REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR840/12

In the matter between:

STEPHEN DOUGLAS HODGES **Applicant**

and

URBAN TASK FORCE INVESTMENTS CC **First Respondent**

VIVI MASINA, N.O **Second Respondent**

COMMISISON FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

Heard: 9 July 2013

Delivered: 7 November 2013

Summary: Review application- settlement agreement, whether jurisdiction of the CCMA ousted merely on the face of a settlement agreement

JUDGMENT

MOOKI, AJ

[1] The first respondent employed the applicant as a field manager. The applicant returned from leave on 6 September 2011 and attended an operational meeting on that day. Mr Jonathan Cohen, the managing director of the first respondent, and a number of colleagues of the applicant attended this meeting. Mr Cohen allocated tasks ordinarily done by the applicant to the applicant's colleagues during that meeting.

[2] The applicant and Mr Cohen met on 7 September 2011. Mr Cohen told the applicant that the applicant was being retrenched. Mr Cohen later sent an email on the same day to employees of the first respondent, advising them that the applicant no longer worked for the first respondent as of 7 September 2011.

[3] The applicant and Mr Cohen arranged to meet the following day, 8 September 2011. This was to discuss the applicant's package. The meeting culminated in a signed agreement setting out the terms of the retrenchment of the applicant. The agreement is indicated as a mutual agreement between the parties in full and final settlement and that the agreement could be made an order of the Labour Court.

[4] The applicant subsequently referred a dispute to the CCMA. He recorded the following additional information in his referral: "the unfair dismissal retrenchment involves a single employee (myself) I was the only employee retrenched by the company the retrenchment was substantively and procedurally unfair the employer failed to comply with the provisions of the LRA when retrenching me".

[5] The first respondent objected that the Commission lacked jurisdiction on account of the agreement between the applicant and the first respondent. The Commissioner determined that there was no dismissal

and as such the Commission lacked jurisdiction to entertain the referral. The applicant seeks to have the award reviewed and set aside.

[6] The applicant relies on various grounds in having the award reviewed and set aside. The essence of his complaint is that he signed the settlement agreement to ensure that he received what was due to him and that he did not intend to settle the dispute concerning his unfair dismissal. The applicant also contends that:

6.1 The determination by the Commissioner denied the applicant the opportunity to challenge the fairness of his dismissal.

6.2 The Commissioner erred in his determination that the settlement agreement precluded the Commissioner from determining the facts of the applicant's alleged unfair dismissal.

6.3 The Commissioner disregarded evidence; including that the applicant was coerced into signing the agreement and that the Commissioner failed to apply the correct legal principles.

[7] Mr Maritz appeared on behalf of the applicant. He submitted that the Commissioner, having determined that there was no dismissal, should not have made any further enquiries into the merits of the dispute between the applicant and the first respondent. I enquired from Mr Maritz how else the Commissioner could have been expected to make a determination on whether or not there was a dismissal without considering the merits. Mr Maritz did not press the point in his response.

[8] Mr Crouse, on behalf of the first respondent, sought to impress upon the court that the dispute was a straightforward one and that the court need not look much further than the fact that the applicant and the first respondent concluded an agreement as described above. That, according to Mr Crouse, justified the determination by the

Commissioner that the Commission lacked jurisdiction for the reasons stated by the Commissioner.

[9] The following evidence is important, more so in the light of the submission on behalf of the first respondent that there was a mutual parting of ways; together with the contention by the applicant that he signed the agreement in order to get what he was entitled to receive.

[10] Mr Cohen gave evidence during the arbitration that the applicant would have lost his job either because of misconduct or as a result of retrenchment. Neither outcome became necessary, according to the evidence by Mr Cohen, because the parties subsequently concluded the agreement.

[11] The applicant heard for the first time during the arbitration that he could have been disciplined for misconduct. He asked why, if there was a basis for such misconduct, no charges were ever brought against him; unlike some of his colleagues who faced charges. Mr Cohen did not deal with the substance of the retort by the applicant, other than to say that all of that became unnecessary because the parties reached an agreement.

[12] Mr Crouse submitted to the court that the train was hurtling towards the applicant and that it was a matter of the applicant being dismissed for misconduct or being retrenched. Neither prospect became necessary, according to Mr Crouse, because of the agreement.

[13] The applicant contended that he signed the agreement under duress. Mr Cohen denied this, stating that the agreement was reached following mutual discussion.

