



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 755/12

MKHULISI NKOSINATHI

First applicant

MSENTI MVUYISI

Second applicant

and

HIRE ALL (PTY) LTD

Respondent

Heard: 31 October 2013 and 1 November 2013

Delivered: 6 February 2014

Summary: Settlement agreement entered into as a result of “innocent or simple” misrepresentation. Agreement voidable and should be set aside. Remedies applicable

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The applicants approached the Court to seek an order in the following terms;
- 1.1 Declaring that they had signed the “settlement agreement” on 8 June 2012 by reason of fraudulent misrepresentation.
 - 1.2 Declaring the “settlement agreement” invalid, null and void *ab initio*.

- 1.3 Declaring the termination of the applicants' contracts of employment by virtue of the "settlement agreement" as unlawful and invalid.
- 1.4 Ordering the respondent to reinstate the applicants' contract of employment by reinstating the applicants to their employment with retrospective effect to 4 April 2012, alternatively with retrospective effect to 8 June 2012.

Background and common cause facts:

- [2] The applicants were arrested by members of the South African Police Service on 4 April 2012 whilst tendering their services at the premises of the respondent. The arrests followed upon a robbery that had taken place at the respondent's premises in March 2012. They were released from custody on 31 May 2012.
- [3] On 4 June 2012, the applicants had reported at the respondent's premises to tender their services. They were however not permitted to resume their duties and were instead issued with notices of suspension and notices to appear before a disciplinary enquiry scheduled for 8 June 2012. The applicants had presented themselves at the scheduled disciplinary enquiry. The enquiry however did not commence, and the applicants were instead handed settlement agreements which they had signed. The issue for determination before this Court as agreed between the parties in a signed pre-trial minute is whether the settlement agreements are valid.
- [4] It was common cause that the applicants had signed two separate agreements. The agreement in respect of the second applicant, Msenti, was handwritten, and the major difference between the two agreements was that Msenti was to be paid an amount of R4000.00. The typed settlement agreement in respect of the first applicant, Mkhulisi read as follows;

1. *Preamble*

Whereas the Employee was employed by Hire All (Pty) Ltd

Whereas the Employee was called to disciplinary hearing on 8th June 2012 for misconduct.

Whereas the employee requested not to proceed with the enquiry.

Following discussions between the parties, the parties have mutually agreed on the following;

2. Terms of the agreement

2.1 The employees employment terminates as at the signature of this document (sic)

2.2 The employee will be paid an amount of R2500,00 which is inclusive of sdtatory monies as well as a settlement amount (sic)

2.3 The amount referred to in 2.1 will be paid on signature of this document (sic)

3. Full and Final Settlement

This agreement constitutes the full and final settlement of any and all claims, which either party may have against the other of whatsoever nature arising from or in conjunction with the current dispute with regards the employee's employment with the Company, the subsequent termination thereof.

The agreement constitutes the entire agreement concluded between the parties and no variation, alteration or addition thereto shall be of any force or effect unless reduced to writing and signed by both parties.

(Signed)

The evidence for the applicants:

- [5] Only the first applicant, Mkhulisi had testified in these proceedings. The parties' representatives had agreed that the second applicant's testimony would merely corroborate the first applicant's. Mkhulisi's testimony was as follows;
- [6] They had attended the disciplinary enquiry as scheduled and were presented with documents which they were told to sign. Mkhuseleli had asked his supervisor, Patrick Mpiti, to explain to them what the contents of the document meant and the purpose of the amount of R2 500.00 which was reflected in the document. Mpiti informed had them that as they were from jail, they should sign the document in order to receive money to support their families. He had further told them that they should stay at home for a month as the police were still investigating the incident surrounding the robbery that took place at the respondent's premises. Mpiti had further told them that they would be called after a month.

- [7] Mkhulisi denied that Mpiti told them that by attaching their signatures to the document it meant that their services were to be terminated. He denied that he had agreed to the termination of his services. He testified that Mpiti did not fully and clearly interpret the document or the implications of their signature once attached to the document. A month later they went back to the respondent's premises as per their understanding, and were instead given documents pertaining to their statutory money and told that they had previously agreed to the termination of their services. They then went to the Department of Labour to claim their UIF benefits and were informed that they were not entitled to the benefits as they had resigned from the respondent. The UI-19 form attached to the applicants' statement of claim reflects that the reason for termination of employment was due to "resignation".
- [8] Under cross-examination, Mkhulisi had denied that he ever spoke in English when communicating with his supervisors or anyone whilst still employed as he did not understand the language. On being asked the reason that he had signed the agreement, his contention was that he did not understand the agreement to be to the effect that their services were to be terminated. His understanding was that he would be paid to stay at home whilst the police investigated the robbery. He denied when it was put to him that he and the second applicant had asked the chairperson of the enquiry not to proceed with that enquiry as they were scared that they could incriminate themselves. He further denied that the settlement agreement came about as a result of their request.
- [9] Mkhulisi had conceded that he had signed a copy of the notice to attend the disciplinary enquiry and had understood its contents. He however contended that he did not understand the contents of the settlement agreement hence he had called Mpiti to interpret for them. Mpiti as their supervisor had always interpreted on their behalf before, and had interpreted the agreement to them by saying that the amount to be paid was for them to take whilst the police were investigating the matter. He conceded at the time that the criminal case against them had been withdrawn, and that what he understood was that the police were still to investigate how those charges were withdrawn.

