



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 79/14

In the matter between:

ARWYP MEDICAL CENTRE (PTY) LTD

Applicant

and

HELENA HARRIS

Respondent

Heard: 24 - 26 April 2017

Delivered: 6 February 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] In its statement of claim, the applicant sought an order setting aside a settlement agreement entered into between the parties under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA). The applicant further seeks the repayment of an amount of R378 000.00 plus interest paid to the respondent in satisfaction of the settlement agreement.
- [2] The agreement was concluded pursuant to a constructive dismissal claim having been referred by the respondent to the CCMA. The basis of seeking a

cancellation of the settlement agreement was that it was entered into based on a misrepresentation by the respondent.

Background:

- [3] The applicant is a private company, which operates as a private healthcare centre and hospital. The respondent, Ms Helena Harris (Harris) commenced her employment with the applicant from 1 April 2008 as the Director of Operations, having signed a contract of employment on 18 March 2008.
- [4] This dispute has a protracted history dating back to 2009. In April 2009, Harris was suspended from the employ of the applicant. This led to an alleged unfair labour practice dispute being referred to the CCMA. On 15 July 2009, Commissioner Ravi Naidoo of the CCMA issued an arbitration award, wherein he found that the suspension of Harris was unfair. She was awarded compensation in the amount equivalent to two weeks' remuneration. The applicant subsequently lodged an application to review and set aside Commissioner Ravi's award.
- [5] In a letter dated 12 June 2009, Harris had tendered her resignation from the employ of the applicant. The letter essentially details numerous instances of alleged unfair treatment meted out by the applicant, leading Harris to conclude that her working conditions had been made intolerable.
- [6] On or about 10 July 2009, Harris referred an alleged constructive dismissal dispute to the CCMA. Midstream the arbitration proceedings, the parties agreed to resolve the dispute. A settlement agreement was duly entered into on 4 August 2010, in terms of which the applicant had agreed to pay Harris an amount of R378 000.00. The agreement also covered the withdrawal of the review application initially lodged by the applicant in respect of Commissioner Ravi's award, and the withdrawal of summons issued against Harris (in the sum of R500 000.00) in respect of an alleged breach of contract after her resignation.
- [7] Harris was paid the amount of R378 000 in satisfaction of the settlement agreement. The applicant alleges that in January 2013, some 17 months after

the settlement agreement was concluded, it become aware of a misrepresentation by Harris pertaining to the circumstances that led to her leaving her previous employment prior to joining it in April 2008. It was alleged that the said misrepresentation had the effect of inducing the applicant to enter into the settlement agreement, hence the claim before the court, which was lodged in January 2014.

The evidence:

- [8] The applicant's contention is that throughout Harris' employment with it, and until January 2013, it had belaboured under the impression that at the time she was employed, she had resigned from her previous employ with Netcare Group. It was contended that had it been known before the settlement agreement was concluded that Harris was instead retrenched by Netcare Group, the applicant would not have entered into a settlement agreement with her, and would have instead dealt with the matter differently.
- [9] It was further the applicant's view that Harris' misrepresentation was material and persistent, as she had confirmed at all times including at the alleged constructive dismissal arbitration proceedings that she had indeed resigned from the Netcare Group. According to the applicant, the misrepresentation was also deliberate as Harris knew that had the true state of affairs been known at the time the agreement was concluded, it would have resulted in it pursuing its defence of the alleged constructive dismissal dispute.
- [10] The evidence of Ms Margaret Ireland (Ireland), the applicant's Hospital Manager in support of its claim is summarised as follows:
- 10.1 Because of the nature of the industry and competitiveness, there is constant movement of professionals between different hospitals, which not only compete for clients or patients, but also for skilled professionals like doctors, nurses and pharmacists. The difficulties are compounded by the fact that retrenchment of professional staff in the industry is uncommon.

