THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 656/16

In the matter between:

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA **First Applicant**

MOYENG KIBA AND 16 OTHERS **Second Applicant**

and

CLEAR CREEK TRADING 167 (PTY) LTD t/a
WIREFORCE **Respondent**

Heard: **30 May to 6 June 2018**

Delivered: **12 October 2018**

Summary: **Practice – parties are bound by the pleadings and pre-trial minutes – version of defence not pleaded is forbidden.**
Settlement agreements signed under duress stand to be annulled – the dismissal for operational requirements is procedurally and substantively unfair.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] In most trial proceedings in this Court, some litigants and counsel do not give pleadings the attention which they should, a typical case in these proceedings. The respondent Clear Creek Trading 167 (Pty) Ltd t/a Wireforce (Wireforce) adduced evidence and is seeking to rely upon it in a manner which departed from its pleaded case as summarised in the pre-trial agreement. I deal with this issue fully below.

[2] The second to further applicants, who are members of the first applicant, National Union of Metalworkers of South Africa (NUMSA), are challenging their dismissal. They assert that their dismissal was not effected in accordance with the provisions of section 188 read together with section 189 of the Labour Relations Act[1] (LRA).

[3] Wireforce vehemently opposes the applicants claim and it asserts, in its statement of opposition, that the applicant employees' employment contracts were terminated by consent due to operational requirements and that they were paid severance pay equated to their length of service.[2] It raised a point *in limine* to the effect that the applicant employees are estopped from challenging their termination because they are bound by the settlement agreements and the payments made to them in full and final settlement of all or any claims that they have against Wireforce.[3]

Factual Background

[4] Wireforce is in a persisting collective bargaining relationship with NUMSA. On 1 March 2016, the business of Independent Wire (Pty) Ltd in Vereeniging was transferred to Wireforce in Germiston and the employees were also transferred in terms of section 197 of the LRA. There were issues concerning transport allowance and the three shift system in relation to

[1] Act 66 of 1995 as amended.
[2] See para 17.1 of the Statement of Opposition at page 19 of the pleadings bundle.
[3] See para 22.5.5 of the Pre-trial Minute at page 35 of the pleadings bundle.

employees that had been transferred from Vereeniging. Wireforce and the employee representatives agreed to a R100.00 allowance per week and the introduction of the three shift system with effect from 21 March 2016.

[5] However, the employees were not happy with the deal. On 11 April 2016, the employees embarked on an unprotected strike. The striking employees were issued with final written warnings consequent to consultation with NUMSA on behalf of its members. On 18 April 2016, Wireforce implemented the three shift system as follows:

5.1 06:00 to 15:00 with lunch time at 11:00

5.2 14:00 to 22:00 with lunch time at 19:00

5.3 22:00 to 06:00 with lunch time at 03:00

[6] On 26 April 2016, some of the applicant employees were approached by Mr Tebogo Mokoena (Mr Mokoena), Internal Labour Relations Officer, accompanied by security personnel. While, on 3 May 2016 and 4 May 2016, the rest of the applicant employees were called by different people to appear before Ms Julia McIntyre (Ms McIntyre), the facilitator who was employed as Group Human Resources Manager for Duppro, a labour broker. In all instances, the applicant employees were presented with voluntary retrenchment settlement agreements to sign and were told that Wireforce did not want them anymore.

[7] The applicant employees testified that they were surprised by the turn of events and that their attempt to resist to sign the settlement agreements was not welcome. Ms McIntyre told them that failure to sign the retrenchment settlement agreements would result in their dismissal without any cash benefit. The applicant employees were not allowed to take the settlement agreements to NUMSA for advice.

[8] The applicant employees testified that they were threatened to sign the settlement agreements by the presence of the security guards who were

unfamiliar to them and their uniform was different from that of the security guards who were manning the entrance to the Wireforce premises. Mr Mokoena pointed at the security guards to scare the applicant employees who refused to sign the settlement agreements. This evidence was never challenged.

