REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2377/12

MAYE SEROBE (PTY) LTD **Applicant**

and

LEWUSA obo MEMBERS **First Respondent**

COMMISSIONER S. MAKHUBELA **Second Respondent**

THE COMMISSION FOR CONCILATION

MEDIATION AND ARBITRATION (CCMA) **Third Respondent**

Heard: **10 July 2014**

Delivered: **9 April 2015**

Summary: **review and set aside a Settlement Agreement that was not made an award; the agent lacked the mandate to conclude the Settlement Agreement; the actions of the agent bind the principal; no duty on the Commissioner to save-guard against exceeding of mandate; the application dismissed.**

JUDGEMENT

RALEFATANE AJ

Introduction

[1] This application seeks to review and set aside the conciliation proceedings and a Settlement Agreement ("Agreement") issued by the Second Respondent under the auspices of the Commission for Conciliation, Mediation and Arbitration ("CCMA") in the course of conciliation proceedings under reference number GAEK4250-12.

Background

[2] The Applicant conducts business in the poultry industry. The Applicant submitted that on the 21 July 2012 it became aware of the CCMA dispute when a request was received for 2 employees to be released for the hearing which was to be held on the 23 July 2012 at 12h00.

[3] The Applicant was not aware of the dispute as it did not receive the referral form and notice of set down which was revealed after the investigation that they were sent to the fax number unknown to the Applicant.

[4] The Applicant arranged for its farm manager, Mr Titus Ramaphakela ("Ramaphakela") to attend the hearing to establish the nature of the dispute. At the hearing he found that the First Respondent was complaining about wage increase and bonuses. Ramaphakela advised the Second Respondent that all employees received 8% increase and management employees received 6% performance bonus. The Second Respondent directed the parties to sign an agreement.

[5] Further that the Third Respondent lacked jurisdiction as there was no compliance with its rules in terms of the referral and notice of set down not being received by the Applicant.

Grounds for review

The Applicant submitted the grounds for review as follows:

[6] The dispute itself which was referred, and was settled in terms of the Agreement in issue does not fall under the jurisdiction of the Third Respondent as a dispute that could be arbitrated. It was a dispute of mutual interest. In particular, the remedy available to the First Respondent was to engage in strike activity if the dispute could not be settled.

[7] In performing the functions of an arbitrator in terms of the LRA[1], the Second Respondent exceeded his power in his conduct of the conciliation proceedings.

[8] That the Second Respondent placed undue pressure and duress on the Applicant's farm manager (Ramaphakela) to enter into an Agreement (with Ramaphakela acting on behalf of the Applicant) for the purposes of settling a mutual interest dispute raised by the First Respondent against the Applicant at the Third Respondent., in particular the Second Respondent.

[9] That he induced fear in Ramaphakela that the Applicant had a duty in law to settle the dispute in terms of the processes of the Third Respondent. The Second Respondent consequently directed Ramaphakela to sign the Agreement. In doing so the Second Respondent failed to inform Ramaphakela that he had any choice in the matter, and in fact misrepresented the very apposite contention to Ramaphakela. He did not sketch out (to Ramaphakela) the consequences of falling to sign the Agreement, and in particular he did not indicate that the First Respondent would simply have the option of engaging in a strike.

[10] That Ramaphakela genuinely held the fear that his conduct and the conduct of the Applicant (if the agreement was not signed) would be unlawful. This apprehension of fear was reasonable as the directions and representations were made by a commissioner employed by the Third Respondent, which Ramaphakela viewed as a forum similar to a court.

[1] Labour Relations Act 66 of 1995 (As amended)

[11] The Second Respondent did not enquire whether Ramaphakela had authority and mandate to enter into an Agreement on matter of mutual interest. This is indicative of the partiality and haste of the Second Respondent to settle the dispute.

[12] The Second Respondent's conduct is indicative of not being impartial, and did not handle the conciliation process in an unbiased manner as is required in terms of the LRA and the Third Respondent's rules.

[13] In doing so, the Second Respondent's misrepresentation was *ultra vires* the LRA, the Third Respondent's rules, and *contra bone mores*.

[14] In the circumstance, the agreement is void and the entire process before the Third Respondent, including the conciliation process and Agreement should be reviewed and set aside.

Evaluation

[15] The issue in this matter is that the Applicant sent its employee (Ramaphakela) to the CCMA on the day of conciliation proceedings merely to find out as to what the dispute was all about. Ramaphakela participated in the conciliation proceedings which culminated into an Agreement being concluded which he subsequently signed.

