REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 675/2014

In the matter between:

Elze SCHOLTZ	**Applicant**
and	
CCMA	**First Respondent**
COMMISSIONER JP HANEKOM N.O.	**Second Respondent**
UTILITAS BELLVILLE NPC	**Third Respondent**
UTILITAS ONTWIKKELINGSTRUST	**Fourth Respondent**

Heard: **18 June 2015**

Delivered: **25 June 2015**

Summary: Review of settlement agreement at CCMA. LRA s 158(1)(g). Review of appointment of commissioner – LRA s 137. Jurisdiction to settle dispute outside of dispute referred to CCMA. Undue influence.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Ms Elze Scholtz, was dismissed by the third respondent, Utilitas Bellville, a non-profit company that operates two old age homes. She referred an unfair dismissal dispute to the CCMA. The parties settled the dismissal dispute as well as a pending dispute before the High Court between the employee and the fourth respondent, Utilitas Ontwikkelingstrust. The employee now wants to have the settlement agreement reviewed and set aside, mainly on the ground of undue influence.

Background facts

[2] The arbitration commenced on 25 June 2014, exactly a year ago. Both parties were legally represented at the arbitration; the employee by Riaan de Lange, her erstwhile attorney; and Utilitas by its current counsel, Adv Stelzner, and Michiel Heyns of Werksmans attorneys. The parties had asked for a senior commissioner who is Afrikaans speaking and their request was granted. However, the senior commissioner that was allocated to deal with the dispute, Ms Marieke van der Walt, is the applicant's previous attorney. No other Afrikaans speaking senior commissioner was available. The second respondent, Commissioner J P Hanekom, was then appointed as arbitrator. He is not designated as a senior commissioner although he has about ten years' experience. Neither party objected to his hearing the arbitration at that stage, although it is now one of the grounds of review.

[3] After both legal representatives had made opening statements and while Mr De Lange was looking for some documents, the Commissioner made some remarks relating to settlement. These remarks were made off the record while the recording equipment was switched off.

[4] The parties couldn't settle and the employer called its first witness, Ms Magdalena Fölscher. At the end of her evidence in chief the commissioner

asked the employee's attorney if he was ready to cross-examine. Mr de Lange said:

> "Kommissaris, ek sal verkies om nie te begin nie en eers more-oggend stiptelik nege-uur te begin. Dan wil ek behoorlik instruksies neem oor van die goed, hopelik tyd spaar en ek wil op rekord sit, *ons moet nog steeds probeer vanaand om te kyk of ons die ding kan skik*, maar ek twyfel of dit sommer gaan realiseer, maar who knows. Maar ek sal verkies om nie nou met kruisondervraging te begin nie."[1]

[5] That evening, De Lange consulted with Ms Scholtz and her father. He telephoned the employer's attorney, Michiel Heyns of Werksmans, and told him that they were in the process of preparing a draft settlement agreement. De Lange sent Heyns a text message at 20:53 saying that he had sent Scholtz a draft settlement agreement for her consideration and further instructions. At 21:49 de Lange sent Heyns a second text message to tell him that Scholtz would revert shortly. At 22:52 de Lange sent Heyns an email with the proposed settlement agreement. The pertinent terms of the draft agreement were that:

5.1 Scholtz withdraws the CCMA dispute;

5.2 the fourth respondent (the trust) withdraws the High Court action;

5.3 the trust writes off the motor loan;

5.4 Scholtz acknowledges that her independent contractor agreement with De Rust[2] was terminated lawfully;

5.5 Scholtz would return the Mercedes-Benz used by her; and

5.6 the parties will have no further claims against each other.

[6] The parties' legal representatives had further discussions the next morning at the CCMA, but without the involvement of the Commissioner. The employee's legal representative, De Lange, advised the legal representatives for Utilitas that she wanted to add further terms to the draft agreement, including payments of independent contractor fees of

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[1] My emphasis.

[2] Scholtz was employed by Huis André van der Walt as a bookkeeper, but also acted as a bookkeeper in an independent contractor agreement to De Rust.

R51 005, 27 and medical aid contributions of R 9 381, 00. The parties agreed.

[7] The employee's case that the commissioner acted improperly and that she entered into the settlement agreement because of undue influence rests mainly on the commissioner's comments that he made off the record whilst facilitating settlement discussions between the parties. Although those discussions were expressly and literally off the record – the recording equipment was switched off – the employee tape recorded it and had it transcribed. Both parties agreed that, despite the provisions of rule 16 of the CCMA rules[3], the commissioner's comments are central to this application and could and should be disclosed. The pertinent discussions are these:

> [After opening statements]:
>
> "KOMMISARIS: Terwyl julle nou dit soek, op die einde van die dag sit en wonder ek nou maar, dis nou nie 'n siviele saak dié nie. So maak die saak nie klaar in twee dae nie, jy weet, dan sit julle al twee met regskostes. En jy weet, op die einde van die dag, die dame het 'n halfdag gewerk. Sy wil graag haar werk terug hê. Ons moet hoor by die werkgewer of so iets haalbaar is in die lig van die applikant se verweer. Indien hulle sê hulle is nie lus vir haar nie, dan is dit mos (onduidelik) dat haar werk nie beskikbaar is nie. Is die pos gevul of hy is nog vakant?
>
> MNR STELZNER: Die werk word aan ander geallokeer, deur ander mense gedeel. Ander mense doen die werk.
>
> MNR DE LANGE: Ek dink daar is vroeg in 2013 is daar 'n – 'n ander boekhouer of rekenmeester…(tussenbeide)
>
> MNR STELZNER: (onduidelik) ouditeure (onduidelik).
>
> MNR DE LANGE: Ja. So sy sou nou baie van die funksies ook oorneem.
>
> …

[3] This rule reads: "1. Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.

2. No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation."

KOMMISSARIS: Want jy weet, ek sien nou – wees nou realisties. Ek meen enige goeie mediator sal vir julle sê, luister, kyk, at the best case scenario or take the worst case scenario. Look at the best alternative to a solution. Nou die realiteit is, dit is nie seker of die pos nog beskikbaar is nie. Daar is nou 'n rekenmeesterspos geskep. As dit nou – as die saak nie in twee dae klaarmaak nie en ons moet die omie se getuienis aanhoor en die regsverteenwoordigers wat nou lang asems gaan hê met kruisondervraging, dan hoe ver gaan ons nou kom? En dan moet ek nog hoor of sy nog die werknemer is en nie 'n kontrakteur is by die ander trust nie. Dit gaan die ding net nog langer uitrek. En op die einde van die dag, as jy al die geld nou in ag neem, moet 'n mens nie dalk tot 'n vergelyk kom nie?

…

KOMMISSARIS: En dan sê ek, verloor sy die saak, dan is sy nog slegter af.

MNR DE LANGE: Maar soos ek sê, Kommissaris, ek doen nie daai siviele saak nie, dis 'n ander prokureur wat dit doen. Hy het haar geadviseer oor die meriete in daai saak.

KOMMISSARIS: Dis al wat ek net vir jou wil sê. Dan gaan dit te laat raak om te skik. Okay. So ek is nou klaar met die openingstoesprake. Ek weet nie of julle repliek wou gehad het nie. Kom ons gaan weer oor die rekord."

…

[At the end of Folscher's evidence]:

"KOMMISSARIS: Kyk, ek sê nog steeds wat ek netnou gesê het en ek wil my nou nie self oor en oor herhaal nie. Mnr De Lange en die applikant, die bal is in julle hande. In die lig van wat hier nou getuig is, né, en moet my nou nie verkeerd verstaan nie. Ek loop nie die saak vooruit nie. My ondervinding sê net vir my een ding, in die lig van wat u hier nou getuig is oor die klousules in die trust-akte en ek verwys nou veral hierso na die klousules – en ek gaan nou vir u sê… ja, op bladsy 74 van die Bundel B, ten behoewe van, tot voordeel van trustbegunstigdes en die goete en so en so. Dan sê ek weer, dis vir my eintlik die kruks waaroor die saak gaan. So op die einde van die dag moet ek bepaal, die dinge wat nou aan die gebeur was en die pa wat nou vir haar voorgesê het wat om te doen. Is sy nou soos die redelike man 'n professionele persoon, 'n boekhouer wat nou soos

die redelike man nou moes geweet het, maar die goete wat hier gebeur, is nie reëlmatig nie? Was sy dan nalatig of was dit nou werklik 'n geval wat sy nou nie geweet het hier is dinge verkeerd dan nie, as jy die bepalings nou op bladsy 74 in ag neem nie? Of moes sy geweet het en dan sê ek, dis 50-50. En ek moet ook in ag neem, want ek het vergeet om dit te sê netnou, sy het 'n maand kennis gekry. So nou trek ek die maand af, dan gee ek vir haar vyf maande as sy die saak loshande wen, of wat ook al, maar my gut feel sê vir my, as sy die saak wen loshande, dan gaan sy iets in die omgewing van ses maande kry. Hoekom moet ek haar 12 maande gee? Wat maak haar geval uniek dat ek haar 12 maande kan gee? Tensy julle my kan oortuig? En ek meen ek sê dit nou maar van die rekord af, né.

MNR DE LANGE: H'm..

MNR STELZNER: H'm..

KOMMISSARIS: Moet my nie quote nie, maar dit is wat die risiko's is en dit is wat kan gebeur. So ek gaan – ek deel maar net my ondervinding met julle. So ek sal ernstig sê julle moet dink aan skikking, want julle gaan mekaar se tyd mors en op die einde van die dag gaan julle spyt wees. Miskien is hulle in 'n beter posisie om regkostes te kan bekostig en op die einde van die dag betaal die trust nou maar die regskostes wat nie 'n probleem is nie, maar kyk na julle situasie, wat julle koste aanbetref. Is die kool die sous werd om (onduidelik) of aan te gaan met die saak? As jy sterk voel in die saak, ek kan julle nie dwing om te skik nie, maar ek sê dit is die kruks van die saak. Ons kan nou baie tyd mors oor die ander goed, maar dit is vir my die kruks van die saak. En as ek op die einde van die dag verkeerd is, dan weet julle mos nou, julle vat my op hersiening. Goed. Geniet julle aand, menere, dames, sien dan môre weer."

