THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case No: JR542/23

In the matter between:

SIZAKANCANE BUSINESS ENTERPRISE CC	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER MATOME SEHUNANE *NO*	Second Respondent
CHRISTOPHER JABULANE DUBE	Third Respondent

Heard: 18 March 2025

Delivered: 18 March 2025

Summary: Application to review and set aside settlement agreement Application dismissed.

JUDGMENT

DANIELS J

Introduction

[1] This is an application brought to review and set aside a settlement agreement concluded by the applicant and the third respondent, before the second respondent (hereafter the "commissioner").

Procedural issues

[2] On the date of the hearing, the third respondent failed to appear. His representative had served a notice of withdrawal (as attorney of record) on the applicant's attorneys a few days prior. The applicant requested that the matter proceed in the absence of the third respondent and suggested that the court could accept that the third respondent had knowledge of the set down but chose not to appear. I accepted these submissions.

[3] The applicant moved its application for condonation for the late filing of its replying affidavit. I accepted the submissions and granted condonation.

Material facts

[4] The facts of the matter are common cause:

4.1 The applicant dismissed the third respondent for alleged misconduct. Thereafter, the third respondent referred a dispute concerning the fairness of his dismissal to the first respondent for conciliation. The first respondent enrolled the dispute for con-arb before the commissioner.

4.2 At the con-arb, the applicant arrived prepared for arbitration and resolute not to settle. Despite this, the applicant and the third respondent entered into a settlement agreement which required the applicant to pay the third respondent an amount of R37 500, 00 in five separate instalments.

4.3 The applicant alleges that it was unduly pressured by the commissioner, into entering into the settlement agreement because:

4.3.1 The commissioner informed the applicant that, if the arbitration proceeded, the applicant could end up approximately R300 000, 00 for legal costs. This was, allegedly, an exaggeration of the possible legal costs.

4.3.2 The commissioner advised the applicant that the dispute could take several years to finalise,

4.3.3 The commissioner was in a position of authority and abused his authority,

4.3.4 The commissioner was biased against the applicant.

4.4 As a result, the applicant alleges that it entered into the settlement under undue pressure, and against the will of the applicant.

<u>Legal principles and analysis</u>

[5] In *GB Engineering (Pty) Ltd v Mbongo & others*[1] the Labour Appeal Court confirmed that this court has jurisdiction to set aside a settlement agreement, which is not a collective agreement, where the agreement was concluded under duress or where the agreement was induced by misrepresentation. However, importantly, at para 25 of its judgment, the LAC echoed the sentiments of the Constitutional Court which has stated that: "*when parties settle an existing dispute in full and final settlement the public and the courts have a powerful interest in enforcing such an agreement and that none should be lightly released from an undertaking seriously and willingly embraced*".

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1 (2024) 45 ILJ 267 (LAC)

[6] The exact nature of the duress, alleged by the applicant, is unclear. The applicant, and its owner, do not allege that they were subjected to any unlawful threat, physical force, or imminent harm, which caused them to be afraid. It is trite that effective mediation or conciliation requires the commissioner to address the potential consequences of failing.

[7] Even if there was unequal bargaining power, which I do not accept, this cannot assist the applicant on the facts of this matter. In *Medscheme Holdings (Pty) Ltd & another v Bhamjee*[2] the SCA noted, in relation to alleged economic duress, at para 18:

> '*In commercial bargaining the exercise of free will ... is always fettered to some degree by the expectation of gain or the fear of loss ... hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more ... would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress*.'

[8] It is *possible* that the commissioner may have overestimated the legal costs if the dispute were to proceed, but this is uncertain. We are in the realm of speculation. This court cannot render judgment for the applicant based on the *possibility* that the commissioner may have overestimated costs. The applicant does not explain why the commissioner misrepresented the period of time that the dispute could take to finalise. If the dispute proceeded to review stage, the dispute could take more than a year to finalise. In the circumstances, there was no substance to the allegation that the commissioner abused his authority. Nor is there any substance to the allegation that the commissioner was biased against the applicant. These are serious allegations and should not be made lightly.

[9] The applicant does not *expressly* allege that it was induced into the agreement by a false misrepresentation, but this remains a necessary

[2] 2005 (5) SA 339 (SCA)

consideration. The principles are clear:[3] (i) the misrepresentation must be material or significant, (ii) the misrepresentation must have induced the innocent party to enter into the agreement, and (iii) the innocent party must have acted with ordinary prudence and discretion. Here, the applicant clearly did not act with ordinary prudence or discretion. If the applicant was concerned about the representations made by the commissioner as to the costs or the duration of the litigation, it should have made appropriate enquiries from the commissioner. There is no indication that the applicant made any such enquiries.

[10] In addition, I have taken into consideration that the settlement agreement was entered into by the owner of the business, in the presence of the Human Resources Manager. I was informed that the HR Manager attended the con-arb proceedings in order to advise the business owner. This is clearly not the case of an innocent, impressionable, uneducated, or naïve, individual having been induced into a settlement.

[11] I am of the view that the applicant entered into the settlement cognizant of its rights. The applicant accepted the advice of the commissioner, entered into the settlement, but now regrets doing so. There was nothing outlandish about the advice of the commissioner and there is no clear misrepresentation.

[12] In the circumstances, I am unable to find that there was any duress, misrepresentation, or any other valid basis, to review and set aside the settlement agreement.

Costs

[13] Costs do not follow the result in employment disputes. However, here, the applicant approached the court on a matter without any merit whatsoever. Not only that, but it made allegations against the second respondent which were unwarranted and vexatious. Accordingly, law and fairness require that the applicant bears the costs of the third respondent, until his attorneys withdrawal.

[3] See *Goddard v Metcash Trading Africa (Pty) Ltd* (2010) 31 ILJ 104 (LC) at para 21

Conclusion

[14] In the circumstances, for the reasons set out above, I make the following order:

14.1 The application is dismissed,

14.2 The applicant is ordered to pay the costs.

Reynaud Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr S Zungu

Mosehla Attorneys