IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 95/2014

In the matter between:

MUYIWA GBENGA-OLUWATOYE **Appellant**

and

RECKITT BENCKISER SOUTH AFRICA

(PTY) LIMITED **First Respondent**

NADEEM BAIG N.O. **Second Respondent**

Heard: **12 November 2015**

Delivered: **03 February 2016**

Summary: Appellant's urgent application to have separation agreement declared invalid and to set aside the termination of his employment dismissed by the Labour Court. On appeal held: agreement remains in force and binding upon parties; duress and undue influence not proved to exist; and no term contrary to public policy. Appeal dismissed with costs.

Coram: Waglay JP, Coppin JA *et* Savage AJA

JUDGMENT

SAVAGE AJA

[1] This is an appeal, with the leave of this Court, against the judgment of the Labour Court (Molahlehi J) which dismissed with costs the urgent application of the appellant, Mr Muyiwa Gbenga-Oluwatoye, in which an order was sought that:

1. the first respondent, Reckitt Benckiser South Africa (Pty) Ltd (the respondent), had breached clause 10.1 of his employment contract in dismissing the appellant without a hearing;

2. the mutual separation agreement concluded between the parties on 3 March 2014 was unlawful, invalid *ab initio* and of no force and effect; and

3. the termination of the appellant's employment be set aside and he be reinstated into his employment pending an enquiry into the allegations of misconduct raised against him.

[2] The appellant, a Nigerian citizen, concluded a contract of employment with the respondent on 16 June 2013. On 22 July 2013, he commenced employment as the respondent's regional human resources director. His employment with the respondent followed an approach made by a recruitment consultant during January 2013 to the appellant, who was at the time employed by Unilever in Dubai, regarding a work opportunity in South Africa. In February 2013, the appellant left Unilever to take up employment with Standard Chartered Bank in Dubai. Shortly thereafter he contacted the recruitment agent to enquire about the South African work opportunity previously mentioned. In his *curriculum vitae* provided to the respondent, the appellant did not record that he was no longer employed at Unilever, or that he was employed at Standard Chartered Bank. In fact, when interviewed by the respondent, he indicated that he remained employed at Unilever and it was on this basis that his remuneration package with the respondent was negotiated. As a result, the respondent agreed to pay the appellant US $40 000 as a sign-on bonus for Unilever shares/share options he purportedly held and which he represented to the respondent he would forego on termination of his employment with Unilever.

[3] On 21 February 2104, several months after the appellant had commenced employment with the respondent, the appellant was suspended from duty pending the outcome of a disciplinary investigation against him into alleged misconduct.

[4] On 3 March 2014, the appellant was called to the offices of the respondent in Johannesburg where from 14h00 several telephonic conversations were conducted between the appellant, the respondent's in-house regional legal counsel, Mr Francois French, who was also in Johannesburg, and Mr Nadeem Baig, the second respondent, who was in Dubai. The transcript of one of these conversations records that the appellant admitted that "…*there is really nothing that I am going to say to justify …my actions*…" which he acknowledged had breached the trust relationship between him and the respondent.

[5] On the same day, the appellant's employment with the respondent was terminated with immediate effect on the basis of the misrepresentations which he made. In the termination letter provided to him, it was recorded that:

> '*…1.2 during the interview[s] and/or the recruitment process you advised, inter alia [that] –*
>
> *1.2.1 you were employed at Unilever, situated in Dubai, until RB made the formal offer of employment on/or about 12 June 2013 and until you accepted employment at RB on/about the same date, i.e. 12 June 2013, via e-mail;*
>
> *1.2.2 you negotiated your remuneration package based on your then current employment at Unilever;*
>
> *1.2.3 you stated that you would lose shares/share options as a result of –*
>
> *1.2.3.1 terminating your employment with Unilever; and*
>
> *1.2.3.2 if you accept the offer of employment at RB;*
>
> *1.3 RB compensated you for the loss of shares in the amount of gross USD 40,000.00;*
>
> *1.4 your Curriculum Vitae ("CV") which you forwarded and presented to RB, also stated that you were at all times employed at Unilever;*
>
> ***True State of Affairs***
>
> *1.5 you were not employed at Unilever during the interview[s] and/or the recruitment process;*

