

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN DURBAN)**

CASE NO: D581/2005

In the matter between

R GODDARD

APPLICANT

And

METCASH TRADING AFRICA (PTY) LTD

RESPONDENT

JUDGMENT

AC BASSON, J

- [1] The Applicant in this application is Mr. R Goddard (hereinafter referred to as “the Applicant”) and the Respondent is Metcash Trading Africa (Pty) Ltd. The Applicant brought an application to this Court to set aside the settlement agreement entered into by the parties on 15

February 2005 in terms of which he agreed to accept the retrenchment package offered to him. This agreement was in full and final settlement of all claims and/or disputes arising from the termination of his contract of employment.

- [2] The gist of the Applicant's case was as follows: He was employed by the Respondent as a Divisional Training Manager until 31 May 2005 when his contract of employment came to an end by virtue of a retrenchment process which had been initiated by the Respondent. At the time of the dismissal the Applicant had 19 years of service with the Respondent. The retrenchment process was concluded by the Applicant entering into a settlement agreement on 15 February 2005 which set out the terms of the termination of employment. It was the Applicant's case that he had entered into the agreement principally on the strength of representations made to him namely that his position would be made redundant. The Applicant accordingly accepted the Respondent's offer of the retrenchment benefits as set out in the settlement agreement. The Respondent's case (as it appears from the papers) was materially different. It was denied by the Respondent that the position of the Applicant had become redundant. According to the Respondent's papers the Applicant was struggling to meet and maintain the Respondent's required performance standards and that

that had led to performance counseling meetings during which the compatibility and/or inability to cope with his role were dealt with. During these meetings it became apparent that the relationship between the Applicant and his immediate superiors was suffering due to the fundamental differences in opinion which the Applicant had regarding his role as training manager. During a subsequent meeting the incompatibility and differences of opinion were discussed. Various alternatives were also discussed. In February 2005 the Applicant advised the Respondent that it was not prepared to accept any of the alternative positions offered to him and that he would like to discuss a separation package. As a result the settlement agreement was concluded.

- [3] From the foregoing it is clear that there existed a dispute of fact on the papers. It was the Applicant's case that he had signed the settlement agreement because he was advised by the Respondent that his position became redundant. When he subsequently found out that his position was not redundant and that someone else was appointed to his post, he decided to approach this court to set aside the contract (settlement agreement). According to the Respondent, the Applicant's position never became redundant. The Respondent alleged that it had a discussion with the Applicant in respect of his

incapability and that alternatives suggested by the Respondent were rejected. It was the Respondent's contention that it was the Applicant who had suggested a separation package. It was in light of these disputes of fact that the matter was referred to oral evidence.

[4] The following four issues were before this Court:

- (i) Whether there was an incompatibility / performance issue that gave rise to the agreement being concluded;
- (ii) Whether the Applicant signed the agreement on the basis of there being a representation by the Respondent of his post being made redundant.
- (iii) Whether the Applicant proposed a separation package in the form of a retrenchment.
- (iv) The circumstances which gave rise to the agreement being signed.

Evidence of the Applicant

[5] The gist of the evidence of the Applicant was that there were no incompatible issues and that no procedure was followed in respect of the alleged incompatibility issues.

[6] The first time the Applicant received anything in writing about a possible retrenchment was on 15 February 2005 when he was handed his notice of retrenchment. He testified that he signed the letter because he was informed that his job was redundant. The Applicant disputed the allegation that he was consulted on poor workperformance and that this severance agreement was as a result of that process. The following appears from the notice of retrenchment:

“NOTICE OF RETRENCHMENT; RATIONALIZATION OF OPERATIONS

As you know, management has had several consultation meetings with yourself regarding the abovementioned exercise. The consultation meetings have now been concluded. Due to the implementation of the aforementioned exercise it has become impossible for us to maintain the existing staffing compliment and retrenchments have therefore become necessary.

It is with regret that we have to advise you that your position with the company has been affected by this decision and your services will be terminated with effect 31 May 2005.”

[7] The Applicant testified that Mr. Le Roux, the HR Director of the Respondent, discussed the retrenchment agreement with him.