- 10.2 At the time that Harris was employed, Ireland was the Human Resource Manager, and had assisted with the conclusion of her employment contract. No reference checks were conducted at the time of the conclusion of the employment contract with Harris, as the Chief Executive of the applicant had specifically instructed that such an exercise should not be undertaken. When Harris was employed, all that was known it was that she had resigned from Netcare Group due to transport problems, and the need to improve her quality of life.
- 10.3 Harris was employed within the Nursing Division, and was responsible for *inter alia* the management of the quality division, marketing, nursing school and the pharmacy. She reported directly to the Chief Executive.
- 10.4 On 6 April 2009, Harris was suspended pending investigations into the circumstances that led to her leaving the Netcare Group. The Chief Executive, Mr Otto Wykema sent an email to the representatives of the Netcare Group on 7 April 2009 to ascertain the real reasons Harris had left. Mr Peter Warrener (Warrener), the Human Resource Manager of the Netcare Group in a written response stated that Harris had left the employ of Netcare "on her own volition".
- 10.5 Pursuant to the clarification by Warrener, the applicant in a letter dated 15 April 2009 uplifted Harris' suspension, and further recorded *inter alia* that any allegations of substantial misrepresentation on her part were unfounded and could not be proven.
- 10.6 On 12 June 2009, Harris had submitted her resignation letter and thereafter referred an alleged constructive dismissal dispute to the CCMA. During the arbitration proceedings, Harris had reiterated that she had indeed resigned from Netcare Group.
- 10.7 During or prior to the arbitration proceedings, copies of Harris' IRP3 form were obtained from South African Revenue Services which

however indicated that she was retrenched from the Netcare Group. This was despite the fact that there was a copy of her resignation letter from Netcare. Furthermore, a copy of Harris' salary advice from Netcare was also obtained, which indicated that she was paid a severance pay.

10.8 The applicant also came into possession of a letter addressed to Harris by Netcare. The letter recorded *inter alia* that Harris had requested voluntary retrenchment during the period of Netcare's restructuring. It further recorded that '*All communication with regards to your departure will reflect the reason as a resignation due to you wishing to adopt a more family focus lifestyle.*'

10.9 A conclusion was then reached based on the above documents that indeed Harris was retrenched by Netcare Group, and that she had not resigned as she had persistently maintained. According to Ireland, these revelations were significant in that, if in fact Harris was retrenched from Netcare, the implications are that she had skills deficiency, and could not have been accommodated anywhere else. Thus, had the applicant known that Harris was retrenched, it would not have employed her, especially in a senior position.

[11] Harris' evidence in response to the allegations against her are as follows:

11.1 She is a registered nurse and has held a number of senior position in various private health facilities. She commenced employment with Netcare after the Netcare Group acquired her erstwhile employer, Maddox. Her job at Netcare required extensive travelling between her place of residence and the hospital she was based at. She was also required to travel to other hospitals as well. The travelling was taxing, especially taking into account her age at the time (52 years of age). She had worked for Netcare for 17 years.

11.2 In 2007, her life partner became ill, and her work became overwhelming because of the long working hours. She therefore decided to adopt a more relaxed life style. She intended to resign

from Netcare, in order to spend more time with her life partner and grandchildren.

- 11.3 At some point, she had a conversation with a Dr du Plooy, who was the Hospital Superintendent of the applicant. Dr du Plooy was also her nephew. It was during one of these conversations that Dr du Plooy had extended an invitation to her to join the applicant as its employee. When she informed Dr du Plooy of her intentions to resign from Netcare, the latter offered her a position even before she had not yet been interviewed.
- 11.4 On 18 February 2008, she had a meeting with the Group Human Resource Director of Netcare, Mr Warrener. In that meeting, she informed Warrener of her intention to resign. Netcare was aware of the reasons she wanted to resign. At the time, Netcare was undergoing a restructuring process and she had asked and was granted a generous severance package. She then resigned on 19 February 2008.
- 11.5 On 18 March 2008, Dr du Plooy interviewed her for the position. Further interviews were held with the applicant's Chief Executive, Ireland and the applicant's clinical psychologist, Dr Carr.
- 11.6 On 1 April 2008, she commenced her employment with the applicant, and the Chief Executive had informed her that her position would be changed from what she was originally offered, but that this would not affect her salary.
- 11.7 On 25 March 2009 she was called to attend a meeting with Ireland and the applicant's attorneys of record (Mr Bouwer). In that meeting Bouwer *inter alia* produced a letter, and instructed her to report for a counselling meeting with the Chief Executive. She was also offered an exit package and threatened that if she did not accept package, "they" would ensure that she did not work in the private health service again. Allegations of poor work performance were also

levelled against her, and she was subsequently placed on special leave of absence.