[14] The following evidence bears pointing out. The applicant signed the agreement and received certain payments consequent to the conclusion of that agreement. The applicant took the view that the retrenchment package provided only for what was legally due to him in the event of a retrenchment. The applicant contended that he did not,

on signing the agreement, waive his rights to challenge the fairness of his retrenchment.

[15] The Commissioner was satisfied that the agreement referred to deprived him of jurisdiction to consider the referral to the Commission. He was wrong to reach that conclusion. He had a duty to enquire into whether there was merit in the contention by the applicant that the applicant did not waive his rights to challenge what the applicant considered a retrenchment that did not accord with the law. A commissioner cannot merely wash his hands off a referral because the parties concluded a settlement agreement.

[16] The applicant requested arbitration having alleged an unfair retrenchment. A failure to consult, in a retrenchment, is an unfair labour practice.[1] Section 191 grants a commissioner jurisdiction to determine a dispute referred to the Commission as a dismissal or an unfair labour practice. The Commissioner was thus wrong in his finding that he lacked jurisdiction in the circumstances.

[17] The Commissioner should first have enquired whether the applicant, in signing the agreement with the first respondent, did so with the intention to waive whatever rights that the applicant might have had in law concerning the retrenchment. This is more so because the applicant contended throughout the arbitration that he signed the settlement agreement in order to receive what was due to him in a retrenchment.

[18] The Commissioner did not make a determination as to whether or not the applicant signed the agreement without any intention of challenging the lawfulness of how his retrenchment was effected. The mere signing of a settlement agreement was not determinative of the lawfulness of the retrenchment. That is so particularly because the applicant challenged the fairness of the retrenchment process. The

[1] *Lanzerac Manor (Pty) Ltd. v De Vries and Others* (689/93) [1995] ZASCA 117; [1995] 12 BLLR 1 (AD) (28 September 1995)

Commissioner was therefore duty-bound to enquire into the lawfulness of how the first respondent effected the retrenchment.

[19] The fact of the existence of a settlement agreement is not a bar to a commissioner probing the terms of such an agreement or the circumstances leading to the conclusion of such an agreement. Put differently, it is a misdirection for a commissioner to stop the enquiry on the fact of a settlement agreement being established. This is illustrated by the decision in *Goddard v Metcash Trading Africa (Pty) Ltd*,[2] where the court ordered reinstatement following evidence that the employee signed a settlement agreement upon a misrepresentation by the employer.

[20] The mere conclusion of a settlement agreement, in a retrenchment, is not a bar to an employee challenging the lawfulness of the retrenchment.[3]

[21] I conclude that the Commissioner failed to apply his mind by not enquiring both into the events leading to the retrenchment and whether or not the applicant had waived his rights pertaining to the obligations of an employer during a retrenchment. That is so particularly because there is no presumption that a party waived his rights. Waiver of rights cannot take place without full knowledge of the law and the facts.[4] The applicant, on the evidence before the Commissioner, was not shown to have waived his rights to contest the lawfulness of his retrenchment.

[22] It is well to be reminded of the caution expressed in *Roberts and Others v WC Water Comfort (Pty) Ltd*[5] that:

> '…this Court must be very cautious before it makes orders in terms of which employees' claims could be dismissed without

[2] (2010) 31 ILJ 104 (LC),para 23
[3] *May v Mannesman Demag* (2001) 22 ILJ 2019 (LC)
[4] *Ex parte Parfitt and Another* 1954 (3) SA 894 (O) at 896H–897F
[5] (1999) 4 LLD 117 (LC) at 118.

hearing oral evidence when they dispute the fairness of their dismissal, even though they have signed documents to the effect that they accept their severance packages in full and final settlement of all claims arising out of the dispute.'

[23] The above statement by Revelas J has found favour in subsequent decisions of this court.[6]

[24] The Commissioner erred in his view that 'it is trite law that where parties entered into a settlement agreement the jurisdiction of the Commission or the Labour Court is ousted'. This finding is not supported by the very authorities mentioned in the award. The finding is also contrary to the decision in *Maseko v Douglas Green Bellingham*[7] , where the court held that the true intention of the parties must be ascertained through evidence in a dispute concerning alleged unfair dismissal settled by agreement. It would be a remarkable result that the jurisdiction of the Commission or that of the Labour Court is ousted only because parties have concluded a settlement agreement, without the Commission or the Labour Court having power to enquire into such an agreement; including the circumstances leading to the conclusion of the agreement.