[16] The applicant seeks an order reviewing and setting aside the Agreement based on the lack of mandate.

[17] Generally, no formalities are required for an agent's authorisation; an oral appointment is sufficient. Written appointment usually happens in 'power of attorney' in which case it will be a legal instrument setting out the powers conferred on the agent.

[18] An Agency can be defined as a consensual relationship created by contract or by law where one party, the principal, grants authority to another party, the agent, to act on his or her behalf with either curtailed or open mandate and under the control of the principal to deal with a third party. An agency

relationship is fiduciary in nature resulting in the actions performed by the agent binding the principal. The agent may be authorised to act on behalf of another person, company, or government, known as the principal. An "Agency" may arise when an employer (principal) and employee (agent), agree that the agent will perform certain tasks on behalf of the principal. The basic principle is that the principal becomes liable for the acts of the agent, and the agent's acts are like those of the principal. In issues like these, the question is often asked whether the principal acted in such a manner as to make others believe that the person was his or her agent (apparent or ostensible authority).

[19] It was held in the case of *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*[2] that: 'an act of representative needs to be authorized by the principal. Such authorization is usually contained in a contract. The authorisation of the representative is a distinct unilateral act. It is sometimes closely associated with an agreement between the parties, but may also arise by operation of law. Although some representatives (such as public officials, company directors, guardians and curators) are often referred to loosely as agents, the current tendency is to reserve the term "agent" to denote a representative who is bound by contract with a principal to carry out a mandate and also authorised to create, alter or discharge legal relations for the principal'.

[20] It appears that the Applicant does not seek to review and set aside the certificate of outcome, if it was issued. If the certificate indicative of 'resolved' has been issued, which is not within the papers submitted, it will follow that it required review and set aside. In *Kasipersad v Commission for Conciliation, Mediation and Arbitration and Others*[3] the Court set aside an Agreement and the certificate of outcome which emanated from a

[2]1984 (3) 155 (A) 164G-165G

[3] (2003) 24 *ILJ* 178 (LC)
[4] (2010) 31 *ILJ* 104 (LAC); [2010] 2 BLLR 186 (LAC)

conciliation process in which the commissioner had exercised improper influence in persuading the applicant to withdraw his case.

[21] From the records, it appears that the Agreement was not made an award therefore it will be dealt with as an ordinary agreement.

In *Goddard v Metcash Trading Africa (Pty) Ltd*[4] the Court accepted that an Agreement constitutes a contract for purposes of application of classic contractual law principles.

In the case of *Lebogang Malebo v CCMA and Others*[5] it was said that:

> 'Until the agreement is made an award it remains simply a settlement agreement. Any legal force it carries is derived from the ordinary binding power of a contractual arrangement between the parties. Even though the agreement may have come into being through the facilitation of the commissioner, his role in the conclusion of the agreement does not entail the exercise of any statutory decision making powers on his part to make an award or ruling which is binding on the parties. The document embodying the settlement simply records what the parties to the dispute have agreed. The arbitrator' s signature on it confirming that he conciliated it adds no more legal force to the document, in my view, except insofar as it affords some evidence of a third party witnessing the conclusion of the agreement'.

[22] The information discussed in conciliation proceedings is confidential and without prejudice, it involves separate private discussions which means that no party can refer to it in any other proceedings or use such information against each other in a subsequent proceedings unlike in arbitration proceedings, the Commissioner or arbitrator is required to keep a record of the proceedings, which is not the case with conciliation

[5] JR 1508/2009 at para 12.

proceedings. The conciliation proceedings are governed by rules 7(3) and 7(4) of the CCMA[6], which provide as thus:

> **'**7(3) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis so that no party may make reference to statements made at conciliation proceedings during any subsequent proceedings unless the parties have so agreed in writing.
>
> 7(4) Neither the Commissioner dealing with the conciliation nor anybody else attending the conciliation hearing may be called as a witness during any subsequent proceedings to give evidence about what transpired during the conciliation process.'