[9] NUMSA sent a communication to Wireforce wherein it questioned the procedure that had been undertaken and the fact that it was not consulted yet its members were being retrenched. Wireforce was adamant that the process was voluntary and there was no need to involve NUMSA.

[10] Wireforce's version of defence, raised for the first time during trial, is that the Vereeniging employees were not satisfied with the transport allowance and the relocation to Germiston. While the Germiston employees were not satisfied with the shift system. As a result, Mr Yassen Parker (Mr Parker), Wireforce's Chief Operating Officer, requested Ms McIntyre to facilitate the departure of all unsatisfied employees as per their wishes.

[11] Ms McIntyre conducted the separation consultations that sat on 3 and 4 May 2016. She was adamant that the individual applicant employees were allowed to negotiate independent and separate packages on voluntarily basis. Hence, there was no need to consult with NUMSA.

[12] As mentioned above, Ms McIntyre's evidence is incongruous with Wireforce's pleaded version of defence.

<u>Pleadings</u>

[13] It is important that we remind ourselves of the purpose of Pleadings in a lawsuit. Mainly, Pleadings are statements of what each party's contentions will be at the trial and give all such details as opponents need to know in order to prepare their case in answer. It is a cardinal rule that parties are bound by their Pleadings and are not allowed to adduce facts which they have not pleaded. Obviously, the reason is that cases must be decided on

the issues that are on record and if it is desired to raise other issues, they may be placed on the record by way of an amendment.[4]

[14] By the same token, the pre-trial minute, a consensual document, is a binding contract between the parties and it obliges the Court to decide only the issues set out therein.[5] Hence, it impermissible for Wireforce to rock up in court with a new version of defence without, at least, seeking an amendment to its pleaded case. Wireforce must accordingly stand and fall by its pleaded version of defence. It is not for this Court to construe or infer from the asserted facts in the statement of opposition that they sustain another claim even though it is not pleaded.[6]

[15] It follows that Ms McIntyre's evidence, to the extent that she testified that the applicant employees had approached Wireforce and sought to terminate their contracts of employment on mutual basis, stands to be rejected.

Voluntary retrenchment or dismissal?

[16] Wireforce asserts that the applicant employees have accepted the voluntary retrenchment packages in full and final settlement of all claims against it. Therefore, they are bound by the retrenchment agreements. In this regard, I was referred to the Constitutional Court judgment in *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another*,[7] where it was stated:

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[4] *Gcaba v Minister of Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75; *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) at para 90.

[5] *See: MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another* 2010 (4) SA 122 (SCA) [also reported at [2010] 4 All SA 23 (SCA) – Ed]; *Filta-Matix* (*Pty*) *Limited v Freudenberg and Others* 1998 (1) SA 606 (SCA) [also reported at [1998] 1 All SA 239 (A) – Ed]; *NUMSA v Driveline Technologies (Pty) Ltd and Another* [2000] 1 BLLR 20 (LAC); *Shoredits Construction (Pty) Ltd v Pienaar NO and Others* [1995] 4 BLLR 32 (LAC) at 34C–F); *Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union and Others v CTP Ltd and Another* [2013] 4 BLLR 378 (LC); *Mosiane and Others v Murray and Roberts Cementation (Pty) Ltd* [2014] ZALCJHB 518 (12 December 2014) at paras 25 and 25; *Sethole and others v Dr Kenneth Kaunda District Municipality* [2018] 1 BLLR 74 (LC).

[6] *Gcaba supra* n 4.

[7] [2016] ZACC 33; (2016) 37 ILJ 2723 (CC); 2016 (12) BCLR 1515 (CC); [2017] 1 BLLR 1 (CC) at para 24.

