THE REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: JS 661/05

In the matter between:

IVON FAKUDE & 25 OTHERS **Applicant**

and

KWIKOT (PTY) LTD **Respondent**

Heard: **14 May 2012**

Date delivered: **27 December 2012**

Summary: Stated case- point in *limine* regarding dismissal of applicants. Union concluding an agreement to terminate employment of minority members. Section 200, union has power to make decision without consent of members. Economic duress- principle.

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicants in these proceedings claim that their dismissal by the respondent during March/April 2005, was both substantively and

procedurally unfair. They contend that the reason for their dismissal by the respondent was for operational reasons and therefore the fairness of their dismissal should be assessed amongst others on the basis of the selection criterion used by the respondent. They do not, as will appear later in this judgment, dispute the validity of the collective agreement.

[2] The respondent on the other hand contends that the applicants were not dismissed but their employment was terminated by agreement with the union.

[3] The applicants did not dispute the existence of the agreement, neither that the agreement was by definition a collective agreement as envisaged in section 23 of the Labour Relations Act (the LRA).[1]

[4] Subsequent to the signing of the collective agreement, each individual applicant signed agreements which set out the packages which were to be paid to each one of them. These agreements are also not disputed except that the applicants contend that they signed them under duress.

[5] The parties agreed that the court should determine the following issues by way of the stated case in terms of Rule 33 of the rules of the High Court,

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[1] *Section* 23 *of the LRA reads as follows*:

"Legal effect of collective agreement

(1) A collective agreement binds -

(a) the parties to the collective agreement;

(b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;

(c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates -

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;

(d) employees who are not members of the registered trade union or trade unions partyto the agreement if -

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

read with rule 11 of the Labour Court Rules[2]. In the stated case, in terms of Rule 33 of the Rules of the High Court, the parties agreed that the court should determine the following[3].

> '3.1.1 Whether the termination of the applicants' employment by way of agreement between the respondent and NUMSA constitutes a 'dismissal' in terms of section 186 of the LRA.
>
> 3.1.2 Whether the conduct of the respondent referred to in 2.21 above amounts to duress that would entitle the applicants to avoid the settlement agreement."

[6] The parties further agree that the stated case be determined on the basis of the common cause facts set out in the pre-trial minutes.

<u>The common cause facts</u>

[7] It is common cause that a large number of the respondent's workforce engaged in several unprotected industrial actions over several years, including during April 2005.

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[2] *Rule 11(3) of the Rules of the Labour Court reads as follows: 'If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems fit in the circumstances'.*

[3] *The relevant part of Rule 33 of the Rules of the High Court reads as follows:*
'Special Cases and Adjudication upon Points of Law;

(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.
(2) (a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.

[8] The applicants who were members of the National Union of Metalworkers of South Africa (NUMSA), a majority union, were dismissed following the agreements referred to earlier. There are other employees whose membership of NUMSA is disputed by the respondent and they are:

> '2.4.1 SJ Sello Moloi;
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> 2.4.2 Milton Makhoba;
>
> 2.4.3 Victor Mucavele
>
> 2.4.4 Aubrey Mohlakwana; and
>
> 2.4.5 Petrus Moropa"

[9] It is also common cause that subsequent to the industrial action between 23 to the 31 March 2005, the respondent initiated mass disciplinary action against a large number, of the workforce, including the applicants. It would appear that the disciplinary proceedings were instituted against about 100 employees.

[10] At the commencement of the disciplinary hearing NUMSA, assisted by its attorney sought an amicable solution to the problem with the respondent. Although an agreement could not be reached between the parties as to the issue of the discipline, the parties agreed to appoint a private mediator to facilitate the negotiations. The facilitated negotiations were successfully concluded with an agreement during September 2005.

[11] It would appear that subsequent to the conclusion of the agreement and in line with the provisions of clause 1 of the agreement the respondent submitted the core list consisting of 42 employees. A further list was submitted after certain names which appeared in the initial list were removed. It was on the basis of this list that the applicant's employment contracts were terminated. The majority of those who participated in the industrial action were not dismissed but were issued with final written warnings. The essence of the agreement was that those employees whose names appear in the list would be terminated and the others would receive severance package.

[12] The list consisted of 26 employees, who were required to sign for the packages they each were to receive.

[13] The issues in dispute are recorded as follows in the pre-trial minutes:

> "2.23 All facts pleaded and not agreed to above.
>
> 2.24 Whether MM Makhoba and TG Makhubu signed settlement agreements with the respondent. The respondent will revert on this issue.
>
> 2.25 Whether LM Hlongwane was dismissed, and whether he was subsequently re-employed. The respondent will revert."