[23] In the present case, the issue relates to conciliation proceedings whereby this Court is unable to refer to the record in order to establish what transpired therein as there is none. The only record that can be referred to, is the information captured in the agreement as a reflection of the discussions between the parties. The contents of that agreement will be referred to later in this judgment. It is not the duty of the commissioner to authenticate the authority and mandate of the representatives. It suffices that a party is represented at the proceedings and further than that it will be the responsibility of the said representative to always stick to mandate. The commissioner or the other party would not know if the representative is exceeding the principal's mandate. There are no strict rules prescribed for commissioners in conciliation proceedings however, it is important to note that impartiality is highly required from a commissioner, while his or her advice is also welcome. The commissioner shall not take a decision for or coerce any party to enter into an agreement. In the case of *Kasipersad v CCMA and Others*[7], the Court described the functions of a commissioner in a conciliation process as follows:

[6] Commission for Conciliation, Mediation, and Arbitration

[7] (2003) 24 *ILJ* 178 (LC) at paras 18-19.

> 'The function of a Commissioner is to steer the parties towards a mutually agreed outcome… However, no hard and fast rules can be prescribed for conciliation. The process of conciliation is such that Commissioners need to have flexibility to apply appropriate techniques to guide the parties to consensus. Different techniques have been developed for different disputes and personalities involved in the conciliation. To attempt to compile a complete list of do's and don'ts during conciliation is neither feasible nor desirable. Instead, jurisprudence should be developed incrementally, case by case, to guide conciliators as to what is acceptable and unacceptable conduct during conciliation'.

[24] Where a representative has acted without authority or has acted *ultra vires* and the actions are prejudicial, the party standing to suffer prejudice will be the one who raises issues of defence. The principal who raises a defence that the person purported to be a representative was not so authorised or that the person was authorised but with mandate scope which was exceeded, is protected provided that the said principal can prove that the person lacked the authority or that he or she exceeded the powers. Consideration is also given to the other party who concluded the agreement in good faith believing that the person who presented himself or herself as the representative is so authorised and that party may invoke the doctrine of estoppel. Agency by estoppel is where an agent did not have actual authority and the third party may invoke estoppel to prevent the principal in law, or to estop the principal, from denying that the agent has authority. Estoppel by representation is a flexible doctrine capable of application in different situations including to be used as a bar in contractual liability surroundings.

The agent's ability, as the representative, to affect the principal's legal relationship with third party is primarily resulting from, and its scope determined by, the authority to do so.

In *Hely-Hutchinson v Brayhead Ltd and Another*[8], the Court said the following:

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[8] [1968] 1 QB 549

> 'Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoints one of their members to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority.'

[25] A representation by authority and the powers conferred to that representative are to be differentiated. A person may be authorised to represent his or her principal but not being accorded with certain mandate. To reiterate it is the responsibility of the representative to act within the scope of his or her mandate as much as it is the responsibility of the principal to clearly articulate the mandate of the representative.

[26] Mandate (*mandatum*) is an agreement between two or more persons whereby one or more persons, undertake(s) to represent and perform some lawful task for another (principal and agent relationship). When an agreement is struck by an agent outside his or her authority, the principal usually raises the agent's lack of authority as a defence so not to be bound to the agreement. The accepted grounds for holding a principal contractually liable to the acts performed by agent in South African law provide a departure point.

[27] In *casu*, it is a settled issue that Ramaphakela was authorised to represent the Applicant, the principal, but the crispy issue is whether he exceeded his powers and whether the other party ought to have known that Ramaphakela was exceeding his mandate by concluding the agreement.

In the case of *Monzali v Smith*[9], the following principle was established: 'Where any person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to anyone dealing with him as an agent on the face of

[9] [1929] AD 382 at 385.

any such representation, to the same extent as if such other person had the authority which he was so represented to have'.

In *Mavundla and Others v Vulpine Investments Ltd t/a Keg and Thistle and Others*[10] the Court dealt with an issue where applicants concluded an Agreement on behalf of all other co- applicants during conciliation proceedings. The court found that the commissioner had not considered if the Agreement had the consent of all other co- applicants, and therefore the commissioner was expected to have satisfied himself that the dispute had been resolved in respect of all the individual applicants in the claim. In this case the principals were also the co-applicants therefore it was of cardinal importance that the commissioner should have satisfied himself that the dispute was resolved in respect of all the applicants.

See also the case of *Southern Life Association Limited v Beyleveld N.O*[11] In this case the fleet manager was designated to represent applicant's predecessor at the CCMA proceedings. The question that was asked is whether a reasonable man in the position of the Respondent would have not believed that the fleet manager had the authority to sign and enter into the Agreement.

In *Hely-Hutchinson*[12] the Court said the following: 'Ostensible or apparent authority is the authority of an agent as it appears to others...'

