



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Case no: JR 2610/13

Reportable

In the matter between:

**HADIO LINAH CINDI**

**Applicant**

and

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**First Respondents**

**COMMISSIONER SEGOKOALI THOKO N.O**

**Second Respondent**

**CAREERS STAFF SOLUTION (PTY) Ltd**

**Third Respondent**

**Heard: 21 April 2015**

**Delivered: 04 August 2015**

**Summary: Application to review and set aside the settlement agreement. Settlement agreement not a decision of the Commissioner but a decision reached by consensus between the parties. The role of a Commissioner is to facilitate a**

**settlement agreement and not to make a decision for the parties. A settlement agreement is an outcome based on the consensus between the parties and not a decision of a Commissioner.**

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## JUDGMENT

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MOLAHLEHI, J

### Introduction

[1] The applicant in this matter is seeking an order to review and set aside the settlement agreement concluded between her and the third respondent. The application is brought in terms of s158 (1) (g) read with s158 (1) (j) of the Labour Relations Act (the LRA).<sup>1</sup> The settlement agreement was concluded at the conciliation process which was scheduled subsequent to the applicant referring an unfair dismissal dispute to the CCMA.

### The background facts

[2] It is common cause that the applicant was prior to the termination of her employment contract employed by the third respondent as the sales order official. The third respondent is operating as a temporary employment service provider and is subcontracted to UTI which had stationed the applicant at the BMW warehouse in Midrand.

[3] The applicant states in her statement of case that she was during July 2013, made to undertake a polygraph test at BMW site which she failed. She was then

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<sup>1</sup> Sections 158(1) (g) and (j) of the LRA provides that the Court may: “(g) subject to section 145, review the performance or purported performance of any function provided for in *this Act* on any grounds that are permissible in law, and (j) deal with all matters necessary or incidental to performing its functions in terms of *this Act* or any other law.”

told not to report at the BMW site. She then reported at the third respondent's premises but was told by the director not to report for work pending the third respondent securing a client where she could be posted. She thereafter on numerous occasions contacted the third respondent to find out about progress in securing her posting.

- [4] The applicant approached the third respondent again during October 2013, after her leave pay and bonus was paid into her bank account. On arrival at the third respondent's premises she was told that the third respondent did not have work for her and as a result, her employment contract had been terminated.
- [5] The applicant was unhappy by what she was told and accordingly referred an alleged unfair dismissal dispute to the CCMA. The matter was subsequently set down for conciliation where the applicant attended, accompanied by her attorney. The attorney was however not permitted to seat in the conciliation process.
- [6] The applicant says that during the conciliation process the Commissioner informed her that she had no prospects of success in her case. It was according to her following this comment that she signed the agreement which reads:

"In full and final settlement of the dispute the Applicant received R1825-02 from the Road Freight Agency Council on 21 September 2013."

#### Grounds of review

- [7] In seeking to review the settlement agreement the applicant contends that the Commissioner was impartial in that he inappropriately persuaded her to sign the settlement agreement. The applicant further contends that the Commissioner exceeded his powers in that he was not required to give advice on the substantive fairness of the dismissal.
- [8] In relation to the leave pay the applicant contends that the Commissioner failed to appreciate that the amount paid was from the bargaining council and not from

the third respondent and therefore it could not have constituted a settlement amount.

[9] The applicant contends in the supplementary affidavit that she was unduly influenced by the Commissioner to conclude the agreement in terms of which she conceded that she was not dismissed. In this regard she states the following:

“5.2 The Second Respondent committed misconduct during the proceedings in that he told me that I do not have a case (there were no prospects of success in the unfair dismissal dispute) as I failed to personally report for duty at the company's premises between July and October 2013. In so doing the Second Respondent failed to take into our consideration that the company advised me to stay at home and they will contact me once the find another position for me.

5.3 Based on the above I submit that I have been unduly influenced by the Second Respondent to enter into a settlement agreement and had I not been misrepresented by the Second Respondent I would not have entered into this settlement agreement. I further submit that I am being prejudiced in that I would not have entered into an agreement on the basis that there was no dismissal and that I was paid an amount of R 1825.20 in full and final settlement of the dispute a month before the actual date of my dismissal.”

[10] Mr Mabaso, for the applicant argued that the applicant was improperly induced to conclude the settlement agreement and it was for that reason that the court should, as was the case in *Kasipersad v The Commission for Conciliation, Mediation and Arbitration and Others*,<sup>2</sup> intervene and set the settlement agreement aside. In that case the Court reviewed, and set aside the conciliation proceedings and the settlement agreement. The matter was then remitted for conciliation afresh to the CCMA.

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<sup>2</sup> (2003) 24 ILJ 178 (LC).

[11] In its opposition to the review application the third respondent contends that the applicant adopted an incorrect cause of action as according to it the correct one would have been to rescind the agreement. The third respondent further contended that the settlement agreement could not be the subject of the review because it had not been made an arbitration award neither does it constitutes a ruling by the Commissioner.

