



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH
JUDGMENT

Not reportable

Case no: P 341/11

In the matter between:

BRIAN SCHROEDER

First Applicant

GRAHAM SUTHERLAND

Second Applicant

and

PHARMACARE LTD T/A ASPEN PHARMACARE

Respondent

Date of trial: 19 November 2014

Date of judgment: 26 November 2014

JUDGMENT

VAN NIEKERK J

Introduction

- [1] The applicants were employed by the respondent until February 2011, when the respondent contends that it was agreed that their employment would terminate by mutual consent. On 16 February 2011, each of the applicants signed what is termed a 'mutual termination settlement agreement' with the respondent, in terms of which they agreed that their employment would terminate with effect from 16 February 2011. The signature of the agreements was the culmination of a process initiated by the respondent and conducted by what would appear to be its labour consultant. The less said about that process and the terms of the agreements the better, but be that as it may, both applicants later referred unfair dismissal disputes to the bargaining council.
- [2] In the case of the second applicant, on 13 July 2011, the presiding arbitrator held that the bargaining council lacked jurisdiction to entertain the referral since the parties had concluded a settlement agreement, the effect of which was that the second applicant had not been dismissed. In the case of the first applicant, a similar ruling appears to have been made; the council had no jurisdiction since the first applicant's employment had been terminated by mutual consent.
- [3] On 30 January 2012, the applicants referred a statement of case to this court in terms of Rule 6. They seek an order setting aside the settlement agreements, and of reinstatement into the respondent's employ with retrospective effect. In its statement of defence, the respondent raised two special pleas. The first is that the referral falls to be dismissed because the applicants unduly delayed exercising any right they may have had to challenge the validity of the settlement agreement. The second is that this court lacked jurisdiction to grant relief in the form of 'an order of reinstatement or compensation.'
- [4] When the matter was called, I raised with the parties' representatives the issue of jurisdiction, not specifically in the terms of the respondent's special pleas but

more narrowly, whether this court has the jurisdiction to set aside an agreement (on the grounds of duress, misrepresentation and the like) entered into between an employer and employee in terms of which a termination of employment is mutually agreed.

- [5] Adv. Grogan, who appeared for the respondent, submitted that any averments of misrepresentation and duress ought properly to have been raised before the commissioner in the course of an enquiry into the existence of a dismissal. He referred to *Cook4Life CC v Commission for Conciliation, Mediation and Arbitration & others* (2013) 34 ILJ 2018 (LC), where the court stated, at paragraph 14 of the judgment, that s 191 of the LRA contemplates that the CCMA must make a ruling when the existence of a dismissal is placed in issue. The court held further that where it is contended that an agreement is voidable on account of its having been induced by duress (and that the employee had therefore been dismissed for the purposes of the Act), the arbitrator ought properly to determine that issue, even if requires ultimately that the agreement be set aside.
- [6] From the papers before me, it would appear that in the case of the second applicant, the commissioner took the view, incorrectly, that a dispute about the validity of the settlement agreement precluded him from arbitrating the dispute. However, that finding is not relevant for present purposes – the issue under consideration goes directly to the jurisdiction of this court to enquire into the validity of an agreement concluded between an employer and an employee, by way of a referral in terms of Rule 6, where the employee claims to have entered into an agreement, under duress, in terms of which his or her employment is terminated.
- [7] Adv. le Roux, who appeared for the applicants, conceded that there was no provision in the LRA (or any other statute for that matter) which conferred jurisdiction on this court to entertain the applicants' dispute in the terms in which

it has been referred. He conceded too that in the case of the second applicant at least, the arbitrator, as part of the enquiry into the existence of a dismissal, ought properly to have determined whether the settlement agreement had been entered into under duress. (It would appear that in the case of the first applicant, the arbitrator did make such an enquiry and on being advised that the agreement had been concluded free of duress, held that its terms precluded the first applicant from claiming unfair dismissal.) Argument in the present proceedings was therefore confined primarily to the consequences of that concession. Adv. le Roux submitted that the court is empowered to remit the matter to the bargaining council for a continuation of the arbitration proceedings, and that in the present circumstances; an order to that effect was warranted. In support of this submission, Adv. le Roux relied on the provisions of s 158 (2). That section reads as follows:

- (2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the court may –
 - (a) stay the proceedings and refer the dispute to arbitration; or
 - (b) with the consent of the parties and if it is expedient to do so, continue the proceedings with the court sitting as an arbitrator, in which case the court may only make an order that a commissioner or arbitrator would have been entitled to make.

