IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 1305/2020

In the matter between:

BIFAWU obo HLAHLA JUSTICE & 4 OTHERS **Applicants**

and

SOUTH AFRICAN FOOTBALL ASSOCIATION (SAFA) **Respondent**

Heard: **18 – 21 July 2023**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 27 March 2024.**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] In this opposed claim, the union, BIFAWU, sought an order on behalf of its members (the individual applicants), declaring their dismissal on account of the respondent's (SAFA) operational requirements to have been unfair. The individual applicants seek reinstatement.

[2] The termination of the individual applicants' services arose from SAFA having implemented measures to mitigate the effects and the impact of Covid-19 pandemic from March 2020. SAFA in an effort to manage its sustainability and improve its financial position, had implemented wage cuts, followed by offers of Voluntary Severance Packages (VSPs) to its employees.

[3] The individual applicants had applied for VSPs and their applications were accepted by SAFA, leading to the conclusion of settlement agreements in that regard. BIFAWU, which is the representative union of the individual applicants however challenges the termination of the services of the individual applicants. It contends that SAFA bypassed it when offering the individual applicants the VSPs and failed to consult with it.

[4] Principal to BIFAWU's further contentions is that SAFA had forced, threatened, misrepresented and induced its members to accept VSPs. It is alleged that SAFA acted contrary to the provisions of clause 15(a) of the parties' collective agreement, read with section 189(1) of the Labour Relations Act[1] (LRA), and the provisions of Schedule 8 of the Code of Good Practice for dismissals based on operational requirements.

[5] In response, SAFA contended that the Court lacked jurisdiction to adjudicate the dispute as the individual applicants were not dismissed, but that each one of them had elected to apply for VSPs, which applications were accepted. It further contends that the individual applicants' services were therefore terminated by mutual consent. SAFA further denied that it made any form of threats or induced the individual applicants to accept VSPs.

Background:

[6] SAFA is a voluntary association, and regulates the game of soccer at both amateur and professional levels. It does not receive any funding from government and derives its revenue mainly from sponsorships sourced from private and public companies. From this revenue, SAFA must fund its operational costs, the national soccer teams, the four soccer leagues, and all football development in the country. Sponsorships are not a steady source of revenue as sponsors can pull out or at most, reduce the amount of their sponsorship.

[1] Act 66 of 1995, as amended.

[7] On 6 July 2012, SAFA and BIFAWU entered into a collective agreement. In March 2020, a National State of Disaster was declared by the President of the Republic, which was also followed by a nation-wide lockdown. As a result, SAFA's then Acting COO, Mr Mokoena sent a letter to all employees, advising them that most would be required to work from home. At that stage, nothing was mentioned by Mokoena about staff reduction, cutting of salaries or implementation of any new structure that may necessitate retrenchments.

[8] In April 2020, SAFA's President, Mr Danny Jordaan raised concerns with Mokoena about the sustainability of paying employees in full, whilst they were not at work. Following various meetings between the Chief Financial Officer of SAFA and other officials and senior management, from April 2020, measures were considered regarding SAFA's cash flow and how best to address *inter alia*, payment of employees during the lock-down. Amongst measures considered were a reduction of the head count and salaries in the light of employment contracts in place. Other options considered were VSPs or forced retrenchments.

[9] On 22 April 2020, SAFA's Management Committee recommended to SAFA's National Executive Committee that in order to reduce the salary annual costs by at least R20m, certain recommendations had to be adopted, including a 15% salary reduction across the board (for all employees), effective from May 2020 until SAFA's financial position had improved. It was further recommended that month to month contracts be terminated with immediate effect; and that the extension of fixed term contracts should be motivated by General Managers.

[10] On 2 May 2020, an email was sent to all staff members informing them about Covid-19 annual leave and the costs of salaries as a result of the unfavourable financial position SAFA found itself in. Staff was informed that management had agreed to implement the 15% salary reductions across the board. Employees were also informed to establish committees that would participate in a consultation process, including their input into how the R20m salary reduction could be achieved.