…

[On resumption the next day after the parties had submitted their typed settlement agreement]:

"KOMMISSARIS: Okay, goed, ek gaan nou maar net – dit is nou julle skikkingsooreenkoms. Ek gaan dan nou net sê, die is nou maar net die dekblad, né, mos nou die Aanhangsel A.

MNR STELZNER: Gaan ons 'n afskrif kry?

KOMMISSARIS: Ja, nee, definitely, julle sal kry, julle gaan kry. Ek lees dan gou hierso:

"This is the settlement agreement…"

Vertaal maar as julle nie Afrikaans – of Engels verstaan nie.

"This is a settlement agreement in the CCMA in the dispute between Elze Scholtz, the applicant and Utilitas Bellville NPC, the respondent.

The undersigned parties record a settlement of their dispute in the following terms:

Dis nou julle wat teken hierso:

"By signing the agreement, the parties acknowledge that the agreement was read to them and interpreted where necessary and that they understand the contents thereof".

So as julle teken, weet julle wat julle teken en julle verstaan wat julle teken. Kan nie more terugkom en sê julle was gedwing om te teken en julle het nie verstaan nie. (onduidelik) andias[4] [*sic*] gaan nou nie werk nie.

MNR STELZNER: Andias. [*sic*]

KOMMISSARIS: "This agreement is a full and final settlement of the dispute referred to the CCMA, as well as a full and final settlement of all statutory payments due to the applicant, unless specifically excluded in paragraph 4 of this agreement."

Nou dit is nie van toepassing nie, dit is doodgetrek. As julle nou skik, dan is dit eens en finaal. U kan nie nou weer môre gaan eis vir uitstaande salaris en uitstaande verlofgeld en sulke goed nie. U verstaan dit so? Die betalings is so, dit is alles vervat in die ooreenkoms, né.

MNR STELZNER: Ja.

KOMMISSARIS: Hoe julle dit gaan betaal, in haar bankrekening in?

MNR STELZNER: Sewe dae, binne sewe dae.

KOMMISSARIS: Ja, okay.

MNR STELZNER: (onduidelik).

KOMMISSARIS: Ek gaan dan net sê hierso, "monetary settlement as per Annexure A", né? Okay, en dan "method of payment", dis ook "As per annexure A'.

[4] Seemingly a mistaken transcription of "andazi", the isiXhosa expression for "I don't know" or, in this case, "I didn't know".

MNR STELZNER: Reg.

KOMMISSARIS: Okay, as per Annexure A attached. Dan: "Withdrawal of the dispute.

The applicant voluntary withdraws her referral and the balance of dispute against the respondent in settlement of her case at the CCMA, with the full knowledge that she will not be able to proceed with this dispute at a later stage."

So u sal nie môre weer u saak kan oopmaak nie. As u nou teken is dit oor en verby."

[8] The applicant received the money and both parties acted in terms of the settlement agreement. However, one day short of six weeks later, she brought this application to have the agreement reviewed and set aside.

Evaluation / Analysis

[9] It is against this background that the settlement agreement and the review application must be considered. But first, the applicant seeks condonation for the late filing of her review application (insofar as it is necessary) and her replying affidavit.

Condonation: review application and replying affidavit

[10] Although the applicant initially framed her review application in terms of s 145 of the LRA[5] (when she was represented by a different legal team), Mr *Ackermann* made it clear in his argument that she now confines the application to one in terms of s 158(1)(g). That subsection does not prescribe a time frame within which to bring a review application, but it must be done within a reasonable time.[6]

[11] In *Weder v MEC for the Department of Health, Western Cape*[7] this Court took the view that a review application in terms of s 158 that is delivered outside a period of six weeks should at least trigger a condonation

[5] Labour Relations Act 66 of 1995.

[6] *Fidelity Guards Holdings (Pty) Ltd v Epstein N.O.* [2000] 12 BLLR 1389 (LAC) para 15; *JDG Trading (Pty) Ltd v Laka N.O.* [2001] 3 BLLR 294 (LAC) paras 17-20.

[7] [2013] 1 BLLR 94 (LC).

application. On appeal[8] the LAC did not refer to a specific time period, but noted with reference to *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA) at paras 22 – 23 that Nugent JA explained the purpose and function of the delay rule both under s 7 (1) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), which is inapplicable to a review brought under s 158 of the LRA , and its common law predecessor as follows:

> 'It is important for the efficient functioning of public bodies… that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule … is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view, more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.'

[12] In this case, the delay in bringing the application was not excessive. Had it been a s 145 review, it would have been in time, albeit by one day.