The issues for determination

[14] The first issue to determine is whether the termination of the employment of the applicants by way of the above agreement constitutes a dismissal in terms of Section 186 of the LRA[4].

[15] The second issue is whether the conduct of the respondent in requiring the applicants to sign an agreement for payment of their packages constitutes duress, which would have the effect of vitiating the agreement.

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[4] *Section 186 of the LRA reads as follows:* ***186. Meaning of dismissal and unfair labour practice***

(1) "Dismissal" means that- (a) an employer has terminated a contract of employment with or without notice;(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; (c) an employer refused to allow an employee to resume work after she- (i) took maternity leave in terms of any law, collective agreement or her contract of employment; or (ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child; (b) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or(c) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee. (d) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

(2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving – (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

<u>Applicants' case</u>

[16] As indicated earlier the applicants do not dispute the fact that the collective agreement was concluded between the parties, the consequence of which was termination of their employment. It was however argued on behalf of the applicants that the court should not "enforce" the agreement as "the circumstances enforcing it might violate public policy".

[17] Relying on the cases of *Bredenkamp v Standard Bank* and *Barkenhuizen v Napier*[5], Mr Manchu, for the applicants argue that even if the court was to find that prima facie the agreements were not unconstitutional, they were such that the court should rule that they were unenforceable because the offended public policy. I will revert to these two judgments later in this judgment.

[18] In addition to the issue of public policy considerations, attempt was also made to introduce, an exception to the application of the agreement as concerning some of the individuals on the basis that they were not members of the trade union.

[19] The other argument on behalf of the applicants is that their dismissal was unfair because the agreement did not provide for a fair selection criteria. It was for this reason that it was argued on behalf of the applicant that the dismissal was unfair because there was no compliance by the respondent with the requirements for a fair dismissal based on operational reasons.

[20] As concerning the agreement signed by the individual applicants, it was suggested that the applicants are entitled to avoid the agreement, firstly because the terms thereof are questionable and also because they were concluded on the basis of duress.

[21] It should be noted that in terms of the collective agreement provision was made for the deadlock breaking mechanism in the event of a disagreement about employees who were to be on the list. In terms of the deadlock breaking mechanism the power was given to the employer. It should also be noted that there was no evidence that the deadlock

[5] 2007 (5) SA 323

breaking mechanism was introduced by way of misrepresentation or other underhanded methods.

Evaluation

[22] The applicants' contention in relation to the issue of the collective agreement is based on two legs. The first leg is that, despite accepting the validity of the agreement, it is unenforceable because the individual applicants did not give their consent to its conclusion. The second leg to the applicant's contention is that which conflates the provisions of section 189 of the LRA[6] and the situation were the parties have reached a consensus as to how their employment relationship is to be terminated without necessity of having to go through the process set out in that section.

[23] The first argument on behalf of the applicants is on its proper analysis based on the notion that trade unions are agents of their members. In other words, trade unions as agents of their members have as a matter of law, to seek approval from members before concluding any agreement.

[24] The general principle based on the proper interpretation of the common law and legislation is that a trade union has the power and authority to take decisions to settle disputes in the interests of its members, in particular in the interests of the majority and at times to the detriment of the minority members. This principle has its basis in the notion of majoriterianism and Freedom of Association. In terms of this principle a decision taken by a union cannot be vitiated by the fact that the decision was taken without having regard to the interest of the minority members.

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[6] *The essence of Section 189 is that it provides for an approach to be adopted by an employer when it contemplates dismissal of an employee based on operational requirements.*
Section 189 (1) of the LRA reads as follows:
(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-
(a) any person whom the employer is required to consult in terms of a collective agreement;(b) if there is no collective agreement that requires consultation –(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and (ii) any registered trade union whose members are likely to be affected by the proposed dismissals; (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

[25] Trade unions specifically derives their power to make decisions on behalf of their members in terms of the provisions of Section 200 of the LRA which provides as follows:

> '(1) A registered *trade union* or registered *employers' organisation* may act in any one or more of the following capacities in any *dispute* to which any of its members is a party -
>
> (a) in its own interest;
>
> (b) on behalf of any of its members;
>
> (c) in the interest of any of its members.
>
> (2) A registered *trade union* or a registered *employers' organisation* is entitled to be a party to any proceedings in terms of *this Act* if one or more of its members is a party to those proceedings.'