[11] BIFAWU opened its offices when the lockdown restrictions were eased to level 3 in May 2020. SAFA issued notices in terms of section 189(3) of the LRA on 10 June 2020. The Notice contained *inter alia*, an offer of VSP. In the same month, SAFA addressed a letter to BIFAWU and also attached a notice in terms of section 189(3) dated 18 June 2020. BIFAWU was also informed of the decisions already taken, including the 15% reduction in salaries and offers of VSPs to employees.

[12] BIFAWU and SAFA held a meeting on 24 June 2020. BIFAWU had raised concerns about not being involved in discussions surrounding SAFA's restructuring in view of parties' collective agreement and the defective nature of the notice in terms of section 189(3) of the LRA.

[13] Another meeting was held on 29 June 2020 where SAFA was to justify the decision to implement the 15% salary cut across the board and the options given to the employees. It appears nothing of substance arose out of the meetings and engagements between the parties. BIFAWU had on 27 August 2020 referred a dispute to the CCMA, and when the dispute could not be resolved, BIFAWU brought the claim before the Court. One of the individual applicants, Ms Constance Twala has since withdrawn from this matter.

Preliminary points raised by SAFA:

[14] As already indicated, SAFA's main contention was that the Court lacked jurisdiction to adjudicate the dispute on the basis that the individual applicants were not dismissed but that they had elected to apply for VSPs. It further contends that to the extent that the applicants have not taken any steps to set aside the settlement agreements in terms of which they had accepted VSPs, there was no basis to conclude that they were dismissed.

[15] It was further not in dispute that the VSPs were offered in the notice issued in terms of section 189(3) of the LRA on 10 June 2020. Employees were advised that if they were interested in VSPs, they were required to submit

their applications to the HR department within 7 days from the date of the notice, as the period for applications would be closed with effect from 25 June 2020. It is not in dispute that the individual applicants had applied for the VSPs in June and July 2020, and that their applications were accepted. Standard settlement voluntary severance agreements were then prepared and given to the individual applicants, who had then signed them on varying dates in July 2020. Copies of these agreements formed part of SAFA's bundle of documents.

[16] On 28 July 2020, BIFAWU was informed that about 19 applications from employees were received for VSPs, and that number included its members. SAFA's contention was that BIFAWU members applied for VSPs without informing their union. SAFA had nonetheless accepted these applications resulting in the VSP settlement agreements.

[17] BIFAWU's case in the light of the jurisdictional point raised by SAFA was that the VSPs were accepted by the individual applicants in circumstances where SAFA had threatened them after the national lockdown was announced, and after they were told to work from home. The basis of the alleged threat was correspondence sent by SAFA to all the employees, informing them that due to its financial position, it was unable to continue paying monthly salaries.

[18] As I understand BIFAWU's argument, it was this correspondence to the employees that gave rise to alleged fears and feelings of being threatened, hence they signed the VSPs. Furthermore, BIFAWU submitted that the VSPs was a matter of consultations between parties to a collective agreement in view of the fact that they arose from a retrenchment exercise, and that SAFA had unilaterally implemented them contrary to the provisions of the LRA, and outside the parameters of the collective agreement.

[19] The terms of the standard *'Voluntary Severance Agreement'* entered into between SAFA and the individual applicants made provision for certain amounts of voluntary severance package in certain payments in full and final settlement. The package included bonuses, leave pay, and two months'

notice pay. The applicants were to remain members of the Pension Fund of SAFA until 31 July 2020.

[20] Of importance for the purposes of this dispute was that under clause 7 '*Full and final settlement'*, the parties recorded that the signature of the agreement *'will result in full and final settlement of any and all claims arising from the employee's employment by SAFA, whether such claims arise from delict, contract, operation of statute, fairness or otherwise'*

[21] As a starting point, it is trite that agreements such as in this case, are a product of compromise between two parties, and are held up as enforceable deals. Written agreements are ordinarily conclusive as to the rights and obligations of the parties[2]. In *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another,* it was held that our courts, have a powerful interest in enforcing agreements, and that the parties must be held bound to their agreements. This was so in that where parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced, as the intention is to finally settled the dispute[3].

[22] It is accepted flowing from *Arend and Another v Astra Furnishers (Pty) Ltd*[4], that a contract or agreement may however be vitiated by duress, misrepresentation, intimidation, or some other improper pressure, as this would render the consent of the party as not being true consent. Even in such circumstances however, a party must still demonstrate such duress in order to have the settlement agreement set aside.

