) at para 12 onwards.

> “considerable evil” to the person concerned, or to his, or her, family. The threat or intimidation must be unlawful, or *contra bonos mores* and the moral pressure used must have caused damage. The burden of proving the existence of duress rests on the party raising it.
> [Footnotes omitted]

[12] In the current matter, the applicant contended that he signed the agreement under duress as the respondent told him that he had no time, pointed to where he had to sign and was not allowed to take it home to consult his children. When asked if he complained to the respondent about the settlement amount before signing, he explained that his relationship with the respondent was that of a "*boy and boss*". The picture painted by the applicant did not show actual violence or reasonable fear caused by considerable evil to him. He had a choice to leave Mr Steven’s office without signing the agreement, but he chose not to.

[13] The applicant did not immediately refer the dispute to the bargaining council. Instead, he raised concerns about the settlement agreement when he was unhappy with the payment amount from the Provident Fund. In the referral to the bargaining council, he did not raise the complaint about being coerced to sign a settlement agreement. Additionally, he could not, under cross-examination give a reason why he chose not to, save to state that it was his attorneys who referred the dispute. Therefore, the only reasonable conclusion that the Court could draw is that he read and understood the contents of the settlement agreement prior to signing it.

[14] The Constitutional Court in *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another*[3], held as follows:

[3] 2016 (12) BCLR 1515 (CC) at para 24

> ‘The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.’

[15] In *casu*, the applicant accepted the conditions of the agreement to be in full and final settlement of all claims of whatever nature that he may have against the respondent. On the conspectus of all the evidence, the applicant failed to prove the existence of duress or coercion. Thus, with the signature of the agreement not being in dispute, the settlement agreement is binding on the parties. The fairness of the applicant's dismissal does not arise in light of the above. Therefore, it follows that the applicant's claim ought to be dismissed.

<u>Costs</u>

[16] Whilst the applicant was ill-advised in bringing this application, I am not inclined to order costs against him, considering the principles of equity and fairness.

[17] Accordingly, the following order is made:

<u>Order</u>

1. The applicant’s claim is dismissed.

2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the applicant: Mr Goerge Leshaba, an attorney of MM Mitti Incorporated Attorneys

For the respondent: Mr George Jonker, an official of the South African United Employers's Organisation