[8] The Applicant testified that the retrenchment process commenced on 18 January 2005 and that there were three meetings with representatives of the Respondent. A meeting was held on 18 January 2005 with Mr. Gys du Plessis (Du Plessis did not give evidence). It was during this meeting that the Applicant was informed that he no longer had a job. The possibility of him relocating to Bloemfontein was also mentioned. The Applicant testified that he had asked for reasons for his removal but that none was forthcoming. A second meeting was held on 4 February with Le Roux. The Applicant was not certain but stated that Mr. Loots may have been present at the meeting. Following this meeting, the Applicant sent an e-mail to Le Roux in which he stated the following:

“With regards to our meeting and discussion on Friday 04.02/2005 at Trade Center Mt Edgecombe I hereby wish to reply. As I have regrettably and forcefully been placed in a position with no alternative I therefore have no option but to be forced to negotiate a retrenchment package. I do, however, require a written explanation as to the reasons of the removal of me from my current position as

indicated by Gys du Plessis on 18/01/05 at a meeting with him at the Blue Waters Hotel in Durban. This was also requested from him in writing but has to date not been received.”

[9] The Applicant conceded that he did not refer to a “*redundancy*” in this e-mail and that he merely referred to a “*removal*” and conceded that this e-mail was not consistent with his version of a retrenchment. He, however, insisted that he was told that he no longer had a job.

[10] A third meeting (the final meeting) was held on 15 February 2005 when the Applicant signed the settlement agreement.

Allegations of poor workperformance

[11] In response to the allegation that he was being counseled for poor workperformance, the Applicant referred to two recent assessments. He testified that the assessment showed him to perform generally above average and in one instant excellent. He conceded that there was a complaint of incompatibility in 2004. It was, however, common cause that he was found not guilty. The Applicant also admitted that Van Wyk was brought down to do some of his functions in November/December 2004. He also admitted that he was upset and that he felt

left out. He, however, denied that by bringing in Van Wyk, that fact was indicative that there were problems with his performance.

[12] In cross-examination, the Applicant admitted that at the meeting of 4 February 2005, mention was made of incapability and that he had asked them to put that in writing. He also admitted that at that meeting it was discussed that he should relocate to Bloemfontein. He, however, requested that the Respondent explain to him in writing why he was taken out and why he was removed to Bloemfontein. This is consistent with the e-mail dated 8 February 2005 in which he requested written information about the reasons for his “removal” which was not forthcoming. He also conceded that Le Roux had told him that he would go back and that he would look for another post. He, however, denied that Le Roux came back with another suggestion about a post in Natal and that he was unhappy about that.

E-mail dated 5 April 2005

[13] The Applicant testified that he was astounded when it came to his attention that there was an e-mail stating that a certain Mr. Mansoor Mohamed was appointed as the training manger of the Natal region. This e-mail specifically stated that “*Mansoor replaces Rob Goddard as Training manager for this area.*” This e-mail is dated 5 April 2005 and

was sent by Mr. Gys du Plessis. The Applicant left the Respondent's employ in February 2005. The Applicant testified that he was astounded because Mohamed was more junior than him and had less experience. What made matter worse was the fact that he was informed that this position was redundant only to find out that someone else was appointed in his position. On 7 April 2005 the Applicant referred a dispute to the CCMA in which he described the dispute as follows: *"I was retrenched but I don't believe that there existed an operational requirement because someone was appointed in my position after I left."*

- [14] The Applicant subsequently applied for condonation for the late filing of his dispute to the CCMA. In the founding affidavit (in the application for condonation before the CCMA) the Applicant explained that he *"was retrenched on 15/02/05 and my position was only replaced on 04/04/05. That only when I became aware that my dismissal for operational requirements was substantively unfair in that the position was still available."* In the answering affidavit, Le Roux stated that *"[a] full and final settlement pertaining to applicant's termination as a retrenchment was reached."* No mention was made in this affidavit that the real reason for reaching this agreement was because of

performance problems and that the Applicant was the one who wished to negotiate a retrenchment package.