The issue of the power and authority to make decisions by registered trade unions as envisaged in section 200 of the LRA has received attention in a number of the decisions of the Labour Court.

[26] In *Manyele & Others V Maizecor (Pty) Ltd & Another*[7], the court held that:

> "These last two mentioned categories warrant examination. To act in the interest of any of its members would be evidenced by an application by a union where, other than asserting its representative capacity, it need not cite any of its members as such. This would cover situations where a controversy affected members other than personally or individually, in other words, intrinsically collective interests. It might be regarded as a species of class action. Where a union "acts on behalf of " members, it does not "become" the agent of those members, because its pre-existing representative relationship already constitutes the foundation for that status and power. In my view, the union's role under this rubric is akin to that of a curator *ad litem* in civil proceedings; that is to say, the union is the party in the proceedings. Philosophically, the union constitutes the institutional embodiment of the several members involved in the dispute."

[7] 2002] 10 BLLR 972 (LC)

[27] In *Mzeku v Volks Wagen SA* (Pty) Ltd and Others[8] at 57 to 58 the court held that:

> "[57] It is clear to us that the effect of sec 200(1) is to give a union that is registered - as opposed to one that is not registered- a statutory right to represent any of its members in anyone or more of the three capacities there set out. This, therefore, means that in this matter the union was entitled to act on behalf of the appellants in dealing with the first respondent about the conduct of the appellants which threatened not only their own employment but also the employment of many of its other members who were not on strike. If the union was entitled to act on behalf of the appellants, the first respondent had to respect that right. The way to respect that right was to deal with the union on the basis that it was acting on behalf of its members. For the commissioner to have found, as he did, that the first respondent was not entitled to deal with the union as a representative of the appellants was to make a finding that is contrary to the express provisions of the Act.

[28] The court further explained the powers and the authority of the union to act on behalf of members in the middle of paragraph [58] where it says the following:

> [58] It is, therefore, clear also that sec 200(1) gives a registered union the right to act on behalf of its members when there is a dispute involving anyone or more of its members and that sec 202(1) takes this further and provides that, once a registered trade union acts, as it is entitled to, on behalf of its members, the employer has a right not to serve documents on the individual members themselves but to serve them on the union. It provides that such service on the union is as good as service on the members of the union themselves. If this is so, the position must be that even with regard to the giving of the opportunity to be heard, the employer is entitled to deal with the union."

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[8] 2002] 10 BLLR 972 (LC)

[29] The above authorities indicate that a trade union is entitled to take any decision on behalf of either the majority or the minority of its members without necessarily having to obtain the members' consent, even if such a decision is to adversely affect those members. In other words members affected by a decision taken by a union without their consent are bound by such a decision and are unable as a matter of principle to withdraw from such an agreement.[9] Any decision taken by a trade union either detrimental or beneficial to some of its members cannot be said to be unconstitutional because the trade union would have derived the power to act in that particular manner in terms of the provisions of section 200 of the LRA which in turn has its basis in terms of section 23 of the Constitution. [10]

[30] In the present instance it is apparent that the union acted in the interests of the majority at the expense of the minority. The fact that the minority are adversely affected by the decision taken by the union is immaterial because in law, those affected by the decision joined the union voluntarily and in the exercise of their Freedom of Association.

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[9] *See also NUMSA v CCMA and Others* (2000) 11 BLLR 1330 (LC) at para [32].

[10] *Section 23 of the Constitution reads as follows:*

1. *Everyone has the right to fair labour practices.*
2. *Every worker has the right*
   a. *to form and join a trade union;*
   b. *to participate in the activities and programmes of a trade union; and*
   c. *to strike.*
3. *Every employer has the right*
   a. *to form and join an employers' organisation; and*
   b. *to participate in the activities and programmes of an employers' organisation.*
4. *Every trade union and every employers' organisation has the right*
   a. *to determine its own administration, programmes and activities;*
   b. *to organise; and*
   c. *to form and join a federation.*
5. *Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).*
6. *National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).*

[31] Turning to the two judgments referred to earlier and which the applicants relied on in support of their case, it is important to note that the facts and the circumstances in both cases are distinguishable from the facts in the present case. The underlying principles that inform the agreement under discussion are also different. However, the broader principles are the same.

