REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case No: P 480/10

In the matter between:

LYDIA PETERS Applicant

and

BLUE FINANCIAL SERVICES

(SOUTH AFRICA) (PTY) LTD **Respondent**

Heard: **26 November 2012**

Delivered: **18 June 2013**

Summary: A voluntary retrenchment agreement induced by misrepresentation is void *ab initio*. A dismissal for operational requirements of the employer in breach of the pre-retrenchment requirements in Section 189 of the LRA is procedurally unfair.

Section 189 of the LRA: Unfair dismissal for operational requirements of the employer.

JUDGMENT

LALLIE, J

[1] The respondent is in the business of financial services. It has a number of branches in the country. In 2006 it employed the applicant at its George office as a branch manager. In October 2007, it transferred the applicant to the same position at its 30 Govan Mbeki Avenue branch. On 1 August 2009, it again transferred her to the same position at its 564 Govan Mbeki branch. On 6 April 2010, the applicant's branch was visited by Mr Earle (Earle), the respondent's Country Manager, and Ms Roberts (Roberts), its Human Resources Manager. They held a meeting of all the employees at the branch and informed them that the branch would be closing down at the end of the month as it was being sold. They gave the branch employees including the applicant an opportunity to choose from the following options:

1.1 A transfer to the new owner on the same terms and condition of employment;

1.2 A voluntary severance package VSP, or

1.3 To apply for internal positions that would be advertised during the course of the month.

The applicant asked to be transferred to the position of branch manager of 30 Govan Mbeki branch which was vacant at the time. Earle responded that the position and any other vacancies had to be advertised so that the applicant and other interested employees could apply for them.

[2] On 7 April 2010, the applicant directed an email to Roberts raising a number of issues including reasons for the staff to apply for one position and the identity of the new owner of the business. The reason proffered by Roberts was that the respondent wanted to give employees equal opportunities. She promised that the position would be advertised. On 14 April 2010, the applicant chose the VSP option and on the 16 April 2010 she received all the money due to her in terms of the Basic Condition of Employment Act 75 of 1997 (the BCEA). In addition she signed the

voluntary retrenchment agreement (the agreement). Her last day on duty was 30 April 2010.

[3] On 3 May 2010, the applicant discovered that Mr Bain (Bain) had been transferred from the position of branch manager of the Cleary Park branch to the same position at the 30 Govan Mbeki branch with effect from 14 April 2010 after making this discovery the applicant felt that she had been deceived by the respondent into entering into the agreement. She also felt that she had been discriminated against as the respondent had chosen to offer the position she requested to a white male with less service. She approached the Commission for Conciliation Mediation and Arbitration (the CCMA) for relief. She ultimately referred her dispute to this court.

[4] The issues before this court were crystalized to two, namely, the validity of the agreement and the procedural fairness or otherwise of the applicant's retrenchment.

[5] I now consider whether the agreement can be set aside in terms of section 77(A), 77(3) and 77A (e) of the BCEA. The relevant parts of the agreement are the following:

'<u>Termination of Employment</u>

5.1 The company and the employee hereby agree that the consultation process and all the other provisions of Section 189 of the Labour Relation Act have hereby been complied with.

5.2 The company and the employee further agree that the employment of the employee with the company will terminate by agreement with immediate effect on 30 April 2010.

5.3 This agreement is entered into by the employee and of her own desire and accord. It is recorded that the employee was not in any manner forced or coerced to conclude this agreement.

<u>Settlement</u>

5.4 This agreement is entered into in full and final settlement of all claims of any nature whatsoever arising from the termination of the employment of the employee with the company.

5.5 It is further agreed that this agreement was reached in full compliance with all procedural requirements in terms of the Labour Relation Act, 1995, and all procedural requirements pertaining to termination by agreement.

5.6 The employee fully understands and is aware of all the provision of this agreement.

Payment

5.7 The company undertakes to pay the employee as follows:

Pay the following on or before the last working day of April 2010

Salary for April 2010 (last day: 30 April 2010)	**7591.00**
Leave pay out (11.167)	**3260.33**
1 Months (sic) Salary (notice pay)	**7591.00**
Severance Pay (1week for every completed year's services(3))	**4379.42**

UIF and PAYE to be deducted off the finale amount due.