Evidence of Le Roux

[15] Le Roux, the HR Executive for the training centre confirmed that he had invited the Applicant to a meeting on 4 February 2005 together with Loots. He testified that he spoke to the Applicant about incapability. Le Roux stressed that the Applicant was regarded as being incapable by the Respondent and that his position was never redundant. He also testified that it was the Applicant who had requested a retrenchment package. He suggested the alternative of Bloemfontein but this was rejected by the Applicant who stated that he did not wish to leave Natal. He then told the Applicant that he will look at alternatives in Natal. According to him the Applicant then informed him that they should talk about retrenchment. Le Roux told him that he did not have a mandate and that he will take it up with the Respondent. He confirmed that he received an e-mail from the Applicant. He testified that he offered the Applicant an alternative position in Natal under a certain Mr. Venter. Le Roux denied that the position of the Applicant was ever redundant. He testified that the Applicant wanted a retrenchment letter because that would look better for future job prospects. In respect of the terms of the settlement

agreement, Le Roux confirmed that they did negotiate about the terms of the settlement and that this was reflected by the fact that the package gave the Applicant more than the normal: He received three months notice and the shares due to him. Le Roux testified that he had to make a few calls to obtain a mandate to settle on these terms. He also confirmed that it was taxwise better for the Applicant to have opted for a retrenchment package.

[16] It was put to Le Roux that if the Respondent's version was that there was no retrenchment, this agreement constituted fraud and that the Court may refer the issue to the Receiver of Revenue for investigation. Le Roux insisted that the agreement was termed as such because the Applicant insisted on it.

[17] Le Roux was not able to comment on whether or not the Applicant was indeed incapable as he had no personal knowledge. He was only told about the incompatibility issues. He could therefore not dispute the fact that the Applicant was found not guilty of incompetency the previous year.

Evaluation

[18] I cannot, on the evidence presented to this Court, make a finding that there existed a competency issue. Le Roux, the only witness on behalf of the Respondent, could not comment as he did not have any first hand knowledge about the Applicant's performance. No one else was called as a witness to testify about the performance standard of the Applicant and more specifically about whether or not the Applicant had performed below standard. The mere fact that the competency of the Applicant was raised during the meetings does not persuade me that it was the performance issue that prompted the Applicant to sign the settlement agreement. Also, the mere fact that the Applicant conceded that Le Roux did mention the issue of incapability to the Applicant during the meeting of 4 February 2005 does not take the matter any further for the Respondent as no evidence was presented to this Court to support the fact that there was an issue about the Applicant's performance.

[19] What was, however, common cause on the papers is the fact that Van Wyk took over the Applicant's external leadership programme for the Kwa-Zulu Natal region. Although Le Roux who deposed to the Answering Affidavit on behalf of the Respondent stated in the Answering Affidavit that there were problems with the performance standard of the Applicant and that this had led to the hiring of Van Wyk

to manage the external leadership programme, Le Roux (as already pointed out) conceded in his evidence that he was merely briefed about the incapability. It must be pointed out that the Applicant in the replying affidavit disputed that this was as a result of poor workperformance. He insisted that he was told that retrenchment was his only alternative in light of the fact that he was made to understand that his post was redundant.

[20] I am therefore on the evidence satisfied that there is no evidence before this Court to show that the Applicant was in fact incapable and that that was the central issue of the discussion. It was also not disputed that the Applicant was found not guilty the previous year of incompetence. The Respondent elected not to call any witnesses to substantiate the claims of incompetence. The Respondent must therefore stand and fall by the evidence of Le Roux who admitted that he was merely briefed about the alleged incompetence of the Applicant.

[21] The next crucial question to consider is whether or not the Applicant was mislead about the fact that his post was redundant and that this information had led to him negotiating a severance package and sign

the settlement agreement. It is trite that a misrepresentation effectively removes the Applicant's assent thereby resulting in a situation in which no agreement exists. The agreement will accordingly be void *ab initio*. In order to be successful the complaining party must show that he was induced by a misrepresentation to enter into a contract. In other words, he must show that he would not have entered into the contract but for the misrepresentation. The Court was referred to the following passage from RH Christie in *The law of Contract in South Africa* (3rd edition page 316 – 317):

"The victim of a misrepresentation cannot be permitted to rescind the contract unless he can show that he was induced by the misrepresentation to enter into the contract... then requirement has been expressed in different ways: he must have acted upon the misrepresentation in entering into the contract; he would not have entered into the contract but for the misrepresentation; acting with ordinary prudence and discretion, he would not have entered into the contract if he had know the truth..."