- 11.8 She was suspended on 6 April 2009, pending the finalisation of an investigation. She was not informed of any allegations against her. It was only when the suspension was uplifted that she was informed that it related to the circumstances under which she had left the employ of Netcare.
- 11.9 After her resignation, and during the constructive dismissal dispute proceedings, Bouwer, the applicants' attorneys of record had issued a subpoena for her personal employee file from Netcare. A representative of Netcare brought the file to the proceedings. Bouwer took possession of the file and inspected it together with Ireland and others before it was handed to the Commissioner. In the file was a letter dated February 2008, which made reference to the severance package offer from Mr Warrener of Netcare. At that point, Bouwer requested that the matter be postponed. Harris further testified that Bouwer had made attempts to also subpoena her medical files.
- 11.10 The settlement offer came about after she had finished her testimony in chief and when she was to be cross-examined by Bouwer. It was the applicant that had initiated the settlement discussions. She denied that there was any basis for the agreement to be cancelled as she had not misrepresented anything to the applicant. She further contended that she had resigned from Netcare and was instead granted a voluntary package. This led to her agreement with Netcare being confidential and there was no reason to disclose it to the applicant at the time of her employment. The settlement agreement concluded at the CCMA according to her had nothing to do with her resignation from Netcare.

The legal principles:

- [12] A compromise is a contract between two or more persons which has as its object the prevention, avoidance or termination of litigation¹. Contractual principles apply to any agreement entered into between an employer and employee, including an agreement of compromise in terms of which parties agree to settle any dispute, or claims, that may exist between them².
- [13] It is further 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 the misrepresentation was intended to induce him or her to enter into the contract and; and had in fact succeeded in doing so³.
- [14] A further requirement is 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 agreement⁴. It is further trite that a misrepresentation, once established, effectively removes the applicant's assent thereby resulting in an agreement being non-existent. The agreement will accordingly be void *ab initio*⁵.
- [15] In this case, the agreement concluded at the CCMA as per its terms and conditions was entered into in full and final settlement of all disputes between the parties at the time, hence the withdrawal of the summons at the magistrate court, and the review application before this court. To the extent that this is the case, the Constitutional Court has held that when parties settle

¹ *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others 1978 (1) 914 (AD)* at 921A-D, where it was held that;

"A transaction is an agreement between two or more persons either to end litigation or to prevent litigation resulting from the differences between them. It is most closely equivalent to consent judgment.

Whether extra-judicial or embodied in an order of Court, it has the effect of *res judicata* and, like any other contract and any order of court, made by consent, it may be set aside on the grounds that it was fraudulently obtained or on the grounds of justus error, provided the error vitiated true consent and did not merely relate to motive or the merits of a dispute which it was the very purpose of the parties to compromise."

² *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another (JA95/2014) [2016] ZALAC 4; (2016) 37 ILJ 902 (LAC); [2016] 5 BLLR 425 (LAC)* at para 12

³ See *Karoo & Eastern Board of Executors & Trust Company v Farr and Others 1921 AD 413* at 415.

⁴ *Novick and Another v Comair Holdings Limited and Others 1979 (2) SA 116 (W)* at 149C-150D

⁵ See *Goddard v Metcash Trading Africa (Pty) Ltd [2010] 2 BLLR 186 (LC)* at para 21

an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced⁶.

Evaluation:

[16] The basis upon which the applicant seeks to have the settlement agreement between it and Harris cancelled is disconcerting in the extreme. I am even astonished by the relentless manner with which this claim was pursued. My concerns at the applicant's conduct in pursuing this claim should be viewed within the context of the following evidence and conclusions;

16.1 On the applicant's version, when Harris was employed, no reference checks were done into her background upon the instructions of its own Chief Executive. The failure to conduct these checks can only imply that the applicant was prepared to take risks with every candidate it had interviewed and employed.

16.2 On Ireland's version, in April 2009, and after Harris was suspended, investigations were done on the instructions of the CEO into the circumstances surrounding her departure from Netcare. These investigations had revealed that was granted a voluntary severance package.

16.3 Essentially, there was no reason to believe that Netcare had lied, or the fact that it went through a restructuring process, resulting in Harris being offered a voluntary package. This evidence was not challenged. The applicant nonetheless sought to rely on documentation which did not assist its case, as Harris had satisfactorily explained the circumstances that led to her resignation and how she was offered a severance package.

16.4 It was therefore belated for the applicant in its closing arguments to challenge the veracity of the arrangements between Harris and Netcare at the time that she left the latter's employ. If the applicant

⁶ *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another* (2016) 37 ILJ 2723 (CC); 2016 (12) BCLR 1515 (CC); [2017] 1 BLLR 1 (CC) at para 24

was not satisfied with Harris' version of events, nothing prevented it from obtaining the evidence of anyone from Netcare to dispute that of Harris. As correctly submitted on behalf of Harris, negative inferences should be drawn from the failure by the applicant to subpoena witnesses from Netcare to rebut Harris' version.