> '[22] As against this, <u>we must consider the importance of giving effect to agreements, solemnly concluded, by parties operating from the necessary position of approximate equality of bargaining power.</u> Here, the power of the Labour Appeal Court's approach is obvious. What is at issue here is a powerful consideration of public policy – the need for parties to settle their disputes on terms agreeable to them. That need arises in their own interests, and the interests of the public.
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> [23] <u>Here, the applicant had engaged in outright material deceit and misrepresentation. He himself, confronted with the misrepresentation in his curriculum vitae, confessed he had no defence. It was then that he entered into a final agreement to put a present dispute to bed. He did so full knowingly, with his eyes open to his own future interests</u>. It may have been different if he had agreed to abjure recourse to the courts in future disputes. But here the dispute was hot and fresh, and present. He agreed to part ways with Reckitt on terms that were final, and that protected him from further action by his employer – including the possibility of a disciplinary process that could wound his career irremediably. <u>That finality included an agreement that the courts would not be involved. The parties would go their ways without more</u>.
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> [24] The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. <u>When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct.</u> Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.' (Emphasis added)

[17] *Gbenga-Oluwatoye*[8] is distinguishable as the Constitutional Court had regard, *inter alia*, to the parties' position of approximate equality of bargaining power and the fact that the agreement was for the benefit of the party seeking to escape the consequences of his own conduct. The

[8] *Supra.*

converse is true in the present case; retrenchment is a no fault termination and must be effected in accordance with section 189.

[18] In *Elliot International (Pty) Ltd v Veloo and Another,*[9] the Labour Appeal Court (LAC), confronted with similar circumstances, rejected the suggestion that when the respondent employees accepted payments in '*full and final settlement'* of their claims, they accepted settlement of the dispute in terms of the voluntary retrenchment agreement. It was stated:

> '[34] At any rate, it seems to me that, whereas in a business transaction scenario between business people or corporate entities certain patterns of conduct are expected, the same set of expectations cannot ordinarily be applied to circumstances where employees, who are generally ignorant of business conventions, make decisions. Therefore, if the indications from the facts suggest that banking the money was not intended to be a waiver, on the part of the party banking the money, then the inference cannot be drawn from the facts, against such party, that the transaction was a full and final settlement of the claim or dispute between the parties. Each case would have to be determined on the basis of its own specific facts. It is significant that even in *Andy's Electrical,* relied upon by Mr *Snyman*, the Court further stated as follows:
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> > "A payment's description as one 'in full settlement' is not necessarily decisive. The circumstances may show that, despite the description, the payment is intended to satisfy nothing more than an admitted debt. If that is its true rating, the words 'in full settlement' are of no further consequence and may safely be ignored." (346B-C)
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> [35] Therefore, in the present instance it would be important to examine whether any facts exist on the record which suggested that the respondents grasped and appreciated the significance and potential negative implication that by not returning or offering to return the payments they would thereby be deemed to have made an election to

[9] [2014] ZALAC 36; [2014] 10 BLLR 955 (LAC); (2015) 36 ILJ 422 (LAC) at paras 34 and 35.

subscribe to the retrenchment agreement as voluntary participants. In my view, such facts did not exist, for the reasons that appear in this judgment. Therefore, in my view, an inference in favour of the appellant cannot properly be drawn.' (emphasis added).

[19] Even in the present case, the payment of severance packages 'in full and final settlement' have no additional consequences as the applicant employees were evidently ignorant of the legal implications of keeping the said payments.

[20] In any event, the applicants disavow that the applicant employees voluntarily participated in the retrenchment discussions as the settlement agreements were signed under duress. Since Wireforce seeks to enforce the voluntary retrenchment agreements, it bears the onus to prove the parties' common intention to enter into the agreements.[10]

[21] Duress is not necessarily a consequence of 'physical threat, such as locking the employees into a room and physically forcing them to sing an agreement', as correctly opined by Steenkamp J in *Kanku and Others v Grindrod Fuelogic*[11] where he eloquently summarised the legal principles and relevant the authorities applicable in similar circumstances as represented in the present and stated:

> '[38] Did the employees in this case sign the agreements "voluntarily, i.e. without duress or coercion, unequivocal and with full knowledge of its terms and implications as a full and final settlement of all the issues"?
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> [39] On the facts and on the evidence before me, and on the probabilities, I am not persuaded that Grindrod has discharged that onus. All three drivers were called in out of the blue, with no prior warning and without the benefit of a notice that is required by law in s 189(3) of the LRA. They were presented with a *fait accompli*: This is Eskom's requirement; there is nothing we (Grindrod) can do about it; if you

[10] See: *Wireforce Springbok Trading (Pty) Ltd v Zondani* (2004) 25 *ILJ* 1681 (LAC) at para 46, referred with approval in *Kanku and Others v Grindrod Fuelogic* (C602/2014) [2017] ZALCCT at para 43.
[11] *Kanku supra* at paras 38 to 40.

refuse, we lose the contract (and put all the South African drivers at risk); you have no choice but to sign. Mateus was on his own, confronted by his two superiors in their boardroom. Neither he, nor the other two, were given the opportunity to obtain union or legal representation. On the probabilities, I do accept that Kanku was not given the opportunity to ascertain for himself what Eskom's position was, even though I find it improbable that the door was locked. And the consistent evidence of all three drivers that Church insisted on leaving for Johannesburg with the signed agreements is also more probable than not. Under those circumstances, I do not think it can be said that Grindrod has shown that the employees accepted the agreement voluntarily, unequivocally and with full knowledge of its terms and implications.

[40] The employees in this case had even less opportunity to consult anyone about the "retrenchment agreement" that was presented to them out of the blue than was the case of the employee at *Adelkloof Drankwinkel.* In that case, the employee was also called into a meeting and presented with a "voluntary retrenchment agreement". She telephoned her mother and then signed it. The Court commented:

> "I am unconvinced that there was any attempt to comply with the obligations placed upon an employer by section 189 of the Act. The applicant was told that her services had to be terminated on 15 December 2000. She heard about this for the first time on that day. Yet the document setting out her package is dated 11 December 2000, four days previously, and is titled "Kennisgewing van aflegging". She received no such notice, and she was taken to Mr Viljoen unprepared and unrepresented."
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> ...
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> "The respondent argued in a special plea that the termination of the applicant's services was consensual, as she had signed the agreement in question. Any shortcomings in the process, which was conceded by the respondent's advocate or counsel for the respondent, that preceded the agreement was cured by the voluntary retrenchment package agreement.

In my view, and for the reasons set out above, the respondent did not discharge its onus of proving that the dismissal was for a valid reason. The procedure was entirely unfair, high-handed and flawed. In *Bekker v Nationwide Airlines (Pty) Ltd* 1998 2 BLLR 139 (LC) Landman J held that where an agreement of this nature is reached as a form of settling a retrenchment, the agreement must be preceded by consultation. In this matter, the consultation process was so flawed that it amounted to no consultation at all. The applicant was taken to a building where she was confronted by a perfect stranger with the news that she had to be retrenched. Mr Viljoen had a standardised agreement ready at hand. Even if she declined the postponement of the meeting, Mr Viljoen says he offered, it was clear that she would eventually be retrenched whether, at this meeting or the next meeting. The circumstances in which her signature was procured were oppressive. She was in shock, needed advice, followed her mother's advice over the telephone in circumstances where no one had her interests at heart.
The main objective of that meeting was to procure the applicant's signature on the agreement, and to circumvent the requirements of section 189 of the Act. The decision to dismiss was taken four days ago.

From the respondent's point of view there was really nothing to discuss, and Mr Viljoen did nothing to discuss, other than the amounts set out in the retrenchment package. In the end he conceded, when asked about the minutes, the only notes he made were in relation to the amounts to be paid. All that was discussed was the package.

In my view, an agreement obtained in such unfair circumstances amounts to a nullity. I therefore find that the dismissal was both procedurally and substantively unfair. The applicant should be reinstated."