[32] In the *Barkehuizen's* case the issue concerned the constitutionality of a time limitation-clause in the short-term insurance policy. The clause in question, provided that the insured had to institute proceedings within three months after the claim had been rejected by the insurer. The insured contended in that case that the time limitation-clause denied him his right of access to the courts which is guaranteed by section 34 of the Bill of Rights. The court found that the common law has always recognised the right of an aggrieved person to seek assistance of a court of law and that the term of contract, which deprives a party of that right, is contrary to public policy. The court further found that section 24 does not only reflect the foundational value that underlies the constitutional order but also constitute public policy. [11]

[33] The Supreme Court of Appeal in the the *Bredenkamp* matter, dealt with a clause in a contract between the bank and a client which entitled the bank to unilaterally cancel the contract without affording the client a hearing. The client argued that the clause was unfair and unenforceable because it prejudiced his future right of contracting with other banks. In dismissing the appeal Harmse DP held:

> '[60] I find it difficult to perceive the fairness of imposing on the bank the obligation to retain the client simply because other banks

[11] *Section 34 of the Constitution reads as follows:*

"34. Access to courts

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."

> are not likely to accept that entity as a client. The appellants were unable to find a constitutionality niche or other public policy considerations justifying their demand. There was, accordingly, in the words of Moseneke DCJ, no 'unjustified' invasion of a right expressly or otherwise conferred by the highest law in our land."

<u>Exceptions.</u>

[34] In terms of section 23 (1) (d) of the LRA,[12] employees who are not members of the trade union or trade unions party to the agreement are bound by such an agreement if they are identified in the agreement and the agreement expressly states that those employees are bound by the agreement.

[35] It follows from the above that even if Mr Sello Moloi, was not a member of the trade union he is in terms of section 23 (1) (d) bound by the decision taken by the union. His case is further not assisted by the fact that he signed the individual settlement agreement.

[36] As indicated earlier, the applicants signed the individual settlement agreements in which they each individually accepted the packages given to them by the respondent in full and final settlement of any claim they may have against the respondent. However, the applicants seek to renege from these agreements on the basis that they were forced to sign them under the thread that they would not receive the packages if they did not sign those agreements.

[37] The basic and general principle of our law is that economic pressure to conclude an agreement does not constitute duress. It would however appear that in special circumstances of a given case our courts would be

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[12] *Section 23 (1) (d) of the LRA reads as follows:*

" (d) employees who are not members of the registered trade union or trade unions party to the agreement if -

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace."

willing to consider rating economic pressure as duress.[13] The reason for not treating economic pressure as duress is explained by Nugent JA in *Medscheme Holdings (Pty) Ltd v Bamjee* [14] in the following terms:

> '[18] For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. . . (H)ard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more – which is absent in this case – would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress.'

[38] The requirements for a successful avoidance of the contract on the basis of duress is set out in *Arend v Astra Furnitures*[15] (Pty) Ltd at 306 as follows:

> "Duress may take the form of inflicting physical violence upon the person of a contracting party or of inducing in him a fear by means of threats. Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following elements must be established:
>
> (i) The fear must be a reasonable one.
>
> (ii) It must be caused by the threat of some considerable evil to the person concerned or his family.
>
> (iii) It must be the threat of an imminent or inevitable evil.
>
> (iv) The threat or intimidation must be unlawful or contra bonos mores.
>
> (v) The moral pressure used must have caused damage.

<u>Conclusion</u>

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[13] *See Van Den Berg & Kie Rekenkundige Beamtes v Boomprops* 1028 Bk 1999 (1) SA 780 *(TPA), a judgement which was referred with approval by the Supeme Court of Apeal, in the Van Den Berg & Kie Rekenkundige Beamtes, supra.*

[14] *See Supreme Court of Appeal in Medscheme Holdings (Pty) Ltd v Bamjee* 2005 (5) SA 339 *(SCA).*

[15] *Arend v Astra Furnitures (Pty) Ltd* 1974 (1) SA 298

[39] In my view the collective agreement concluded by NUMSA on behalf of the employee does not offend the Constitution neither is it contrary to public policy. There is therefore no basis to treat it as unenforceable. The termination of the employment of the applicants was a result of a binding collective bargaining agreement.

[40] As concerning the individual agreement, I am of the view that the applicants have failed to make out a case for vitiating their agreements on the basis of duress. The agreements are accordingly binding on the applicants.

[41] In light of this, the applicants are not entitled to pursue their claim of unfair dismissal. In the circumstances of this case I see no reason both in law and fairness why the costs should not follow the results.

Order

[42] In the premises, the respondent's point in *limine* that the applicants were not dismissed is upheld and accordingly the applicants' claim is dismissed with costs.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT: Norton Rose (incorporated as Denys Reitz)

FOR THE RESPONDENT: Tshiqi Zebediela Inc