In the case of *George v Fairmead (Pty) Ltd*[13], in answering the question whether the type of a mistake pleaded by the Respondent is the mistake that can entitle a party to repudiate the contractual liability, it said that the proper approach to the question is to take into account the fact that there is another party involved and to consider his position. 'Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man to believe he was binding himself, If the question is so posed in the present case it is clear that respondent cannot resile from the settlement. An exception

[10] [2000] 21 *ILJ* 2280 (LC) .

[11] [1989] 1 All SA 390 (A)**; [1989] (1) SA 496 (A) at 10**
[12] See footnote 6 *supra*
[13] [1958] 2 SA 465 (A)

noted in the authorities (upon which the court a quo seems to have focused its attention), namely, that a party in the position of the respondent will not be bound if "his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party'.

[28] In the current case, Ramaphakela had the authority to represent the Applicant therefore there was no reason for the First Respondent and the Second Respondent not to believe that he had mandate to conclude the Agreement. It will be burdensome for the commissioner should he or she be expected to interrogate the contract between the principal and the agent where she or he will be enquiring if the agent has the mandate to say certain things or whether the agent is acting *ultra vires*. The inherent risk coupled with agency, is that the terms and conditions of the private contract (between the principal and agent), are not obvious to third parties and the mandate has the consequences of residual authority too. If a builder is granted the authority to build a house, it is implied that the builder is authorised to secure the necessary materials to complete the building and taking certain related decisions to get the building done. It is the discretion of a principal to expressly curtail the implied authority of his or her agent.

In Lawyers' Professional Liability by J R Midgley[14] has importantly stated that if a litigant limits the implied authority of his attorney to compromise a case (if it is accepted that generally such an authority exists and even more so in the case of the state attorney), unless the limitation of authority is communicated to the opposing litigant or legal representative, or is implicit from the principal's conduct or the surrounding circumstances, he may be estopped from relying on the lack of authority.

See also *Hlobo v Multilateral Motor Vehicle Accidents Fund*[15]; *Glofinco v ABSA Bank Ltd (t/a United Bank)*[16]; *Sonnekus Akojee v Sibanyoni and Another*[17]; A

[14] [1992] Juta 10 and 16 LAWSA vil. 14 2ed

[15] 2001 (2) SA 59 (SCA) at 65D;

[16] 2002 (6) SA 470 (SCA) at 482B

[17] 1976 (3) 440 (W).

principal cannot by way of private instructions to his or her representative curtail the latter's authority as far as third parties are concerned.

[29] The commissioner's function is to assist the parties to reach mutual and amicable solution where the parties will have the option to entering or not to enter into agreement. The commissioner must not impose his or her will on the parties. Besides, one is thinking of a situation where the conciliating commissioner, in attempt to resolve the dispute, go to an extent of advising the parties hence in certain matters advisory award is issued which is not binding to the parties simply because commissioners are not decision-makers in conciliation proceedings. The parties will still exercise the discretion whether to accept or reject the commissioner's advice.

The Court in *Mavundla and Others v Vulpine Investments Ltd t/a Keg & Thistle and Others*[18] said:

> 'The concluding of the Agreement was not an administrative act of the commissioner…. The commissioner's role was to try and procure a meeting of the minds of the parties so that by agreement between themselves their dispute could be settled. The Agreement is not her decision it is a recording of the parties' consensus over the manner in which they agree to settle their differences. The role of the commissioner in that Agreement was through conciliation to procure an offer from the company that would ultimately be acceptable to the applicants. The final decision to conclude the agreement lay solely in the respective party's hands. They had to decide of their own volition whether to accept or reject the offers …'

In *Shortridge v Metal & Engineering Industries Bargaining Council and Others*[19], the Court dismissed an application to review and set aside an Agreement, which also had not been made a CCMA award where the applicant sought to set aside the Agreement on the basis that the union which concluded it had no mandate to do so.

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[18] [2000] 9 BLLR 1060 (LC)
[19] (2009) 30 *ILJ* 389 (LC); see *Samancor (Pty) Ltd Metal and Engineering Industrie Bargaining Council and Others* (2007) 28 *ILJ* 2328 (LC)

The question that follows is whether the principal can escape contractual liability on the basis that its agent did not have mandate to conclude the agreement? From the *Shortridge* judgment, it shows that the principal cannot automatically be exonerated from contractual liability unless the reviewing Court is satisfied that the principal, under the circumstances, should not be liable for the actions of his or her agent.