[13] The reasons for the delay, taken together with its length, are persuasive. After delivering the initial review application within six weeks, Mr De Lange withdrew as the applicant's attorney. The CCMA filed the record on 4 October 2014, two months after the applicant had delivered her review application. The record was not complete as the settlement discussions were pertinent to the application. Those discussions were recorded and transcribed by the applicant. She sought new legal representatives. In November 2014 she obtained the services of Ms Fiona Bester of Chennels Albertyn. Ms Bester went through some 9 lever arch files pertaining to the matter and then instructed counsel. Initially she briefed Adv Leslie but he informed her two days later that he was not available. She then briefed Adv Suzanna Harvey, who consulted with the applicant two days later (after she had been in Johannesburg) and delivered the supplementary founding affidavit two days after that. There is no prejudice to the respondents.

[8] *MEC, Department of Health v Weder; MEC, Department of Health v DENOSA obo Mangena* [2014] 7 BLLR 687 (LAC), (2014) 35 *ILJ* 2131 (LAC).

[14] The third and fourth respondents delivered their answering affidavit some one and a half months late. The applicant did not object. In December 2014 the applicant's previous attorney told her that she had to deliver her replying affidavit by 15 January 2015. That was wrong, but in any event, she told the applicant that the respondents' attorneys had agreed that she could deliver the replying affidavit by 28 January 2015.

[15] That also turned out to be incorrect. The applicant made contact with her previous attorney, Ms Bester, on 6 January. She followed up four times between 6 and 20 January. Still the attorney had not drafted the replying affidavit. Then Ms Bester advised the applicant to obtain an opinion from junior counsel. That was provided on 24 January. A dispute arose between the applicant and Ms Bester. She terminated Bester's mandate on 26 January and instructed her current attorney, Mr Geyser of Cluver Markotter, the next day, 27 January. They consulted on 30 January. Bester exercised a lien over her files. Eventually the replying affidavit was drafted without all the files. It was delivered on 17 February 2015.

[16] The delay is not excessive and the explanation is acceptable. I will deal with the merits on the basis that condonation is granted for the late filing of the founding, supplementary and replying affidavits, although the prospects of success can only be considered by dealing with the merits.

First review ground: conduct of commissioner

[17] The applicant argues that the commissioner conducted himself in a manner that left her no alternative but to settle.

[18] This submission rests on the commissioner's remarks as set out above. The applicant argues that the commissioner expressed his views on the merits of the case, having heard only the evidence on chief of the employer's first witness, and induced her to settle. He entered into the merits of the matter and made it clear to her that it was not worth her while to continue.

[19] It is so that, when a commissioner enters into the merits of a dispute before the end of the arbitration, thus inducing a party to settle, it may be a

reviewable irregularity. Thus, in *Kasipersad v CCMA*[9] the court noted that the commissioner had told the employee that he had a 50/50 chance of success (as did the commissioner in this case); that it would take between two to three months before the matter would be heard in the Labour Court; and that he might have to pay for legal representation and, if he lost, the employer's costs. Pillay J further noted:

> "Except for her assessment of the prospects of success being a 50/50 chance, the other three outcomes sketched by the commissioner present a negative scenario for the applicant. She did not advise the applicant of the possible outcome if he succeeded.
>
> …
>
> By sketching only the four possible outcomes, the commissioner manifested bias against the applicant. As the commissioner elected to use the technique of scenario sketching, she ought to have presented fully and dispassionately all the consequences of proceeding with and withdrawing the dispute. If she did not intend to advise the applicant to withdraw the application, then her conduct had precisely that effect. It was not unreasonable for the applicant, a layperson, to infer from what she said that he was being advised to withdraw the dispute.
>
> …
>
> Giving advice is … counterproductive to the objectives of conciliation. A party who is advised that she has a good case is unlikely to settle. One who is advised that he has a bad case is likely to capitulate, as happened in this case."

[20] Mr *Ackermann* also referred to *Anglo Platinum Ltd v CCMA*[10] where the court found that, when the commissioner gave direct legal advice when facilitating conciliation, he had induced the company to settle:

> "The applicant contends that the decision to settle the matter on its part was influenced quite significantly by the advice its representative received from the commissioner. Whatever the reason for giving the advice, there seems to be no doubt that the commissioner acted outside his mandate and in so doing induced the applicant to enter into the settlement

[9] (2003) 24 *ILJ* 178 (LC) paras 15-29.

[10] (2009) 30 *ILJ* 2396 (LC) para 36.

> agreement. It is on this ground alone that I believe that the settlement agreement stands to be set aside…"

[21] I agree with these sentiments. But each case has to be assessed on its own merits. It is clear from the excerpts quoted above that the court in *Kasipersad* did not consider the remark of a "50/50 chance" to be improper; the learned judge says that, "except for her assessment of the prospects of a 50/50 chance", the other three scenarios presented a negative scenario for the applicant in that case. The same goes for the applicant in this case. And the commissioner did not tell Ms Scholtz that she would not succeed; what he did do, was to sketch two possible scenarios: either she withstood cross-examination, of which she had a 50/50 chance, thus showing that she was not negligent; or she didn't, in which case her dismissal would be fair. But even if she won the case "hands down", it would be unlikely that she would get more than six months' compensation.