1.6 you were employed at Standard Chartered Bank ("SCB"), situated in Dubai, as a Senior Human Resources Relationship Manager, from 11 February 2013 to 30 June 2013;

1.7 your employment with SCB terminated on/about 30 June 2013;

1.8 you were aware that the representations you made in relation to your employment with Unilever, including the period and currency of your employment, the loss of shares and remuneration you earned at the time, were false;

1.9 you failed to act in the best interest of RB in that you were dishonest and/or made representations to RB which representations were untrue, which is also a breach of your Employment Agreement, alternatively failed, neglected or refused to disclose pertinent information in relation to your employment with Unilever and SCB;…

…1.9.3 In addition, when questioned on 21 February 2014, regarding your employment at SCB, you advised that you were only employed for 1 month at SCB whereas you were in fact employed for almost 5 months, from 11 February 2013 to 30 June 2013.

2. Had RB known the true state of events, RB would not have employed you, let alone agreed to pay the compensation for the alleged loss of shares in the amount of gross USD40 000.00…'.

[6] The appellant was informed that it had been decided to terminate his employment immediately on the basis of what was stated to be his misconduct which was "…*serious, has a significant and negative impact on RB as employer and erodes any confidence or trust RB has in you as an employee and executive…".* The letter recorded that *"all mitigating and aggravating circumstances*" had been considered and that the appellant had been invited to make representations as to why his services should not be terminated and that the representations made had been considered prior to his termination.

[7] Having been informed that his employment had been terminated, the appellant immediately thereafter requested that the respondent afford him a

"softer exit". He asked for time to repay the US$40 000 and to allow his work permit and housing allowance to be extended for some months. When the second respondent agreed, the appellant responded: "*Nadeem, thank you very much for the human touch and the human face and extending for 3 months my work permit and my – the housing*." Further negotiations took place and the second respondent indicated that a further letter would be prepared which would require the appellant to agree to the repayment of the US$40 000. The appellant agreed.

[8] The first separation agreement prepared by the respondent was not signed. Further negotiations took place and in a subsequent telephone conversation between the parties, the second respondent advised the appellant that management had agreed to a soft exit on the terms discussed. The amended separation agreement was then signed. It recorded that it was entered into "*in full and final settlement of all claims of whatsoever nature and however arising between the Parties*". The appellant acknowledged in the agreement that he accepted the termination of his employment "without duress or undue influence" and that he "…*was not in any manner whatsoever forced or coerced to conclude this [a]greement*". He "voluntarily and unconditionally" waived his right to any notice pay and "*his right to approach any [r]elevant [a]uthority including the CCMA and/or the Labour Court or any other [c]ourt for any relief against the* [first respondent] *emanating from his [e]mployment and/or his resignation and/or this [a]greement*". In addition, the appellant signed an acknowledgment of debt in terms of which he became indebted to the first respondent in the sum of US$ 40 000 with interest, which debt was to be repaid from no later than 31 January 2015.

[9] On 10 March 2014, a week after the termination of his employment, the appellant approached the Labour Court on an urgent basis, contending that he was coerced into signing the separation agreement against his will and under duress, after having been threatened with the immediate revocation of his work permit and cessation of his salary, payments towards his housing, medical aid and school fees and repatriation costs. The appellant further contended that the terms of the agreement, particularly those restricting his

right to approach the courts were contrary to public policy and that the agreement was invalid *ab initio*. The appellant also claimed that the respondent had repudiated the contract of employment, which, in clause 10.1, created an express, alternatively an implied entitlement to a pre-dismissal hearing. As a result, he sought specific performance in the form of an order of reinstatement.

[10] The respondent opposed the application on the basis that the appellant had signed the separation agreement voluntarily, in full and final settlement, without duress and that he had neither been coerced, nor forced to sign the agreement. The respondent denied that the agreement was invalid *ab initio* and disputed that the limitation on seeking further redress, on the basis of the full and final settlement reached, was a term that was contrary to public policy. In addition, it was disputed that the appellant held an express, or implied, contractual right to a pre-dismissal hearing. The respondent contended that even if the appellant held such a right, he was heard prior to termination and the terms of the contract of employment had not been breached.