Evidence for the respondent:

- [10] Janet van Notten is an official of an employers' association, GDP. She was appointed to be the chairperson of the enquiry scheduled for 8 June 2012. Having introduced herself to the applicants and further having explained her role, Mkhulisi had raised concerns about their arrests and had informed her that they did not wish to proceed with the enquiry and only wanted money due to them. She had then consulted with one Craig of the respondent and asked him to look into what the respondent owed the applicants as there was a need to negotiate a settlement agreement with them. Van Notten further testified that a settlement agreement was discussed, and she had then drafted the agreements and given them to the applicants. The latter had confirmed that they understood the terms of the agreement. Van Notten had nevertheless suspected that the applicants did not understand what was going on and she had called Mpiti to explain and interpret on their behalf. Mpiti had explained the terms of the agreement to the applicants and they had thereafter attached their signatures after stating that they understood what the agreements meant.
- [11] In order to ensure that the applicants understood what the agreement was all about, Van Notten had further informed them that everything was now "finished" by using the isiZulu term "*Phelile*". The applicants had responded by saying that they understood. Under cross-examination, Van Notten testified that although Mpiti might not have been present when she drafted the settlement agreement, she could recall that Mpiti had translated the agreement to the applicants. She conceded that one copy was typed whilst Msethi was given a hand-written copy. She attributed this to the fact that she could not print all the copies as she was not connected to a server at the time. She further testified that there was an agreement on the settlement amount, and she had explained the agreement in the presence of Mpiti.
- [12] Mpiti's testimony was to confirm that he was called upon to translate for the applicants when they were issued with the settlement agreements. He conceded that his understanding of isiZulu was not perfect, but that he had translated the contents of the agreement word for word and asked the

applicants whether they understood what he had just explained. Under cross-examination, he conceded that as he was not isiZulu speaking, and that he may have interpreted the contents of the agreements incorrectly. This concession was repeated during his re-examination.

Evaluation:

- [13] The issue is whether the parties had entered into a valid agreement in full and final settlement of the termination of the applicants' services. If the answer is in the affirmative, it cannot be said that there was a dismissal. If however it is found that the applicants had entered into the settlement agreements having been induced by fraudulent misrepresentation as they had alleged, the next issue for determination is whether the agreements are null and void, or voidable, and if so whether there was a dismissal which was fair or unfair.
- [14] Van Notten's evidence was hardly of assistance insofar as she understood how the agreements were interpreted. She had drafted the settlement agreements on her own and presented them to the applicants. She had confirmed that Mpiti was called to interpret and or translate the contents of the agreement. With her limited or no understanding of the isiZulu language, she could not have fully appreciated what Mpiti had informed the applicants. Her inappropriate and supercilious use of the isiZulu phrase "*Phelile*" to the applicants can hardly lead to a conclusion that the applicants knew and understood what they had just been told, or in what context the phrase was used. Mpiti's version in this regard was to the effect that he did not understand in what context Van Notten had uttered the word "*Phelile*". If Mpiti could not have understood the context under which the phrase was used, it is unlikely that the applicants could have understood what Van Notten meant.
- [15] Pivotal to the determination of the dispute in this case is clearly the evidence of Mpiti in respect of how he had interpreted the contents of the settlement agreement, and how the applicants understood the implications of attaching their signatures to those agreements. Mpiti had conceded that isiZulu was not his home language. He had further conceded that he could have misinterpreted the terms of the agreement. His concessions can only add

credence to the applicants' version that they clearly misunderstood what the settlement agreement was all about. The applicants' version and belief was that by signing the agreement, they were to stay at home for a month and thereafter come back as the police were still investigating the circumstances that led to the withdrawal of the criminal charges against them.

[16] The criminal charges against the applicants had been withdrawn, and it is improbable that they could have asked for the disciplinary enquiry not to proceed for fear that they might incriminate themselves. In the applicants' view, they were paid the amount in question, and had accepted it on the basis that they would be back at work the following month. It can therefore not have been odd for them to have reported back for duty a month later as they had done and in accordance with their understanding. Van Notten's version that the settlement amounts were negotiated and agreed upon with the applicants is hardly probable in view of her earlier version that what she had asked Craig to enquire was whether there were any statutory amounts owed to the applicants.

[17] It is trite that for an applicant to succeed with a claim or plea of misrepresentation, he/she must show that he or she was induced to enter into the settlement agreement by virtue of a misrepresentation of fact; that the misrepresentation was material and false; that it was intended to induce him or her to enter into the contract and; had succeeded in doing so¹. The Court in *inovick and Another v Comair Holdings Limited and Others*², had added a further requirement which was to the effect that it had to be shown that the misrepresentation was material, in a sense that it would have induced a reasonable person to enter into the agreement.