[22] I do think that the commissioner overstepped the mark in expressing a *prima facie* view that, if the employee were successful, she was unlikely to receive more than six months' compensation. But his remarks must be seen in context. They were made off the record in circumstances akin to conciliation. And the commissioner was sketching different scenarios. He was not giving legal advice. He did point out the costs of litigation; but that is no more than a "reality check" without expressing a view on her prospects of success. It must also be borne in mind that, contrary to the position in *Kasipersad*, the applicant was represented throughout by an attorney; and it was her attorney who mooted the possibility of settlement. And in *Anglo Platinum* the commissioner gave legal advice based on a decision of the Labour Court that had been overturned by the Labour Appeal Court. I do not think that the commissioner's remarks in this case constitute legal advice as opposed to a form of reality checking.

[23] The commissioner reverted to conciliation at the end of the first witness's evidence in chief in circumstances where the applicant's attorney indicated that he did not wish to commence cross-examination as he still wanted to explore settlement overnight. It is only after he had made that remark that

the commissioner made the "off the record" remarks with regard to settlement that he did.

[24] In that context, I agree with the following remarks of Van Niekerk J in *WESUSA v Slabbert Burger Transport (Pty) Ltd*:[11]

> "[8] The LRA acknowledges mediation (the nature of the process undertaken by the arbitrator in the pre-arbitration phase) as a preferred form of dispute resolution. Mediation is often a robust process in which the mediator will seek to persuade and cajole parties, using techniques that rely on gentle and less gentle pressure to reach agreement. Obviously, a mediator cannot overstep the mark and act dishonestly, or misrepresent a position to the parties, or engage in conduct that amounts to intimidation. In *National Union of Metalworkers of SA & others v Cementation Africa Contracts (Pty) Ltd* (1998) 19 *ILJ* 1208 (LC) Waglay J said:
>
> 'While a commissioner may not advise the parties on the merits or compel parties to adopt any particular view, he or she may indicate to the parties making the claims or demands the possible weaknesses in their claims or demands.'
>
> [9] There may often be a fine line involved here, but there are a number of self-evident guidelines that might apply in a situation where a panellist attempts, with the parties' agreement, to explore the prospect of a settlement before arbitrating a dispute. First, the hallmark of the process is its voluntary nature. The panellist must therefore protect the voluntary participation in the process of each party, and respect the right of the parties to reach their own agreement. Secondly, the panellist should conduct the process impartially. By this, I mean not only that the panellist should avoid a conflict of interest, but also that the panellist should avoid communicating any pre-existing opinion that might bring her integrity and impartiality into question. Any conduct that might compromise the position of the panellist as a neutral intermediary should be avoided. This does not imply, as the quote from the *Cementation Africa* judgment suggests, that the panellist is not entitled to provide an evaluation of a party's position nor sketch likely outcomes should a dispute proceed to arbitration. But the panellist should avoid any expression of her own views to the parties on the merits of their positions.

[11] [2009] ZALC 214 (3 Feb 2009) paras 8-10.

> [10] I am not persuaded that in the present instance, the arbitrator acted unethically. This is evident from Beer's own evidence in which the arbitrator's language is expressed in tentative terms. He avers that the arbitrator stated that if the matter proceeded to arbitration he would be asked and would have the power to award the employees a year's remuneration. These are the arbitrator's powers under the LRA, and the union would have been quite within its rights to seek that relief. It does not appear from Beer's evidence that the arbitrator expressed his own opinion on the outcome of any arbitration, or that he ever stated that he would make an award less favourable to the Respondent than the terms of the union's proposal. In other words, there is no evidence that the arbitrator pointed out anything other than a range of possibilities should the matter proceed to arbitration. It was for Beer to assess the Respondent's risk in the light of those possibilities, and to decide whether to settle the dispute on the terms proposed. In short, I am unable to find on the evidence before me that the arbitrator made any misrepresentations to Beer, that he subjected Beer to any form of duress, or that he acted otherwise in a manner that was unbecoming."

[25] It seems to me that the commissioner's remarks in this case, albeit expressed strongly, are more akin to the situation in *Slabbert Burger*. The commissioner sketched different scenarios: It could be that the applicant withstood cross-examination and the employer could not show that she was negligent; or, on the other hand, the employer could show that she had not fulfilled her duties and had, as bookkeeper, been ignorant (like " 'n donkie met oogklappe aan"). On the other hand, if the dismissal was unfair, the likely outcome was that she would receive in the region of six months' compensation; but to both of these scenarios the commissioner added the *caveat*, "Ek loop nie die saak vooruit nie".