TOTAL	**22821.76**

General

5.8 'This agreement constitutes the required statutory written notice of the termination of the employment of the employee'.

[6] The applicant relied on *Goddard v Metcash Trading Africa (Pty)Ltd*[1] where the court dealt with the issue of misrepresentation as follows:

[1] [2010] 2 BLLR 186 (LC) at 191 G-192B

> ‘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 misrepresentation. The court was referred to the following passage from RH Christie in the *Law of Contracts in South Africa* 3ed at 316-317:
>
> The victim of misrepresentation cannot be permitted to rescind the contract unless he can show that he was induced by the misrepresentation to enter into a contract… the requirement has been expressed in different ways: he must have acted upon 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 presentation as material…’

See also *Bowditch v Peel and Magill*[2] where the court pointed out that the person who has been induced must make an election as to whether he stands by the contracts 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’.

[2] 1921 AD 561 at 572-573

[7] Only the applicant testified on the issue of misrepresentation. Her evidence was that contrary to the terms of the agreement, she is and was at no stage aware of the provisions of section 189 of the LRA and whether the respondent had complied with all the procedural requirements pertaining to the termination of her contract of employment by agreement. She only believed that the respondent had complied with the requirements of the LRA. No evidence was led by the respondent to gainsay the applicant's version which she maintained even under vigorous cross-examination.

[8] It is common cause that at the meeting in which the applicant was informed of the sale of the branch where she was working, she was presented with three options from which she, after a few days had to choose. She made her choice. Section 189 (1) of the LRA requires an employer which contemplates dismissing employees for reasons based on its requirements to consult, inter alia, its employees likely to be affected by the proposed dismissal. Section 189 (2) of the LRA requires the employer and the consulting parties to engage in a meaningful joint consensus seeking process during which an attempt to reach consensus on a number of issues must be made. Those issues include the method of selecting employees to be dismissed and severance pay for dismissed employees. Consultation as envisaged in section 189 of the LRA requires both consulting parties to make a contribution to the discussions. It does not give the employer party power to dictate to employee parties.

[9] At the meeting of 6 April 2010, the respondent acted in breach of section 189 of the LRA in that it denied the applicant of the opportunity to influence the selection procedure as the respondent had pre-determined it. She had to choose from the three options the respondent presented. The applicant's severance pay was also pre-determined. It was the statutory minimum.

[10] The signing of the agreement was also not preceded by a written notice inviting the applicant to consult with the respondent disclosing

information stated in section 189 (3) of the LRA. When the agreement was signed the respondent knew that it had not complied with its pre-retrenchment statutory obligations. In an attempt to conceal the omission it included in the settlement agreement clauses to the effect that it had complied. In so doing it deliberately misrepresented to the applicant who knew no better that her retrenchment was effected in compliance with the relevant legislation. As the applicant trusted, the respondent she entered into the agreement. Our law protects litigants who are victims of misrepresentation from being bound by agreements they would not have consented to but for the misrepresentation. The applicant's evidence that she would not have signed the agreement had she known that it was in breach of the LRA was not challenged. Her evidence under cross-examination that she was bound by the agreement as she has signed it and that she was happy with the terms and condition of the agreement does not vitiate her evidence that she is not a lawyer and had no knowledge of the provisions of the LRA. The totality of her evidence proves that she was induced by misrepresentation to enter into the agreement. The prejudice the applicant suffered by enter into the agreement is that she was denied of all the benefits that come with compliance with the requirements of section 189 including an opportunity of protecting herself from being retrenched by suggesting a selection procedure which favoured her and a possibility of influencing her severance pay.

[11] The clause that the applicant fully understood and was aware of all the provisions of the agreement does not assist the respondent. The respondent had to ensure that the applicant understood the entire agreement before signing it as that would have placed her in a position to give her consent. Its failure constituted misrepresentation which rendered the agreement void *ab initio*. In the circumstances, the voluntary retrenchment agreement entered into by the applicant and respondent is set aside.