- [8] Adv. Grogan submitted that the application of s158 (2) was limited to the circumstances in which a party genuinely but mistakenly refers a dispute to this court for adjudication and where it becomes apparent during the course of the proceedings that the issue in dispute is one that ought properly to be arbitrated by the CCMA or a bargaining council. A court is not empowered, he submitted, to remit a matter in circumstances where the referral was misconceived in the first instance and where no arbitrable dispute is before this court, and where the proper remedy in any event, is to review and set aside the jurisdictional ruling made by the arbitrators in each case.

- [9] It is well-established that the court's jurisdiction is to be determined on the basis of the applicant's pleadings. In the referral made by the applicants, I find no reference to any provision of the LRA that confers jurisdiction on this court to determine the validity of a settlement agreement, in the context of a termination of employment. To the extent that the relief sought by the applicants is the setting aside of the agreement, this court has jurisdiction to make a settlement agreement an order of court in defined circumstances. (See s 158(1) (c).) The court is not empowered, without more, to enquire into their validity. The court may determine whether an agreement induced by duress or misrepresentation ought to be set aside in the context, for example, of an alleged dismissal for a reason related to the employer's operational requirements. But the court exercises jurisdiction in that instance by virtue of the employee asserting a reason for dismissal that falls within the court's jurisdictional ambit. Further, the court has jurisdiction in terms of s 77 (3) of the BCEA in respect of matters that arise from employment contracts. This is not the basis on which the present claim has been referred. Whether a dispute about the validity of an agreement that has the effect of terminating employment is a matter that arises from an employment contract is therefore an issue that I need decide.
- [10] As far as the future conduct of this matter is concerned, the wording of s 158 (2) and in particular the use of the word 'may' in the preamble to the section, makes it clear that the court has a discretion to refer a matter to arbitration if it becomes apparent that the nature of the dispute is such that it ought to have been so referred. The exercise of a discretion to remit is common in those cases where applicants contend that they were dismissed for a reason that is automatically unfair (a dispute over which this court has jurisdiction) and where it becomes apparent during the course of the proceedings that the true reason for dismissal is not automatically unfair and which the LRA requires is one that requires to be arbitrated. I do not understand s 158 (2) to mean that this court is empowered to remit a matter to arbitration in circumstances where the court has no jurisdiction

in respect of the subject of the original referral. In other words, there must at least be some preliminary basis for the court to assume jurisdiction. In the present case, there is none.

- [11] In any event, the arbitrator has already issued a ruling to the effect that he or she has no jurisdiction to arbitrate the dispute. To remit a matter to arbitration in the circumstances and to direct that the arbitration proceedings continue on the basis that the arbitrator has jurisdiction to determine the dispute, would amount to a review of the arbitrator's ruling. What the applicants are asking the court to do is to remit their dispute to arbitration in circumstances where in both their cases, there remains a valid and binding ruling to the effect that the settlement agreement constituted a mutually agreed termination of employment and thus not a 'dismissal' for the purposes of s 186 (1) of the LRA. While those rulings stand (put another way, until they are reviewed and set aside), s 158 (2) does not empower this court to make any order to the effect that the arbitration proceedings should continue.
- [12] For these reasons, the applicants' referral stands to be dismissed for want of jurisdiction, without any further order as to the further prosecution of the applicants' unfair dismissal dispute.
- [13] Insofar as costs are concerned, the court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. While the respondents would ordinarily be entitled to its costs on the basis that costs follow the result, there are at least two considerations that require that the parties bear their own costs. The first is that the applicants are individuals. The Labour Appeal Court has recently highlighted the potential of adverse orders for costs to discourage employees who feel genuinely aggrieved from pursuing their grievances against their employers, however misguided that pursuit might be. I accept to that the arbitrator's view on his powers in relation to the settlement agreement significantly influenced the course of this dispute, and

in particular, the referral to this court. Secondly, although the respondent raised a jurisdictional point of sorts in its special plea that referred only to the remedy of reinstatement and/or compensation sought by the applicants. The jurisdictional point which the parties at the stage of trial concede disposes of the referral to this court is more deeply grounded and one that ought properly to have been anticipated and clearly articulated at the time that the statement of defence was filed. Had the respondent done so, it is possible that this matter would never have reached the stage of trial. For these reasons, I do not intend to make a costs order.

I make the following order:

1. The applicant's referral is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicants: Adv. F le Roux, instructed by Bakker Attorneys

For the respondent: Adv. J Grogan, instructed by Joubert Galpin Searle Attorneys