[26] This is a case where the commissioner sailed close to the wind and came near to crossing the line, at the risk of mixing my sailing metaphors, from a robust conciliation process to one where he pressed too hard for a settlement.[12] But in my view, given the context and the nature of the

[12] As the learned authors note in Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (LexisNexis 6 ed 2015 at 140): [I]f settlement is encouraged as a goal in itself, the push to settle acquires a normative force."

proceedings, I do not think that he did. Neither party objected to the mid-arbitration attempts, off the record, to settle; it was at the instance of the applicant's attorney; and, once the commissioner had sketched the risks and possible scenarios, everyone went home and the actual settlement was brokered between the parties' legal representatives, with no further input from the commissioner (other than his remarks post settlement, to which I shall return under the fourth review ground).

[27] In all these circumstances, I am of the view that the first review ground cannot succeed.

[28] The CCMA has already conducted an investigation into the commissioner's conduct; suffice it to say that he will be well advised to be particularly careful in future processes not to push too hard when discussing possible settlement with the parties.

Second review ground: Senior commissioner not appointed

[29] The second review ground is that the CCMA was obliged to appoint a senior commissioner.

[30] The parties jointly asked for a senior commissioner fluent in Afrikaans to be appointed, as all the witnesses would be Afrikaans speaking. The CCMA granted the request. However, the first senior commissioner appointed, Ms Marieke van Rooyen, was the applicant's erstwhile attorney. The second senior commissioner appointed was not fluent in Afrikaans. The matter then ended up with the second respondent, Mr J P Hanekom. Although he has extensive experience, he is not a designated senior commissioner,

[31] The applicant argues that, once the CCMA had decided to appoint a senior commissioner, it was unlawful – and thus a reviewable irregularity – for another commissioner to hear the dispute.

[32] Section 137 of the LRA reads:

"**Section 137 Appointment of senior commissioner to resolve dispute through arbitration**

(1) In the circumstances contemplated in section 136(1), any party to the dispute may apply to the director to appoint a senior commissioner to attempt to resolve the dispute through arbitration.

(2) When considering whether the dispute should be referred to a senior commissioner, the director must hear the party making the application, any other party to the dispute and the commissioner who conciliated the dispute.

(3) The director may appoint a senior commissioner to resolve the dispute through arbitration, after having considered—

(a) the nature of the questions of law raised by the dispute;

(b) the complexity of the dispute;

(c) whether there are conflicting arbitration awards that are relevant to the dispute; and

(d) the public interest.

(4) The director must notify the parties to the dispute of the decision and—

(a) if the application has been granted, appoint a senior commissioner to arbitrate the dispute; or

(b) if the application has been refused, confirm the appointment of the commissioner initially appointed, subject to section 136(4).

(5) The director's decision is final and binding.

(6) No person may apply to any court of law to review the director's decision until the dispute has been arbitrated."

[33] Mr *Ackermann* made the following points:

33.1 The director may appoint a senior commissioner.

33.2 Once a senior commissioner has been appointed, the CCMA is *functus officio*.

33.3 The director's decision is final and binding.

33.4 No person may apply to review that decision until the dispute has been arbitrated.

33.5 Thus, the applicant could not review the fact of Hanekom hearing the dispute until now; but he had no jurisdiction to do so.

[34] Compelling as this argument is, I cannot agree. Neither party objected to Hanekom being seized with the arbitration; in fact, they appeared to welcome it, as he was the only Afrikaans speaking commissioner available and he was experienced, albeit not a senior commissioner. Had the applicant had any remaining misgivings, her attorney would surely have objected at the time; and only if that objection had been overruled, he would have reserved the right to review Hanekom's appointment at the end of the arbitration in terms of s 137(6). It could not have been the legislature's intention that the parties – especially when they are legally represented – would acquiesce in the appointment of an arbitrator where the first choice of a senior commissioner who speaks their language is not available, only to pull the rabbit out of the hat at the end of the arbitration and review the full proceedings on that ground. That scenario would be against the very spirit of the LRA: it would mean that, rather than a cheap and quick process, it would envisage the scenario of a lengthy arbitration, involving legal costs for both parties, only to have the whole process repeated before a different arbitrator in circumstances where no-one objected initially.

[35] In any event, the arbitration did not continue. The parties settled the dispute, assisted by their attorneys, and presented the commissioner with that agreement. He merely added the standard CCMA form to it as a cover sheet and asked them to sign that document as well. And the parties and their legal representatives accepted his limited role.

[36] In my view this ground of review cannot succeed either.

Third review ground: settlement of High Court litigation

[37] The applicant further submits that the CCMA did not have jurisdiction to settle the matter pending in the High Court.

[38] The settlement agreement states:

> "Hierdie skikking is 'n volle en finale vereffening van enige en alle eise wat die partye teen mekaar het of mag hê gebaseer op bogenoemde twee sake, synde WECT 18114-13 en 7656/2014."

[39] WECT 18114-13 was the case number of the dispute referred to the CCMA and 7656/14 was the case number in the High Court.

[40] The parties settled both disputes as part of an "all-in" settlement agreement. The applicant now says that the CCMA did not have jurisdiction to settle the High Court dispute.

