**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JS 388/18

In the matter between:

**EDWIN MALAPENG** **Applicant**

and

**SOUTH DEEP GOLD MINE JOINT VENTURE** **Respondent**

**Date heard: 16 November 2018**

**Delivered: 22 January 2019**

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**JUDGMENT**

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RABKIN-NAICKER, J

[1] This interlocutory application was set down by South Deep Gold Mine Joint Venture (referred to as in the main claim, the respondent). In its statement of response, the respondent notes a 'Special Plea' that the dispute between the parties has been settled by means of the signing of a settlement agreement on 7 February 2018.

[2] The applicant submits in his statement of claim that he was threatened with dismissal in order to force him to sign an agreement which violated his right to fair labour and the right not to be unfairly dismissed. Further that the respondent "used the threat of dismissal for alleged misconduct to circumvent

its obligation in terms of Section 189 of the Labour Relations Act[1] (LRA) and in the process achieve through the impugned settlement agreement, what it could not achieve through properly constituted disciplinary hearing or a fair process for termination of employment for operational requirements."

[3] The respondent brings the interlocutory application to establish the validity and enforceability of the settlement agreement. It argued the following:

3.1 Mr Matlapeng admits to signing the settlement agreement;

3.2 Mr Matlapeng admits to querying the terms of the settlement agreement but finally relenting and accepting the terms;

3.3 Mr Matlapeng has not prayed for the setting aside of the settlement agreement;

3.4 Mr Matlapeng does not claim the settlement agreement was invalid when entered into;

3.5 Mr Matlapeng has not claimed that he did not understand the contents of the settlement agreement;

3.6 All Mr Matlapeng seeks from the Court in respect of the settlement agreement is for the Court to declare the Settlement agreement a dismissal; and

3.7 South Deep has performed in terms of the Settlement agreement.

[4] The Pre-Trial Minute signed of record however does include the following issue which the Court is required to decide: "Whether the Applicant has made out a case of duress to set aside the settlement agreement." The factual issues in dispute as recorded in the minute include: "Whether or not the Applicant was threatened with dismissal for misconduct if he did not accept retrenchment and signed the settlement agreement under undue pressure/threat."

[5] The applicant has pleaded duress in respect of the settlement agreement. There are in addition factual issues in dispute and relevant to this plea contained in the Pre-trial Minute. These are quoted as follows:

[1] Act 66 of 1995 as amended.

> "1.14 Whether or not Mr Preece discussed the misconduct with the Applicant on 24 January 2018 and presented a settlement agreement to him on the same day.
>
> 1.15 Whether or not the Applicant initiated the discussion on voluntary severance and negotiated the terms of the settlement agreement.
>
> 1.16 Whether or not the settlement agreement was already prepared on the 23rd of January 2018 when the Applicant and the Respondent were discussing the alleged misconduct…..
>
> ...
>
> 1.21 Whether or not the Applicant was threatened with dismissal for misconduct if he did not accept retrenchment and signed the settlement agreement under undue pressure/threat."

[6] The respondent expects the Court to determine that the settlement agreement is binding despite the parties having agreed that disputed facts exist to be determined by the trial court, as referred to above. It does so on the basis of what it terms a "special plea''. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the declaration and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex-facie* the pleading, whereas a special plea is necessary to place facts before the court to show that there is a defect.[2]

[7] In its Argument contained in a Note handed up on the day the application was heard, the respondent deals extensively with the proposition that the settlement agreement was valid and binding and in addition submits that there is no legal definition of dismissal contained in the LRA that allows for the entry of parties into a termination agreement to be considered a dismissal. The argument ends in the following submission:

"Applicant's statement of case therefore does not disclose a legally valid basis for his claim and his claim falls to be dismissed."

[8] The application before me was thus ill-conceived. In as far as the allegation into whether duress was at play when the settlement agreement was entered into

[2] Van Winsen et al '*The Civil Practice of the Supreme Court of South Africa'*4th edition at page 471.

there is a dispute of facts *ex-facie* the pleadings and this must be determined at trial. Only an exception procedure brought by the applicant could have led to a determination as to whether there was any merit in the respondent's submission that no legal basis for the claim was disclosed in the statement of claim. Such an exception would have been properly brought before the statement of response was drafted.

[8] In the premises, I make the following order:

Order

1. The interlocutory application is dismissed with costs.

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H. Rabkin-Naicker

Judge of the Labour Court



Appearances:

For the Applicant: Edward Nathan Sonnenbergs Inc.

For the First Respondent: Kokong Attorneys Inc