[30] The submission by the Applicant is that Ramaphakela was not given the mandate to conclude the Agreement but merely to establish the nature of the dispute. As already indicated above that it is not always a simple matter for the other party to depict that the agent's mandate does not extent to entering into an agreement, therefore the reviewing Court must be cautious in exonerating the principal from liability before carefully interrogating the grounds upon which the applicant relies upon. In *Northern Metropolitan Local Council v Company Unique Finance*[20], the Court stated the circumstances under which a liability may sustain. In order to hold the appellant liable on the basis of ostensible authority the respondents had to prove the following:

> (a) A representation by words or conduct; (b) Made by the appellant and not merely by the agents that they had authority to act as they did; (c) A representation in a form such that the appellant should reasonably have expected that outsiders would act on the strength of it; (d) Reliance by the respondents on the representation; (e) The reasonableness of such reliance; (f) Consequent prejudice to the respondents.

[31] In *casu*, the Applicant alleges that the commissioner exerted duress, undue influence, and misrepresented to Ramaphakela that the Applicant was under a duty to conclude an agreement therefore created fear unto him.

In *Ulster v the Standard Bank of South Africa Ltd*[21] this decision confirms the common law position in concluding agreements. The allegations of undue influence and duress were in issue and it was held that: 'the ordinary laws of

[20]2012 (5) SA 323 (SCA); [2012] 3 All SA 498 (SCA)

[21](2013) 34 ILJ 2343 (LC).

contract will apply. Therefore an Agreement can only be set aside if it is successfully shown that the employee was placed under the type of duress required in common law'.

[32] In essence there are types of duress that can render the agreement not to sustain the rod of review process. However, In this case of *Ulster*[22] the Court concerned itself with the agent's profile in terms of her position as bank manager, educated and well-informed to understand the nature of the proceedings and contracts and in the position fully to appreciate the consequences thereof.

[33] I suppose, there will be no clear line of categories to tell, at the face value, if the circumstances of a particular matter falls within the category of reviewable processes. Where the principal appoints an agent being aware that the agent might not be capable of understanding his function owing to the fact that he or she is not conversant with the kind of the field in which he or she is expected to function, the principal cannot escape the consequences resulting thereof. When a principal appoints an agent, that principal must know that his or her legal position will change and the acts of the agent will be regarded as his or hers. In this case, the Applicant's defense is that Ramaphakela was a farm worker who believed that the Applicant was under a duty to conclude agreement. It is apparent that the Applicant is praying for relief based on its wrong choice of representative. If Ramaphakela could not be aware that he had a choice of not concluding the Agreement, then it means he could not understand and appreciate the conciliation proceedings including the functions of a commissioner. Further that he failed to operate within his mandate which was to establishing the nature of the dispute but allegedly he exceeded the mandate by even concluding the agreement. Therefore, the Applicant should have been honest with itself to acknowledge that its agent exceeded the mandate and that cannot be attributed to the commissioner or the other party.

The principal cannot appoint anybody as an agent in any matter irrespective of whether the person is capable of fulfilling the mandate, and when things go

[22] *Supra*

unexpected way, resort to a claim seeking to escape contractual liability. (*See Midgley's Lawyers Professional Liability*)[23]

[34] In this Court's view, it is not a defence that a principal has willingly with open eyes and well knowing that the agent is not capable and without training him, appoints such a person as its agent. If the principal does that, it does on its own risk. The agent's profile such as the rank, the qualifications, experience in such matters, that he or she did not understand the legal significance of signing such an agreement, and that was not well informed, cannot work in favour of the principal. The principal must do enquiry on the person he or she intends to appoint as agent before entrusting such a person with the authority to represent him or her. In any event, in the present case, the Applicant knew Ramaphakela because he is its employee, therefore it is safe to presume that the Applicant was confident that he (Ramaphakela) was capable and equipped to discharge the duties appointed for.

[35] The Court in *Ulster*[24] was required to answer whether an employee who enters into a written agreement under the auspices of the CCMA[25], on the advice of her representative, can she subsequently escape the agreement on the basis that she was duped into doing so by her representative? Can she do so if she entered into the agreement under duress or as a result of the undue influence of her representative? In answering the questions the Court held that the agreement can only be set aside if it is successfully shown that the employee was placed under the type of duress required in common law. In scrutinizing the issue the Court took into account the profile of the employee concerned that she was a bank manager with 30 years' experience, she was educated and well-informed. It was clear she understood the nature of contracts. She understood the nature of the proceedings and agreed to sign the Agreement. In the circumstances she entered into the agreement with open eyes, fully aware of its consequences, and should be bound by the terms thereof. Therefore the Court declined to set aside the agreement.