[12] The termination of the employment relationship between the applicant and the respondent was triggered by the sale of the respondent's branch

where the applicant worked. Section 197 governs transfer of contracts of employment and mainly protects employees from losing their jobs unfairly as a result of the sale of business. It provides that a transfer of business can take place with or without agreement with employees. The effect of section 197 (2) of the LRA is that when the transfer is without agreement with employees the transfer becomes a seamless exercise in which the new employer is automatically substituted in the place of the old one in respect of all contracts of employment existing immediately before the date of transfer. When the transfer takes place by agreement, the employer party is required in terms of section 197 (6) of the LRA to disclose to the appropriate employee party all relevant information that will allow it to engage effectively in the negotiation. The appropriate employee party in this case would have been the applicant.

[13] The respondent did not provide the applicant with the required information. It refused even to disclose the identity of the new employer. It limited the content of the negotiations to providing three options from which the applicant had to choose. Termination of employment by agreement may result from a proper application of section 197. However, in all the events which preceded the signing of the agreement the respondent did not comply with provisions of section 197 of the LRA.

[14] I now consider whether the applicant's retrenchment was fair. Section 189 (1) of the LRA requires an employer contemplating retrenching employees to consult appropriate persons. For purposes of this case, the applicant was one of the appropriate persons as she was likely to be effected by the contemplated retrenchment as no evidence of the existing of a trade union at the respondent was led. The respondent was required by section 189 (3) to issue the applicant with a notice disclosing relevant information for purposes of consultation. In the consultation, the respondent was required to engage in a meaningful joint consensus-seeking process and attempt to reach consensus on *inter alia* appropriate measures to avoid dismissal, the procedure to select employees to be retrenched and their severance pay.

[15] If the meeting of 6 April 2010 was meant to be a pre-retrenchment consultation, it did not comply with the requirements of section 189 as it was not a meaningful joint consensus-seeking process. It limited the issues which the applicant and respondent consulted about as the respondent had pre-determined the issues which were the subject of the consultation and limited them to an offer of three options from which the applicant had to select one. The offer of voluntary severance package did not relieve the respondent of its pre-retrenchment statutory obligations. Section 189 required the respondent to have given the applicant an opportunity to influence the amount of the severance pay. The choice of accepting the severance pay should have been a product of consultation. The applicant should have been given an opportunity to attempt to save her job by suggesting a selection procedure in her favour. Had LIFO been applied as a selection procedure, the applicant might have been saved from retrenchment without the need of having to compete for a position with other employees. The applicant was never given an offer to choose between a guaranteed job at the respondent and a severance package. For these reason. I find that the applicant's retrenchment was in breach of section 189 of the LRA and unfair.

[16] The applicant sought compensation equivalent to remuneration she would have earned over the 31/2 months she was unemployed between the date of her unfair retrenchment and the date on which she started working on the job she got thereafter. The compensation is just and equitable considering the applicant's length of service and her procedurally unfair retrenchment as a result of misrepresentation by the respondent. The applicant received severance package in the amount of R22821.76 consisting of her last salary, leave pay, one month's salary as notice pay and severance pay in the sum of R4379.42. All the other amounts but the severance pay was due to the applicant. It must therefore be deducted from the compensation due to the applicant.

[17] In the circumstances, the following order is made:

17.1 The voluntary retrenchment agreement entered into between the applicant and the respondent in April 2010 is void *ab nitio* and is set aside.

17.2 The applicant's dismissal for operational requirements of the respondent was procedurally unfair.

17.3 The respondent is directed to pay the applicant compensation in the amount of R22188.08 which is equivalent to remuneration she would have earned over a period of 31/2 months minus the R4379.42 severance pay she received in April 2010.

LALLIE, J

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	E Van Staden of Legal Aid Port Elizabeth
For the first Respondent:	Advocate PL Vys
Instructed by:	Gerhardt Botha and Partners