[25] The Commissioner therefore misdirected himself on the law. His finding that the Commission lacked jurisdiction only because the parties entered into a settlement agreement renders the award reviewable.

[26] It is appropriate, in the circumstances, for this court to determine whether there is merit in the referral by the applicant to the Commission. It will serve no purpose to remit the matter to the Commission. Remitting the dispute will result in an unnecessary delay in determining the dispute between the parties. This court in particular

[6] *Bekker v Nationwide Airlines (Pty) Ltd* [1998] 2 BLLR 139 (LC); *Brown v Afgri Producer Service* (*Division of Afgri Operation Limited)* (JS 436/06) [2008] ZALC 138 (31 October 2008)
[7] (1999) 4 LLD 9 (LAC)

is enjoined to bring finality to labour disputes by the expeditious resolution of such disputes within the law. This is one such matter where the court should determine the dispute.

[27] The issue raised by the applicant in the referral to the Commission makes it unnecessary for the court to enquire into the lawfulness of the agreement reached by the parties. It is thus unnecessary for the court to determine whether or not the applicant was coerced into signing the agreement.

[28] The applicant referred the dispute to the Commission, complaining that his retrenchment was substantively and procedurally unfair. He alleged that the first respondent failed to comply with the provisions of the Labour Relations Act at the time of his retrenchment.

[29] The following facts are important in considering the complaint by the applicant. These facts arise from the evidence before the Commissioner. The applicant went on leave immediately before the events leading to his retrenchment. He had been employed since 2 July 2009. No complaint had been made about his performance or his conduct as an employee. He had never been accused of being disruptive in the workplace.

[30] The applicant was on leave from 8 August 2011 until 7 September 2011. He however, returned to work a day earlier, on 6 September 2011. He attended an operations meeting. He arranged to meet with Mr Cohen the following day to discuss operational issues. They met on 7 September. Mr Cohen told him during that meeting that the applicant was to be retrenched. Mr Cohen sent an email later on the same day informing other employees that the applicant no longer worked for the first respondent.

[31] The applicant was advised, also on 7 September, that he was to have a meeting the following day to discuss his package. He was told, in the morning of 8 September, to return various items belonging to the first respondent, including the office keys, the mobile phone, and the credit

card. He then met with Mr Cohen and Mr Johan Bantjies, a labour broker.

[32] The applicant and Mr Cohen, on behalf of the first respondent, eventually concluded a settlement agreement on 8 September.

[33] There is a dispute whether the applicant was coerced into signing the agreement. As already indicated, it is not necessary to determine this aspect for purposes of this judgement. Accepting that the applicant was retrenched, the issue is whether such retrenchment was procedurally and substantively fair.

[34] The applicant found out for the first time, on 7 September 2011, that he was to be retrenched. Nothing had been suggested to him that there was a possibility of him being retrenched prior to that date. Mr Cohen did not contend that the applicant received any notice that the applicant was about to be retrenched. In his evidence during the arbitration, Mr Cohen expressed various reservations about the applicant. Such reservations had not been expressed to the applicant before the arbitration.

[35] Mr Cohen gave evidence during the arbitration that there were certain issues about the division in which the applicant worked. The applicant's department came to the unanimous conclusion that the applicant was not adding value to that department. The applicant asked why he was the only employee who was retrenched. Mr Cohen gave evidence that the applicant was the only employee who was not adding value and that the applicant was causing major disruptions in the office. The applicant's position has not been replaced.

[36] Mr Cohen gave evidence that he consulted with the applicant, leading to the signing of the agreement. The applicant disputes this, and indicated that the discussions were all of some 40 minutes. It is apparent, however, that the discussions between the applicant and Mr Cohen were not a consultation as contemplated in the Act. The parties, on the evidence before the Commissioner, discussed the severance

terms. Mr Cohen did not give evidence on any of the issues that must form the subject matter of a consultation when a retrenchment is contemplated. Those issues are set out in section 189 of the Act.

[37] I find that the applicant was presented with *a fait accompli*, as was the case in *May v Mannesman Demag*[8] .