[23] *Supra*
[24] See footnote in *Ulster*
[25] Commission for Conciliation, Mediation, and Arbitration

The principle in this case confirms that a principal will be bound by the actions of his or her representative. (See also *Roshni Lutchman v Pep Score and Others*)[26]

[36] The applicant in this case argued that she did not read the contents of the agreement nor was she informed of what was contained in the agreement. It was only after she was home that her son informed her of the contents. The Court could not rely upon the applicant's version for several reasons such as that, when considering what transpired subsequently, that is, a) it took the applicant eight days to contact her attorney and complain about the agreement, b) the applicant's son had not filed a confirmatory affidavit, nor was it clear whether he was of age, and a) it took eight months for the applicant's attorney to refer the matter to the Court without a condonation application. The applicant could not prove that there was a mistake on her side when she signed the agreement. There was also no evidence to show that the commissioner was biased in the manner that he conducted the conciliation processes. The application was dismissed.

[37] Quoted from the *Law of Contract in South Africa*[27], by Christie, she articulates the following:

> 'However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. …. in any circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his error is iustus. It is not sufficient simply to avoid the condemnation as careless orinattentive, for the mistaken party must go further and discharge the onus of proving that his mistake was, in the eyes of the law, reasonable.'

[38] The Applicant avers that the Agreement concluded on its behalf by Ramaphakela falls to be void. In law, void means of no legal effect and absolute nullity.

The term void *ab initio*, which means "to be treated as invalid from the inception, *(ab initio*) like it never existed. A void contract is unlawful in its essence and form, short of the elements of a contract and void contract shall be of no effect and shall

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[26] D 967/02 [2004] ZALC 6

[27] 3rd Edition, [1996], at 354

not be capable of being rectified by consent or in any manner whatsoever. A contract is void if the contract is against the public policies; the contract involves illegal matters (like crime); any of the parties to the contract is not 'competent' (minor, mentally challenged person etc.) to enter into a legal agreement; the contract is impossible to perform; the contract restricts certain rights or actions (such as the right to work); a person concluded a contract under duress.

[39] Turning to the present case, there is no evidence of duress that was exerted on Ramaphakela. It would be interesting to note that Ramaphakela informed the commissioner and the First Respondent that the Applicant has agreed to grant wage increase and even stated the percentages thereof. The Applicant admits that indeed there were discussions with the workers regarding wage increase. Quoting from the Applicant's submissions: 'Ramaphakela advised the Second Respondent that all employees received 8% increase and management employees received 6% performance bonus. The Second Respondent directed the parties to sign an agreement'. The Applicant does not deny that it has given all employee 8% wage increase, whereas management received 6% performance bonus. Ramaphakela advised the Second Respondent of the facts within his knowledge where after the Second Respondent directed the parties to conclude Agreement based on the advice of Ramaphakela. The allegations of undue influence, duress, misrepresentation lack the facts to support such inference.

[40] The Applicant further submitted that the Second Respondent lacked the jurisdiction to conciliate the dispute as it involves mutual interest matter which the First Respondent could have embarked on a strike. Section 64 (1) (a) (i) of the LRA[28] provides that:

> (1) every employee has the right to strike and every employer has the recourse to lock-out if –
>
> (a) the issue in dispute has been referred to council or to the commission as required by this Act, and –

[28] Labour Relations Act, 66 of 1995.

(i) a certificate stating that the dispute remains unresolved has been issued'. Any strike must comply with the provisions of the Act. Mutual interest matters are conciliated upon and depending on the outcome of the conciliation, the party who referred the dispute may comply with the requirements of a protected strike before embarking on such. A further jurisdictional issue is that the Applicant never received a referral and set down notice. Nowhere in the submission where the Applicant is mentioning that Ramaphakela, was instructed to raise this issue at conciliation. This issue will not take the discussion to any other option but to rejection.

[41] Under the circumstances, the Applicant's defence falls to be rejected.

The following order is made:

Order

i. The application to review and set aside the Settlement Agreement is hereby dismissed;
ii. The Applicant is to pay costs.

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Ralefatane AJ

Acting Judge of the Labour Court of South Africa.

APPEARANCES:

For the applicant: Advocate S Bernjardt

Instructed by: Y Nagdee Attorneys

For the respondent: Mr A Goldberg of Goldberg Attorneys