[11] The Labour Court approached the matter on the basis that the respondent was entitled to terminate the contract of employment with the appellant on grounds of misconduct. The facts were found not to support the appellant's contention that he had been coerced to sign the separation agreement, and that he did so under duress, after he had refused to sign the first draft of the agreement and had, on his version, requested that he be "*afforded a softer exit – having acknowledged that the 40,000 USD had been paid to him in error*". The separation agreement was therefore found to constitute a valid compromise entered into between the parties and the application for urgent relief was dismissed with costs.

<u>Evaluation</u>

[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.[1]

[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."*

[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*".[2] 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 "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.[3] The burden of proving the existence of duress rests on the party raising it.[4]

[16] The appellant approached the Labour Court by way of urgent application. The general rule applicable to the resolution of genuine disputes of fact in

[1] *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A); Hamilton v Van Zyl 1983 (4) SA 379 (E); *Blou Bul Boorkontrakteurs v McLachlan* 1991 (4) SA 283 (T).
[2] *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C).
[3] *Broodryk v Smuts NO* 1942 TPD 47 at 51-52; *Machanick Steel & Fencing v Transvaal Cold Rolling* 1979 (1) SA 265 (T) at 271; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 *(SOK)* at 439F; *Van den Berg & Kie Rekenkundige Beamptes v Boomprops 102 BK* 1999 (1) SA 780 (T) at 784.
[4] *Ball v Bambalela Bolts (Pty) Ltd and Another* [2013] 9 BLLR 843 (LAC); (2013) 34 ILJ 2821 (LAC) at para 19; *Tully v MLS Bank Limited* [1999] ZALAC 36 (28 September 1999) at para 29.

applications in which final relief is sought is stated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd,*[5] namely that -

> '.... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted'[6]*.*

[17] This rule was qualified in the matter of *Plascon-Evans Paints v Van Riebeeck Paints*[7] in which Corbett JA stated as follows:

> '…It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T); *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882 D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283 E-H). Moreover there may be some exceptions to this general rule, as, for example where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the *Associated South African*

[5] 1957 (4) SA 234 (C).
[6] At 235 E-G.
[7] 1984 (3) SA 623 (A) at 634E-635D.

Bakeries case, supra at 924A).'

[18] It is apparent from the founding and answering affidavits that factual disputes arose between the parties on the papers. The appellant in his founding affidavit stated that he had been compelled to sign the separation agreement and had done so under duress, given the impact the immediate termination of his employment had on his financial position, his housing and benefits, his child's schooling and his status in South Africa. The respondent in its answering affidavit stated that the separation agreement had been signed freely and voluntarily in the absence of duress, or coercion, and at the instance of the appellant, who had sought to soften the personal impact of the termination of his employment and its consequences for his work permit.

[19] In *Buffalo Freight Systems (Pty) Ltd v Castleigh Trading (Pty) Ltd and Another,*[8] the Court cautioned against deciding probabilities in the face of a conflict of facts apparent from the affidavits. The respondent's denial that duress existed raised a real, genuine and *bona fide* dispute of fact, which from the papers is apparent to be neither far-fetched, nor untenable. A substantiated and a weighty defence to the relief sought by the appellant was put up by the respondent.

[20] The appellant elected to proceed by way of notice of motion in the matter and did not seek a referral to oral evidence or trial. Having made such election, he could only have been successful if the facts as stated by the respondents, together with the admitted facts in his affidavit, justified the grant of the relief he sought. In the face of a real, genuine and *bona fide* dispute of facts put up by the respondent, which amounted to a substantiated and clear defence, the Labour Court, on an application of the relevant principles, could not properly have granted the relief sought by the appellant. It follows that the Labour Court correctly refused to declare the separation agreement invalid *ab initio* and of no force and effect on the grounds of duress. The result is that, under the terms of the separation agreement, all claims had been settled between the parties and the appellant had waived his right to approach the CCMA, or any court to seek relief against the respondent *"emanating from his*

[8] 2011 (1) SA 8 (SCA) at para 14.

[e]mployment, his resignation and/or [the] *[a]Agreement."*

[21] In this appeal, the appellant takes further issue with the failure of the Labour Court to find that the separation agreement was contrary to public policy insofar as it restricted the appellant from approaching the CCMA, or the courts, for relief emanating from his employment with the respondent. In this respect, the appellant contends that the agreement is contrary to public policy in that it violates his constitutional right to seek judicial redress under s 34 of the Constitution. Section 34 provides that:

> 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing, before a court, or where appropriate, another independent and impartial tribunal or forum.'

