REPUBLIC OF SOUTH AFRICA

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LABOUR COURT

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 647/2012

In the matter between:

EUGIENE ULSTER	**Applicant**
and	
THE STANDARD BANK OF SOUTH AFRICA LTD	**First Respondent**
CCMA	**Second Respondent**

Heard: **29 January 2013**
Delivered: **15 February 2013**
Summary: Settlement agreement at CCMA – application to set aside.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Ms Eugiene Ulster, entered into a settlement agreement with the Respondent, Standard Bank, after conciliation and at arbitration at the Commission for Conciliation, Mediation and Arbitration (the CCMA, the

second respondent). She claims to have done so under duress and wants to have the agreement set aside.

Background facts

[2] The employee was employed by the Bank from December 1981 until 28 March 2011, when she was dismissed for incapacity in the form of poor performance. Her trade union (SASBO, the finance union) assisted her in referring an unfair dismissal dispute to the CCMA.

[3] A trade union official, Lynne Hoffman, represented the employee at conciliation. The dispute could not be resolved at that stage and it was referred to arbitration. SASBO appointed its in-house counsel, Adv Divan van Niekerk, to represent the employee at arbitration. He flew from Pretoria to Cape Town and met the employee the day before the arbitration, set down for 26 June 2012, in order to prepare.

[4] Before the arbitration commenced, the commissioner asked the parties' permission to attempt conciliation again in terms of s 138 (3) of the LRA.[1] They agreed. As often happens in conciliation, the commissioner had separate caucuses with the employee and her representative on the one hand, and the Bank's representatives on the other hand, as well as plenary sessions. The parties made proposals and counter-proposals. Eventually the employee, through her representative, asked for two months' remuneration and for the Bank to amend her employment record to reflect resignation instead of dismissal. The Bank offered one month's remuneration, together with the amendment as requested. The employee agreed and signed a settlement agreement in those terms. The parties also agreed that the settlement agreement be made an award as contemplated by s 142A(1) of the LRA.

[5] The employee now argues that she entered into the agreement under duress or undue influence. She submits that it should be set aside.

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[1] Labour Relations Act 66 of 1995.

Legal principles

[6] Insofar as the settlement agreement has been made an award in terms of s 142A(1) of the LRA, this Court has jurisdiction to review it in terms of s 145.[2] And in any event, this Court has a residual power to set aside settlement agreements in terms of s 158(1)(j) of the LRA on such grounds as are acceptable in common law.[3]

[7] The employee argues that she did not enter into the agreement freely and voluntarily, and therefore the award was "improperly obtained" as contemplated by s 145(2)(b) of the LRA. Her argument is that she was duped or coerced into signing the settlement agreement by her own legal representative.

[8] A party seeking to avoid the application and enforcement of a contract allegedly entered into involuntarily by reason of undue influence bears the onus to prove, on a preponderance of probabilities, that she did not enter into the agreement voluntarily.[4] And in *Goddard v Metcach Trading Africa (Pty) Ltd*[5] this Court accepted that a settlement agreement constitutes a contract for purposes of application of classic contractual law principles.

Evaluation / Analysis

[9] It is common cause that the employee signed the settlement agreement. She was assisted and advised by her trade union's in-house counsel. Can it be said that she was duped or coerced into doing so, or that she otherwise did not enter into the agreement freely and voluntarily?

[10] The employee's own evidence in her founding affidavit is that, after some horse trading as is customary:

> "There was some 'toing and froing' during which time the prospect of the first respondent 'converting' my dismissal to a 'mutually agreed termination' was raised. Adv van Niekerk then advised the first respondent's

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[2] *Department of Health v Jones & another* [2009] 3 BLLR 195 (LC).

[3] This was the approach followed by Landman J in *Eckhard v Filpro Industrial Filters (Pty) Ltd* (1999) 20 *ILJ* 2043 (LC) para [8].

[4] RH Christie et al *The Law of Contract in South Africa* (6 ed 2011) pp 281-4; 294-6: 321-4.

[5] [2010] 2 BLLR 186 (LC).

> representatives, in the presence of the arbitrator and myself, and without a mandate, that I would accept such a 'conversion' plus six weeks' remuneration. The first respondent immediately counter-proposed one month. Adv van Niekerk turned to me and I said 'OK'."[6]

[11] After this exchange, the commissioner enquired directly from the employee if she confirmed and agreed to her acceptance of the Bank's counter-proposal. She confirmed that she did. The commissioner then left the room to fetch a CCMA *pro forma* settlement agreement. He explained the terms to the parties. The employee confirmed that she understood it. Only then did the commissioner fill in the form and ask the parties to sign it. The employee signed it herself, having had the opportunity to read through it; her legal representative did not sign it on her behalf.

[12] The employee is not uneducated or uninformed. She was a branch manager for the Bank with some 30 years' experience. In her capacity as a Bank employee and branch manager, she must have dealt with contracts on a regular basis. The agreement that she signed was written in English, her first language. At no stage during the conciliation process, or even after agreement had been reached and before she signed the written agreement, did she raise any objection or ask for a further caucus with her legal representative. It is inconceivable that she was not fully aware of what she was agreeing to. One can only imagine what her reaction, as a bank manager, would have been if a bank customer wished to resile from, say, a loan agreement that she had entered into under similar circumstances.

[13] On the evidence before me, I cannot accept that the employee was coerced into entering into the agreement. It may well be that her legal representative was ill-prepared and that he was happy for her to settle cheaply; but she is not an ingénue. She is an experienced and informed woman, wise to the world of business and contracts. She had been through an earlier conciliation process. She knew what it entailed. She could have rejected the Bank's counter-proposal at any time and insisted on proceeding with the arbitration. She could have asked to consult her

[6] My underlining.

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legal representative again before saying "OK" and subsequently signing the agreement. And even if she were unhappy with her representative, she could have taken it up with her trade union and asked for a postponement; she did not do so.

[14] The employee's actions immediately after entering into the agreement also belie any suggestion of coercion or misrepresentation. The Bank paid the money due to her in terms of the settlement agreement into her bank account. She did not repay it or offer to do so; only after she had consulted her attorneys and launched this application, more than a month later, did she say that "should the settlement agreement be set aside I shall tender to return the one month's remuneration paid to me as a consequence of the settlement agreement."

[15] Five days after she had signed the agreement, on 1 July 2012, the employee did write to SASBO's Hoffmann. Even then, she did not claim to have been coerced into signing the agreement. She expressed her unhappiness with her legal representative, but the closest to came to questioning the agreement was to say:

> "After working for 30 years for Standard Bank and being a member of SASBO for just as long, I walked away with Standard Bank reversing the charge of dismissal to 'parting ways by mutual consent' and one month salary. How does one equate 30 years to one month salary?"

[16] The employee entered into the agreement with open eyes, fully aware of its consequences. She is bound by that agreement.

[17] Both parties asked for costs to follow the result. I agree, except that I do not consider it fair to saddle the employee with the travelling costs occasioned by the Bank briefing counsel from Johannesburg for a maater heard in Cape Town.

Order

[18] The application is dismissed with costs, excluding the costs occasioned by counsel travelling from Johannesburg to Cape Town.

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Steenkamp J

APPEARANCES

APPLICANT:	J Whyte of Cheadle Thompson & Haysom Inc, Cape Town.
FIRST RESPONDENT:	D Cithi Instructed by Mervyn Taback Inc, Johannesburg.

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