A person who knew the truth all along, or to whom it was revealed by the maker of the misrepresentation or who discovered it in some other way before the contract was

entered into cannot claim to have been induced by the misrepresentation; nor can a person who would still have signed the contract if he had known its true nature... nor can a person who does not care where the truth lies because he does not regard the representation as material..."

See also *Bowditch v Peal and Magill* (1921) AD 161 at 572-573 where the Court pointed out that the person who has been induced must make an election as to whether he stands by the contract or claims damages:

"A person who has been induced to contract by the material and fraudulent misrepresentation of the other party may either stand by the contract or claim rescission... It follows that he must make his election between these two inconsistent remedies within a reasonable time after knowledge of the deception. The choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate."

[22] It was submitted on behalf of the Applicant that the representation in this matter was fundamental and that its existence went to the heart of the Applicant's consent to the contract. It was further argued that the Applicant has, through his conduct indicated that he wishes to set

aside the agreement and to continue with the employment relationship. It was submitted that, in light of the fact that the misrepresentation was made on the basis of an operational requirement issue, that proved to be false, there appears to be no reason why the employment relationship should not be allowed to continue especially also in light of the fact that another employee has filled the Applicant's post.

[23] I am satisfied that the conduct of the Respondent amounted to misrepresentation and that the Respondent concealed crucial facts from the Applicant. I am also satisfied that the Applicant would not have entered into the contract had he known the true facts. His conduct immediately after he discovered that he was mislead and that his position was not redundant as conveyed to him by Le Roux strongly underscores his version that he was told that his position was redundant. In summary therefore:

- (i) The Applicant asked for written reasons for his "removal". None was forthcoming. If the reasons were so obvious, namely poor workperformance, it does beg the question why the Respondent was not willing to state that in writing. Le Roux is an HR executive, surely one would have expected him to provide the Applicant with the reasons for his removal. If it was so clear to

the Applicant that there were problems with his capability and that it was discussed with him, it does beg the question why the Applicant in his e-mail was so adamant about the fact that he needed reasons for his removal.

- (ii) It was not disputed that the Applicant received good performance reviews and that he was not found guilty of poor workperformance the previous year. Le Roux was not able to shed any light on the alleged incapacity problems as he did not have any first-hand knowledge of such problems.
- (iii) This is an employee with 19 year's service with the Respondent.
- (iv) The e-mail of the Applicant dated 8 February 2005, immediately prior to him signing the settlement agreement, is instructive. In this e-mail the Applicant specifically stated that he has been *"regrettably and forcefully [been] placed in a position with no alternative. I therefore have no option to be forced to negotiate a retrenchment package."* This e-mail, in my view underscores the fact that the Applicant was placed in a position where he had no alternative but to negotiate a retrenchment package which is consistent with his evidence in Court (and his Founding Affidavit).
- (v) Although it was the case for the Respondent that the Applicant initiated the discussions about the settlement agreement, the

contents of the settlement agreement does, in my view, support the Applicant's contention that he was informed by the Respondent that his post was redundant.

- (vi) Lastly, the moment the Applicant found out about the fact that someone else was placed in his position, he referred a dispute to the CCMA reiterating the fact that he only found out later that his post was in fact not redundant. The manner in which the Applicant described the nature of his dispute is also consistent with the version presented to this Court namely that he was told that his post was redundant.

[24] I am thus, on the probabilities, satisfied that the Applicant was induced to believe that his post was redundant and that that was the reason why he had signed the agreement. As a result, the agreement is void *ab initio*.

[25] In the event I am of the view that the settlement agreement should be set aside. I can find no reason why costs should not follow the result.

ORDER:

1. The settlement agreement entered into between the parties on or about 15 February 2005 is set aside.

2. The Respondent is directed to appoint the Applicant in his position as Divisional Training Manager as from 1 June 2005 with benefits.
3. The Respondent is ordered to pay the costs.

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AC BASSON, J

Date of Judgment: 17 June 2009

Date of proceedings: 5 May 2008

For the Applicant:

Mr. B McGregor of Deneys Reitz

For the Respondent:

D Woodhouse of Perrot, Van Niekerk & Woodhouse Inc