[38] The applicant was advised on 7 September 2011 that he was to be retrenched. A meeting was arranged for the following day to discuss the package that the applicant would receive for the retrenchment. The meeting took place, and culminated in the signed agreement. At no point, on the evidence before the Commissioner, did the first respondent deal with the issues that should form the subject matter of consultation when a retrenchment is contemplated. Whatever consultation took place was woefully deficient as to be non-existent: the applicant was confronted with *a fait accompli*.[9]

[39] It was suggested on behalf of the first respondent, when the matter came before court, that the formalities to a retrenchment became unnecessary because the parties had reached a mutual agreement. I do not accept the submission. It is clear that the applicant had resigned himself to the fact that he was to be retrenched. The specific work that he did was already taken away from him, as shown by what transpired during the meeting on 7 September.

[40] The discussions between the applicant and Mr Cohen concerned what the applicant would get in a retrenchment. This much is made clear by the terms of referral to the Commission and evidence by the applicant that he signed the settlement agreement for what was due to him as a consequence of the retrenchment. The applicant did not waive his rights to compel the first respondent to comply with the statutory

[8] (2001) 22 ILJ 2019 (LC
[9] *Visser v Atronic International Bmgh* (JS694/07) [2009] ZALC 76 (11 August 2009), at para 11.

requirements in a retrenchment. Those requirements give important protections to employees.[10]

[41] The first respondent did not comply with the requirements for a lawful retrenchment. The applicant was not given a notice in terms of section 189(3). There were no consultations as required by section 189(2). There was no attempt at a meaningful joint consensus-seeking process as required. The "consultation" referred to by Mr Cohen pertained to discussions about the terms of the applicant's retrenchment package. I find that the applicant's retrenchment was procedurally unfair.

[42] It is the prerogative of the employer to grant employment or to terminate such employment. Such termination must however be lawful. The employer has a duty to point out the basis upon which an employee is to be retrenched. It is expected that there would be a measure of some substance on the part of the employer in retrenching an employee, in the form of at least some valid economic rationale.

[43] The first respondent did not proffer a sound economic rationale in retrenching the applicant. Mr Cohen contended, during the arbitration, that the applicant did not "add value". The court does not make commercial decisions for an employer. The employer is required, however, to put forth a coherent basis when retrenching an employee on account of operational requirements. I find that the first respondent had determined to be rid of the applicant. The considerations mentioned by Mr Cohen during the arbitration were, on the totality of the evidence, an after-the-fact attempt to justify the retrenchment.

[44] The retrenchment of the applicant was substantively unfair. The contention that the applicant was not adding value to the business of the first respondent was an *ex post facto* justification.[11]

[10] *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 I*LJ* 89 (LAC), at para 25-2828.
[11] *Super Group Supply Chain Partners v Dlamini and Another* (2013) 34 *ILJ* 108 (LAC), *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 *ILJ* 129 (LAC).

[45] The applicant was first told of the reasons why he was being retrenched during the arbitration. In this regard, the applicant had not, prior to the arbitration, been told that he was disruptive or that he was not adding value to the first respondent. The first respondent was duty bound to have made the applicant aware of the concerns about the applicant at the time when the first respondent contemplated the retrenchment. It goes without saying that the allegation about the applicant being disruptive is an issue that deals with misconduct, and cannot be a proper basis for retrenching the applicant. The applicant should have been put through a disciplinary hearing if he was to lose his job on account of being disruptive.

[46] The first respondent had, for reasons best known to it, formed the view when the applicant was on leave that the applicant had to go. There was no evidence during the arbitration that suggests that the applicant could have been subjected to a genuine disciplinary hearing on account of misconduct. As Mr Crouse submitted to the court, there was a train hurtling towards the applicant. The collision would have been a retrenchment or the applicant being put through a disciplinary process for some misconduct. The collision was, according to the submission, averted by the signing of the settlement agreement.

[47] The applicant was correct to complain about both the procedural and substantive aspects to his retrenchment. His retrenchment was *a fait accompli.* The manner in which the retrenchment was done was an egregious breach of the law.

[48] Having found that the retrenchment was substantively unfair, it would not be just or equitable to make an order that the applicant be reinstated. It is clear that the relationship between the applicant and the first respondent is beyond repair. In the circumstances, I make the following order:

1. The retrenchment of the applicant was both procedurally and substantively unfair.

2. The first respondent is ordered to pay compensation to the applicant equivalent to 12 months of the applicant's salary as at the date of dismissal of the applicant.

3. The compensation referred to shall be reduced by any amount already paid by the first respondent to the applicant.

4. The first respondent is ordered to pay costs.

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Mooki O

Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: Mr T Serrero, Instructed by Biccari Bollo Mariano Inc

RESPONDENT: Mr J Crouse, Instructed by Charles Cohen