[22] In *Barkhuizen v Napier,*[9] the Constitutional Court emphasised that all law, including the common law of contract, is subject to constitutional control. While public policy, as informed by the Constitution, in general, requires that parties comply with contractual obligations that have been freely and voluntarily undertaken, a term in a contract that is inimical to the values enshrined in the Constitution is contrary to public policy and unenforceable.[10]

[23] The Court found that a contractual limitation on seeking judicial redress is permissible when it is reasonable to limit such right. As much was found to reflect public policy with the constitutional values of freedom and dignity permitting self-autonomy and the ability to regulate one's own affairs.[11] Nevertheless, the Court stated that relevant to a determination as to whether the objective terms of the contract are contrary to public policy is a consideration of the relative position of the parties, including their bargaining power and understanding of the contract.[12]

[24] The appellant was employed in a senior management position by the respondent and had a history of prior work experience at a senior level. From a consideration of the relative position of parties, nothing indicates that their

[9] 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 15.
[10] *Barkhuizen v Napier* at para 29.
[11] *Barkhuizen v Napier* at para 48.
[12] *Barkhuizen v Napier* at para 59.

bargaining power was such that the appellant did not understand the contractual limitation on seeking judicial redress to which he had agreed. The limitation on redress was agreed to within the context of the terms of the compromise. Such a term is not only commonplace, but permits for disputed obligations to be settled in this manner in order to bring finality to disputes. As such, a term limiting redress, in the manner recorded in the separation agreement, is a practical approach to dispute resolution and by its nature is neither unlawful, nor contrary to public policy. Such a term caused the disputed obligations between the parties to be settled in a manner which brought finality to the dispute and had immediate practical effect. Given that courts do not possess a "…*general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith*",[13] it follows that the Labour Court correctly refused to set the separation agreement aside on the basis that the limitation to obtain further redress from the CCMA and the courts, was neither unlawful, nor contrary to public policy.

[25] The *onus* is on the party alleging that a compromise has been reached to prove that this is so. The reason that such an agreement must be clearly and unambiguously proved is that compromise, as a form of novation, involves the waiver of existing rights, or claimed rights.[14] Whether it has been entered into is therefore to be established in the same way as for any other contract, with regard being had to the intention of the parties, which is to be determined from the language of agreement in its context and in light of admissible evidence.[15]

[26] With the signature of the agreement not being in dispute, the respondent raised as a preliminary issue in its answering affidavit, that the separation agreement had been entered into in full and final settlement of all claims, with an express limitation having been agreed to regarding redress being obtained from either the CCMA, or the courts regarding the matter. The intention of the parties is apparent from the language of the agreement in its context and the

[13] *Brisley v Drosky* 2002 (4) SA 1 (SCA) at para 93.
[14] *The Torch Moderne Binnehuis Vervaardiging Venn (Edms) Bpk v Husserl* 1946 CPD 548; *Hubbard v Mostert* 2010 (2) SA 391 (WCC) at para 11.
[15] *Engelbrecht v Senwes* Ltd 2007 3 SA 29 (SCA) at para 6.

principle of *caveat subscriptor,* expressed as far back as in the matter of *Burger v Central South African Railways*[16] and thereafter reaffirmed by our courts, applies. It follows that the respondent clearly and unambiguously proved in the manner required of it that the separation agreement had been entered into between the parties.

[27] Having found this to be the case, it is unnecessary to determine whether the appellant held a contractual right to a hearing prior to the termination of his employment, given that the terms of the separation agreement overtook any such contractual entitlement.

[28] For these reasons, it follows that the appeal falls to be dismissed and there is no basis in law and fairness why the costs should not follow the result.

Order

[29] In the result, the following is ordered:

1. The appeal is dismissed with costs.

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Savage AJA

Waglay JP and Coppin JA concur in the judgment of Savage AJA.

APPEARANCES:

FOR THE APPELLANT: Mr Kelly

Instructed by Ndumiso Voyi Inc.

[16] 1903TS 571 at 578-579.

FOR THE RESPONDENT: Mr W G la Grange

Instructed by DLA Cliffe Dekker Hofmeyr Inc.