[41] I agree with Mr *Ackermann* that the CCMA would not have the jurisdiction to make that settlement agreement an arbitration award in terms of s 142A of the LRA or an order of this Court in terms of s 158(1)(c). The CCMA could only do so "in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court".[13]

[42] But in this case, neither party has asked for the agreement to be made either an arbitration award or a court order. The question of jurisdiction does not arise. The parties, assisted by their legal representatives, reached an "all-in" settlement of al disputes between them, reduced it to writing, and signed it. That settled the disputes, including the dispute between Ms Scholtz and the Trust (the fourth respondent, which was not her employer). The commissioner, *ex abundante cautela*, it seems, added the standard CCMA settlement form to the typed settlement agreement. As he said, "dié is nou maar net die dekblad, né" – in other words, he merely added it as a cover sheet to the settlement agreement typed up and signed by the parties.

[43] In my view, there was nothing to prevent the parties from settling all their disputes in one agreement. Indeed, it made sense to do so, thus avoiding further litigation and costs. It so happened that they reached a settlement in the midst of an arbitration between the employee and her employer, the third respondent. They did so with the help of their lawyers and without that of the arbitrator. They did not ask for it to be made an arbitration award or a court order. The issue of the CCMA's jurisdiction is to my mind

[13] LRA s 142A(2) and s 158(1A). See also *Greeff v Consol Glass (Pty) Ltd* (2013) 34 *ILJ* 2385 (LAC).

not relevant to the fact that the parties reached an all-in settlement agreement.

[44] This ground of review also fails.

Fourth review ground: undue influence

[45] The final ground on which the applicant relies to attack the settlement agreement is the common law ground of "undue influence".

[46] This is a recognised doctrine in our law[14] and has been applied by this Court in similar applications.[15]

[47] In *Patel v Grobbelaar*[16] the court required the following:

47.1 that the defendant had obtained an influence over the plaintiff;

47.2 that this influence had weakened his powers of resistance and had rendered his will compliant; and

47.3 that the defendant had used his influence in an unscrupulous manner to persuade the plaintiff to agree to a transaction which:

47.3.1 was prejudicial to him; and

47.3.2 he would not have concluded with normal freedom of will.

[48] Mr *Stelzner* argued, firstly, that the commissioner was not a party to the agreement. But, as Mr *Ackermann* pointed out, undue influence by a third party also gives the party influenced the right to rescind if the other party to the contract was aware at the time the contract was made that undue influence had been exercised.[17]

[14] *Preller v Jordaan* 1956 (1) SA 483 (A). Fagan JA (for the majority) stated [at 492H], after having trawled through the Roman Dutch authorities: "Myns insiens blyk uit die aangehaalde regsbronne dat die gronde vir *restitutio in integrum* in die Romeins-Hollandse reg wyd genoeg is om die geval te dek waar een person 'n invloed oor 'n ander verkry wat laasgenoemde se teenstandsvermoë verswak en sy wil plooibaar maak, en waar so 'n person sy invloed dan op gewetenlose wyse laat geld om die ander te oorreed om toe te stem tot 'n skadelike transaksie wat hy met normale wilsvryheid nie aangegaan het nie." Van den Heever JA dissented. In his inimitable style he opined [at 503H]: "Vra is vry en om 'n ander tot jou eie voordeel te oortuig is ook geen sedelike vergryp nie".

[15] *Ulster v Standard Bank of SA Ltd* (2013) 34 *ILJ* 2343 (LC).

[16] 1974 (1) SA 532 (A).

[17] *Katzenellenbogen v Katzenellenbogen & Joseph* 1947 (2) SA 528 (W) 540.

Did the commissioner obtain an influence over Scholtz?

[49] Mr *Ackermann* argued that the commissioner was in a position of authority over Ms Scholtz and that she was reliant on him for her further conduct of the matter. He argued that the commissioner clearly communicated to her that she had no case and should settle: "die kool is die sous nie werd nie".

[50] I think that is to place too much of a gloss on his words. The commissioner pointed out the risks to the applicant; but he left open the question whether she could be successful, putting it at 50/50; and he expressed a view, unwisely, as to the possible compensation to be awarded if she were successful ("as sy die saak loshande wen"). And the idiomatic expression must be seen in the context of the following reality check with regard to the costs involved:

> "Miskien is hulle in 'n beter posisie om regskostes te kan bekostig en op die einde van die dag betaal, die trust nou, maar die regskostes wat nie 'n probleem is nie, maar kyk na julle situasie, wat julle koste aanbetref. Is die kool die sous werd om (onduidelik) of aan te gaan met die saak?"

[51] The arbitrator was pointing out – correctly – that the employer's legal costs would be paid by the trust. The respondents had – and have – deeper pockets than the applicant. That is something she had to weigh up against the amount of compensation she stood to recover if she were successful. Against that background, the commissioner asked her to consider, realistically, if it was worth her while to continue: "Is die kool die sous werd om aan te gaan met die saak?" As in most cases, that was a valid consideration. And, as the commissioner noted, a mediator or conciliator should look at the best alternative to a solution. This comment harks back to that cited by Molahlehi J in *Anglo Platinum*[18] :

> "It is essential that conciliators be given some leeway in exploring the parties' BATNAs [best alternatives to negotiated agreements]."