[18] The applicants' case was premised on the contention that a fraudulent misrepresentation was made to induce them into the settlement agreement. Inasmuch as it should be concluded that there was indeed a misrepresentation as evident from Mpiti's concessions, which had induced the applicants to attach their signatures to the agreement, I am however of the

¹ See *Karoo & Eastern Board of Executors & Trust Company v Farr and Others* 1921 AD 413 at 415.

² 1979 (2) SA 116 (W) at 149C-150D

view that the misrepresentation was not fraudulently made. This conclusion is reached firstly on the basis that it was neither put to Mpiti in cross-examination nor even suggested to him that he had intentionally or with malice, incorrectly interpreted the provisions of the settlement agreement. The allegation that the applicants were induced by fraudulent misrepresentation was bare, and there is thus no basis on the evidence before the Court for any other conclusion to be reached.

[19] Secondly, the misrepresentation was to the extent that the terms and conditions of the agreement were incorrectly interpreted to the applicants. On the basis of what was interpreted and what the applicants came to understand, they had signed the agreements. However, as already concluded, there was no intention on the part of Mpiti to fraudulently make that misrepresentation. The misrepresentation in this case, as it was made without fraud or negligence is of the nature that is commonly referred to as “innocent or simple misrepresentation”³. To the extent that this was the case, the settlement agreements signed by the applicants are therefore voidable at their instance.

[20] Mr. Morgan had further argued that there was no dismissal as the principles surrounding *caveat subscriptor* were applicable. In my view, where a misrepresentation that induced a party to enter into an agreement is proven, it would be iniquitous to still insist that the principle of *caveat subscriptor* should apply. This is so in that if the applicants as in this case signed those agreements whilst labouring under a wrong impression as a result of the incorrect interpretation of the terms and conditions of those agreements by Mpiti, it cannot be said that they should have been aware of what they had signed. Furthermore, it has also been held that the *caveat subscriptor* principle will not be enforced if the terms of the contract have been inadequately or inaccurately explained to an ignorant signatory⁴. This principle is apposite to the facts of this case, where the applicants, unsophisticated as they are, had relied upon what Mpiti had translated and explained to them.

³ See AJ Kerr. The Principles of the Law of Contract: 4th Edition.

⁴ Katzen v Mguno [1954] 1 All SA 280 (T).

Relief:

- [21] In the light of the conclusion that the misrepresentation in question rendered the settlement agreements voidable, the only issue for determination is what type of relief the applicants should be entitled to. The applicants sought an order of reinstatement, and the issue is whether such an order is appropriate in the circumstances. Ordinarily, given the nature of the misrepresentation in this case, the common remedy would be that of restitution. Restitution within the context of the remedies provided in section 193 (1) and (2) of the Labour Relations Act would imply an order of reinstatement, or of re-employment, or of compensation. In considering the nature of relief to be granted, the following principles set out in *Hoffmann v South African Airways*⁵ are relevant:

“The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of a constitutional right; second, to deter future violations, third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining the appropriate relief, ‘we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source’”.

- [22] In line with the above principles, I have considered the fact that but for the innocent misrepresentation, the applicants would not have signed the settlement agreements as it was not their intention to terminate the employment relationship. Secondly, the respondent always believed, and reasonably so, that it had entered into a valid settlement agreement with the applicants. In my view, it was only when Mpiti conceded during trial that he may have misinterpreted the provisions of the settlement agreement to the applicants that it can be said that the respondent for the first time became aware that there may have been problems with what it had throughout, thought to be a valid agreement. In these circumstances, it cannot be said that the agreements were *void ab initio*, and that the respondent was aware of that fact. To this end, considerations of fairness to both parties dictate that the

⁵ 2000 ILJ 2357 (CC) at para 45

restitution that the applicants should be entitled to should be that of reinstatement in the ordinary sense. However, since the termination of the applicants' services was as a result of the misrepresentation already referred to, the order of reinstatement cannot be with full back-pay. In considering the amount of back-pay, I have also, apart from the factors already mentioned, taken into account that the applicants were without an income since 8 June 2012. Furthermore, they were unable to claim UIF benefits as a result of the respondent having incorrectly completed their UI-19 forms as clearly they had not resigned. In the light of these factors, and bearing in mind the circumstances that led to the termination of their services, it would be fair to limit the amount of back-pay payable to the individual applicants to four months' salary. To this end, the following order is made;

Order:

- i. The settlement agreements entered into between the individual applicants and the respondent are set aside.
- ii. The respondent is ordered to reinstate the individual applicants in its employ, retrospective from 8 June 2012, and in the same positions they used to occupy as at that date.
- iii. The respondent is further ordered to pay to the individual applicants, back-pay limited to four months' salary.
- iv. There is no order as to costs



Tlhotlhalenmaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. K. Lengane (Pro bono)

For the Respondent: Mr. D W Morgan (David Morgan Attorneys INC)

Labour Court