- 16.5 Ireland had further conceded that Harris had offered to resign at Netcare but was instead offered a voluntary retrenchment. There was therefore no inconsistency between the fact that Harris had resigned, and the fact that she was offered a voluntary retrenchment.
- 16.6 The applicant's contention that Harris had misrepresented the facts surrounding her departure from Netcare in the light of her explanation is spurious in the extreme and obviously fallacious. None of the elements of misrepresentation, let alone fraud, were demonstrated in this case. This is further borne out by the fact that the offer to settle the dispute at the arbitration proceedings was not initiated by Harris. On her version, she was convinced to settle the matter by her partner who had accompanied her to those proceedings. At the time that the settlement discussions were initiated, she had completed her evidence in chief and or was about to be cross-examined. If the applicant was of the view that it had a water-tight defence against her alleged constructive dismissal claim, nothing prevented it from proceeding with the matter. It however willingly chose to enter into a compromise, and I am having difficulties in appreciating the basis upon which it seeks to resile from that compromise.
- 16.7 As Ireland correctly conceded under cross-examination, and further under re-examination, the settlement agreement was reached not as a result of any misrepresentation, but was purely based on an assessment of the risks of the merits of the constructive dismissal dispute before the CCMA. That assessment was made by herself, the applicant's CEO and the applicant's attorneys of record. She further conceded that other than the documents in the applicant's possession

from Netcare, there was nothing to suggest that Harris had lied about the circumstances pertaining to her leaving Netcare.

- 16.8 The further contention by Ireland, and by implication, the applicant, that because Harris was allegedly retrenched can only imply that she had skills deficiencies is equally ludicrous. She conceded under cross-examination that the taking up of a voluntary package within the context of a restructuring process is not a reflection on one's performance. She also conceded that Harris wanted to resign when she was offered a voluntary severance pay, and that it was not as if the retrenchment was forced upon her. Ireland further under cross-examination conceded that there was no reason why an employee could not resign and thereafter enter into a voluntary retrenchment agreement with an employer.
- 16.9 It is trite that a retrenchment exercise cannot be based on alleged skills deficiencies or poor performance. A retrenchment exercise leads to a no fault dismissal, and any suggestion that a retrenched employee is unemployable on account of alleged skills deficiencies ought to be rejected as being nonsensical.
- 16.10 Significant with the dispute between the parties at the CCMA was that it had nothing to do with Harris' alleged skills deficiencies. Ireland's contentions that Harris had work performance issues during her employ by the applicant was not an issue before the CCMA, and I fail to appreciate how that issue could have become relevant at the time that the settlement agreement was concluded. Equally so, the issue before the CCMA was not in regard to whether Harris had resigned from Netcare or whether she was retrenched.

Conclusions and Costs:

- [17] The applicant has hopelessly failed to lay a basis for the order that it seeks. The settlement agreement concluded between the parties is binding upon them as it was seriously and willingly entered into. The sole reason that the

applicant had initiated the settlement of the dispute was purely on the merits of Harris' constructive dismissal claim and nothing else.

- [18] Harris sought a punitive cost order in the event that the applicant's claim was unsuccessful. It was submitted on her behalf that the applicant's evidence in regard to its claim fell woefully short of even beginning to prove the allegations of fraudulent misrepresentation. I have already indicated my dismay at the relentlessness with which this claim was pursued, some 17 months after the settlement agreement was concluded. In her evidence, Harris testified that she was a pensioner, and had to pay the costs of defending this claim out of her pension savings.
- [19] False and unwarranted allegations were made against her, compelling her to defend this claim which was a non-starter in the first place. It is not correct as suggested on behalf of the applicant that Harris was not an innocent party in this debacle, and there is no evidence to suggest that her departure from Netcare was not above board. Harris was enjoying her retirement when 17 months after the settlement agreement was concluded, the applicant had resuscitated a buried dispute. Having had regard to the circumstances of this case, it is my view that the considerations of law and fairness dictate that Harris should not be burdened with any costs in respect of this spurious claim. She should thus be entitled to all her costs, and the applicant should thus carry that burden in its entirety.
- [20] In the premises, the following order is made:
1. The applicant's claim is dismissed;
 2. There is no order as to costs in respect of the costs reserved by Gush J on 04 December 2015;
 3. The applicant is ordered to pay the costs of this action, on a scale as between attorney and own client.

E Tlhotlhemaje

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicant:

Adv. T Venter

Instructed by:

Bouwer Cardona Inc.

For the Respondent:

Adv. A Lamplongh

Instructed by:

Telfer & Associates Inc.

LABOUR COURT