[22] Turning to the present case, like in the authorities referred to above, the applicant employees were individually called 'out of the blue' and without

notice to NUMSA to sign the settlement agreements. They were never allowed time to ponder on the terms of the settlement agreement nor given an opportunity to be represented. They were confronted with Ms McIntyre, a stranger, and Mr Mokoena, a junior manager, whose concern was figures and signatures, as instructed by Wireforce. Wireforce deliberately made sure that none of the applicant employees return to their workstations after signing the agreement in order not to alert other employees. They were all escorted by the security guards to collect their belongings and vacate Wireforce premises.

[23] What is more atrocious is that those employees who were on the 10:00 pm to 06:00 am shift were escorted out of Wireforce premises after midnight and had to wait for their transport outside. It is regrettable that the clandestine styled so-called consultation processes are still happening after two decades into our democracy.

[24] Clearly, like in *Nationwide Airlines,*[12] Wireforce had no intention to bargain or consult with the applicant employees but wanted to procure their signature on the settlement agreements and, consequently, circumvent the requirements of section 189. It is not surprising that NUMSA was never notified.

[25] In the circumstances, I am persuaded that the applicant employees were coerced into signing the settlement agreements. Accordingly, the settlement agreements are annulled.

[26] This matter must then be decided on the basis that the reason for the applicant employees' dismissal is indeed due to Wireforce's operational requirements. In this regard, the only inference that one can draw from the approach adopted by Wireforce in these proceedings is that there was no business rationale for the retrenchments. If Wireforce had one, it would not have abandoned its pleaded case. Also, the retrenchments were not preceded by a fair procedure as contemplated in section 189.

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[12] *Kanku supra* n 10.

[27] In all the circumstances, I an convinced that the dismissal of the applicant employees is substantively and procedurally unfair.

Relief

[28] The applicant employees seek compensation as opposed to reinstatement. In determining what is just and equitable compensation that can be awarded under s194(3) of the LRA, I have followed the guidelines set out in *Minister of Justice and Constitutional Development v Tshishonga,*[13] quoted with approval in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert,*[14] where the LAC stated:

> '[24] …In *Minister of Justice & Constitutional Development v Tshishonga* (Tshishonga), this Court in an award of *solatium* referred to the delictual claim made under the *actio iniuriarum* for guidance in what would constitute just and equitable compensation for non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one's dignity, the relevant factors in determining the quantum of compensation in these cases included but were not limited to:
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> '…the nature and seriousness of the *iniuria*, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the *iniuria* had taken place…''

[29] As such, I have considered the insincere manner in which the applicant employees were treated, the fact that there was no business rationale for the retrenchments and the fact that Wireforce deliberately sought to circumvent the provisions of section 189. To my mind, it is, therefore, just and equitable to award compensation equivalent to eight months' salary to the applicant employees, respectively.

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[13] [2009] 9 BLLR 862 (LAC); (2009) 30 ILJ 1799 (LAC).

[14] [2015] ZALAC 34; [2015] 11 BLLR 1081 (LAC); (2015) 36 ILJ 2989 (LAC) at paras 23 to 25.

[30] However, I must mention that there are three applicant employees (Enseto Maibombo, Aziel Tisetsi Tau and Ngceba Kalo) who did not attend the court proceedings. NUMSA is of the view that they are no longer interested in the matter. Therefore, they stand to be excluded from the relief.

Costs

[31] The only issue remaining is that of costs. It is trite that costs in this Court do not follow the result, especially if the parties are in a persisting relationship as typified in the present case. Nonetheless, given the approach Wireforce adopted which protracted the trial unnecessarily, I am convinced that the present case presents an exception to the rule.

[32] In the circumstances, I make the following order:

Order

1. The dismissal of the applicant employees is substantively and procedurally unfair.
2. Wireforce to pay the applicant employees, excluding Enseto Maibombo, Aziel Tisetsi Tau and Ngceba Kalo, compensation equivalent to eight months' salary, respectively.
3. Wireforce to pay the applicants' costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Advocate F Venter
Instructed by:	Norton Rose Fulbright South Africa Inc.
For the respondent:	Mr X Ngako of Ruth Edmond Attorneys