[23] In *Goddard v Metcash Trading Africa (Pty) Ltd*[5], it was held that if an employee challenges the validity of a settlement agreement with the employer, this Court will ordinarily have jurisdiction to adjudicate the matter

---

[2] *South African Municipal Workers Union and others v City of Johannesburg Metropolitan Municipality* (2013) 34 ILJ 1944 (LAC) at para 20.
[3] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another* [2016] ZACC 33; (2016) 37 ILJ 2723 (CC); 2016 (12) BCLR 1515 (CC); [2017] 1 BLLR 1 (CC) at para 24.
[4] 1974 (1) 298 (C) at 306A – C.
[5] (2010) 31 ILJ 104 (LC).

and set it aside if a case is made therefor. The proviso however is that the applicants must have sought an order setting aside such an agreement.

[24] In this case, inasmuch as the applicants contend that they were induced into accepting the agreements, it is further common cause that they were indeed paid the amounts mentioned in the settlement agreements, and there is no indication that they had tendered the repayment of the amounts paid to them.

[25] Other than the above, from BIFAWU's pleadings and its position when the matter was heard, it argued its case as if there was an application to set aside the agreements, when this was not the case. Its argument other than the issue of duress or other factors vitiating agreements, was in the same vein, directed at lack of a consultation when the VSPs were offered.

[26] The real picture however is that even if BIFAWU may not have been formally aware of the offer of VSPs at least until June 2020, as of 18 July 2020, it was aware that its members had accepted the VSPs. It is clear as contended for by SAFA, that its own members did not inform BIFAWU that they had applied and accepted the VSPs. It is therefore non-suited for BIFAWU to further seek to argue this case as if it is an ordinary retrenchment case when it is not, especially in the light of the preliminary points raised. Once however employees have been offered a VSP and had accepted by entering into settlement agreements in that regard, based on the authorities as cited above, the employees are bound by those agreements. Thus, the question whether the employees were retrenched or not does not feature at all, unless they are able to extricate themselves from the binding nature of the agreements.

[27] In the absence of any attempt to set aside those agreements for whatever reason, and further in view of the applicants not having tendered to repay all amounts received resulting from the agreements, the Court's jurisdiction cannot be engaged. This is so in that, a dismissal as contemplated in section 186(1)(*a*) of the LRA would not have been established. Equally so, the applicants cannot accept the benefits of settlement agreements and yet simultaneously seek to be excused from those agreements. The applicants

cannot have it both ways, and the Court cannot countenance such an approach.

[28] Furthermore, it has been said that a clause in a VSP in which the parties relinquished their rights to approach any forum including this Court regarding any dispute that arises from the work relationship, is valid despite the provisions of section 34 of the Constitution,[6] which grants every person the right to access to the courts. The reason for this is that the parties agreed that the VSP is signed in full and final settlement of all disputes between the parties.

[29] Added to the applicants' dilemma in this case is that with their signature of the agreements to be entered into in full and final settlement of all claims, the intention of the parties is apparent from the language of the agreement in its context, and it follows that the principle of *caveat subscriptor,* should find application in this case[7].

[30] Against the above principles and observation, it ought to be concluded that the applicant's claim before the Court ought to fail, as in the absence of a dismissal having been established, the Court lacks jurisdiction to determine any claim of alleged unfair retrenchment.

[31] I have further had regard to the question of costs. Upon a consideration of the requirements of law and fairness, it is concluded that a costs order is not warranted in this case.

[32] Accordingly, the following order is made:

Order:

1. The respondent's preliminary points are upheld.

---

[6] The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

[7] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another* (JA95/2014) [2016] ZALAC 4; (2016) 37 ILJ 902 (LAC); [2016] 5 BLLR 425 (LAC) at paras 24 - 26

2. The Court lacks jurisdiction to determine the applicant's claim.

3. The applicants' claim is struck off the roll.

4. There is no order as to costs.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:	Mr Nhlapo, Official of BIFAWU
For the Respondent:	Mr P Mosebo of Weksmans Attorneys.