### Evaluation

[12] The issue of reviewing the performance of a Commissioner under section 158 (1) of the LRA received attention in the case *Kasipersaad (supra)*. In that case as indicated earlier the Court set aside a settlement agreement and the certificate of outcome of the conciliation process. The court found that the Commissioner exercised an improper influence in persuading the employee to withdraw his case.

[13] A similar situation arose in *Shortridge v Metal and Engineering Industries Bargaining Council and Others*,<sup>3</sup> where the Court was faced with having to review and set aside a settlement agreement. Similar to the present case the settlement agreement in that case had not been made an arbitration award in terms of section 142 of the LRA.

[14] The Court in dismissing the applicant's application held that the settlement agreement which has not been made an arbitration award cannot be reviewed in terms of section 145 of the LRA. The same approach was followed in *Mavundla and Others Vulpine Investment Ltd t/a Keg and Thistle and Others*,<sup>4</sup> where the court set aside the conciliation proceedings because the Commissioner had improperly allowed a consultant to represent one of the parties during the proceedings. It was for this reason that the certificate of outcome was set aside. The settlement agreement was however not set aside and in this regard the Court had the following to say:

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<sup>3</sup> (2007) 28 ILJ 2328 (LC).

<sup>4</sup> (2000) 2 ILJ 22 80 (LC).

“The concluding of the settlement agreement was not an administrative act of the commissioner. She did not impose her will on the parties. The commissioner's role was to try and procure a meeting of the minds of the parties so that by agreement between themselves could be settled. The settlement 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 settlement 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 made and put through the office of the commissioner. Mr van Zyl, a director of the company, proposed the settlement on behalf of the company, and Mavundla and Msweli accepted the proposal.”

- [15] It is apparent from the above that the fact that the Commissioner committed a reviewable conduct during the conciliation process does not necessarily vitiate the agreement consequent thereto. In *Malebo v Commission for Conciliation Mediation and Arbitration*,<sup>5</sup> Lagrange J correctly in my view held 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.”

- [16] I align myself with those decisions that say that a settlement agreement that has not been made an arbitration award in terms of s142 of the LRA cannot be

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<sup>5</sup> (2010) Z ALC 97 (15 April 2010).

reviewed. In my view the correct analysis of cases similar to the present is to appreciate that the Commissioner in facilitating a settlement agreement has no decision-making powers. In this respect it may well be that during the facilitation process the Commissioner improperly influences one of the parties in arriving at a settlement agreement. In that case the settlement agreement would be invalid because it would have been improperly concluded. However, whatever the role and influence the Commissioner may have had in the conclusion of the agreement, the outcome remains the decision of the parties and not that of the Commissioner.

[17] In my view, the third respondent is correct in its contention that the remedy in challenging the agreement that came into existence due to the alleged undue influence by the Commissioner, lies in the common law principles of contract. It is in this regard trite that the validity of an agreement in terms of the general principles of contract can be challenged under the following grounds:

- impossibility of performance.
- duress and/or undue influence.
- Misrepresentation and/or fraud.

[18] The head note in *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co.*<sup>6</sup> is apposite:

“A transaction is an agreement between two or more persons either to end litigation or to prevent litigation resulting from the differences between them. It is most closely equivalent to consent judgment.

Whether extra- judicial or embodied in an order of Court, it has the effect of *res judicata* and, like any other contract and any order of court, made by consent, it may be set aside on the grounds that it was fraudulently obtained or on the grounds of *justus error*, provided the error vitiated true consent and did not

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<sup>6</sup> 1978 (1) SA 914 (AD).

merely relate to motive or the merits of a dispute which it was the very purpose of the parties to compromise.”

[19] The authors Bosch et al, in Conciliation and Arbitration Hand Book at page 59 in a footnote 74 and in interpreting the above case say:

“Settlement agreements cannot be rescinded based on the merits of the dispute that the agreement was intended to settle.”

[20] It would seem on the above principle that even if the award made in terms of s 142 of the LRA was to be successfully reviewed in the context where the settlement agreement was made an award that would not change the status of the settlement agreement. In other words the review would not affect the merit of the settlement. The settlement would still stand and until set aside on any of the above grounds would serve as a bar against any proceedings which may be instituted relating to the merit of the dispute which is its subject matter.

[21] In the present matter it is, common cause that the settlement agreement did not come about as a result of the ruling of the Commissioner neither was it made an arbitration award subsequent to its conclusion.

[22] In light of the above I find that there is no basis upon which the settlement agreement between the parties can be reviewed. I do not however believe that it would be fair to allow the costs to follow the result.

#### Order

[23] In the premises the applicant's application to review the settlement agreement made on 7 November 2013, facilitated by the second respondent under case number GAJB 26792-13, is dismissed with no order as to costs.

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Molahlehi J

Judge of the Labour Court of South  
Africa

Appearances:

For the applicant: Mr TS Mabaso of Mabaso Attorneys

For the respondent: Adv. F Venter

Instructed by: Van Gaalen Attorneys.

LABOUR COURT