[18] *Supra* para 30, citing Bosch, Molahlehi and Everett, *The Conciliation and Arbitration Handbook*.

Did the commissioner's influence weaken the applicant's powers of resistance and make her will compliant?

[52] This case has to be decided on affidavit and on the strength of the commissioner's *ipsissima verba*. The Court does not have the benefit of oral evidence. But I do not think the applicant has discharged the onus of showing that the commissioner's words had weakened her resistance – if any – and rendered her will compliant.

[53] Again, it must be borne in mind that it was the applicant's attorney who initiated settlement talks. And the onus is on the applicant to prove, on a preponderance of probabilities, that she did not enter into the agreement voluntarily.[19]

[54] As Mr *Stelzner* pointed out, there are many similarities between this matte and *Ulster v Standard Bank*.[20] In that case, the applicant, a bank manager, had also referred an unfair dismissal dispute to arbitration. Before the arbitration began, the commissioner attempted conciliation again. The parties settled. The applicant was assisted by her trade union's in-house counsel. She asked this Court to set the settlement agreement aside because she entered into the agreement under duress or undue influence. In dismissing the application, the Court took into account the following factors:

54.1 She was assisted and advised by her trade union's in-house counsel.

54.2 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.

54.3 The employee was not uneducated or uninformed. She was a branch manager for the Bank with some 30 years' experience. In her

[19] R H Christie et al, *The Law of Contract in South Africa* (6 ed 2011) 281-4; 294-6; 321-4; *Ulster v Standard Bank (supra)* para 8.

[2020] (2013) 34 *ILJ* 2343 (LC) (*supra*).

capacity as a Bank employee and branch manager, she must have dealt with contracts on a regular basis.

54.4 The agreement that she signed was written in English, her first language.

54.5 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.

[55] In the present case, the following factors are as pertinent:

55.1 Ms Scholtz was assisted throughout by her attorney. He brokered the "all-in" settlement agreement on her instructions (together with her father), typed it up, and sent it to the respondents' attorney.

55.2 The next morning, and without the intervention of the commissioner, the legal representatives added and deleted further clauses to the draft agreement, mostly in the applicant's favour (such as further payments to her).

55.3 The agreement was typed in her mother tongue, Afrikaans.

55.4 She signed the agreement herself.

55.5 After the lawyers had negotiated the agreement and presented it to the commissioner, the commissioner was at pains to find out if she agreed that it was in full and final settlement of all claims and that she could not turn around and say she did not know what she was doing; yet that is exactly what she did, six weeks later. One is reminded of these words from the commissioner:

> "So as julle teken, weet julle wat julle teken en julle verstaan wat julle teken. Kan nie môre terugkom en sê julle was gedwing om te teken en julle het nie verstaan nie. …
>
> As julle nou skik, dan is dit eens en finaal. U kan nie nou weer môre gaan eis vir uitstaande salaris en uitstaande verlofgeld en sulke goed nie. U verstaan dit so? Die betalings is so, dit is alles vervat in die ooreenkoms, né…

> So u sal nie môre weer u saak kan oopmaak nie. As u nou teken is dit oor en verby."

[56] The applicant signed the settlement agreement and the pro forma CCMA document and her attorney signed as a witness. She complied with the agreement the following day by returning the motor vehicle.

[57] I also take into account that the applicant waited for one day short of six weeks to object to the agreement, well after both parties had acted in terms of the agreement and she had been paid accordingly. And, Like Ms Ulster in the eponymous case, she is not an ingénue. She was a bookkeeper for the respondents for 14 years. She was a trustee of a number of trusts. She took advice from her attorney and her father. She literally had the opportunity to sleep on it before signing the settlement agreement, after the commissioner had warned her that it was final and binding.

[58] In all of these circumstances, an on a balance of probabilities, I am not satisfied that the applicant has shown that the commissioner's interaction with her attorney had rendered her will compliant to the extent that the commissioner exercised an undue influence over her.

Conclusion and costs

[59] It follows that the application to have the settlement agreed set aside must be dismissed.

[60] With regard to costs, I have to take into account the requirements of both law and fairness. On either count, I do not see any reason why the third and fourth respondents should not be awarded their costs. They had already spent legal fees in the CCMA and High Court proceedings. They settled both of those disputes on the basis that each party would pay its own costs. Then they had to incur further costs in this application challenging that settlement. They should not have had to. I differ with Mr *Stelzner*, though, who argued that Ms Scholtz should have to pay punitive costs.

Order

The application is dismissed with costs.

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A J Steenkamp

Judge of the Labour Court

APPEARANCES

APPLICANT:	L W Ackermann Instructed by Cluver Markotter, Stellenbosch.
THIRD and FOURTH RESPONDENTS	R G L Stelzner SC Instructed by Werksmans, Cape Town.