IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 1508/2009

In the matter between:

LEBOGANG MALEBO **Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION **1st Respondent**

COMMISSIONER D DIBAKWANE **2nd Respondent**

WOOLWORTHS (PTY) LTD **3rd Respondent**

JUDGMENT

LAGRANGE,AJ

Introduction

1. This application is to review and set aside a settlement agreement concluded under the auspices of the CCMA in the course of conciliation proceedings conducted by the second respondent.

2. The dispute which the applicant referred to the CCMA concerned his alleged unfair dismissal for misconduct on 18 June 2008. The matter was set down for conciliation-arbitration proceedings at the CCMA on 9 July 2008. On that date a settlement agreement was signed by the parties and the conciliating commissioner.

3. The settlement agreement was a pro forma agreement issued by the CCMA with a number of standard preliminary terms and other optional terms designed for typical settlements in dismissal disputes, bearing the prominent headings 'REINSTATEMENT', 'RE-EMPLOYMENT', 'MONETORY (sic) SETTLEMENT', 'EXCLUSION OF STATUTORY PAYMENTS', 'WITHDRAWAL OF DISPUTE' and 'OTHER'.

4. The preamble to the agreement under the handwritten entry of the parties' details reads as follows:

> "The undersigned parties record the settlement of the dispute in the following terms. By signing this agreement, the parties acknowledge that the agreement was read to them and interpreted (where necessary) and that they understand the content thereof. This agreement is in full and final settlement of the dispute referred to the CCMA as well as in full settlement of all statutory payements due to the applicant unless specifically excluded in paragraph 4 of this agreement."

5. All the standard provisions under the abovementioned headings were struck out in pen and the following was written by hand under the heading "OTHER":

> "The parties agreed to settle the dispute by giving the applicant a letter of reference."

6. The agreement also contains a provision to the effect that the parties consent to the settlement agreement being made an arbitration award in terms of s 142A(1) of the Labour Relations Act 66 of 1995 ('the LRA'). Although this formed part of the agreement, there was nothing on the record before me to indicate that the agreement was made an award by the CCMA.

7. The applicant alleges that, in a one-on-one meeting between the two of them following one between the commissioner and the company representative, the commissioner attempted to persuade him to withdraw the case because it was not easy to win against a big company like the respondent. However, the applicant says he refused to accede to this pressure. The commissioner then said he had another case

to attend to and did not want his time wasted. After calling the company representative back into the meeting the commissioner left the room and returned with the settlement form and completed it. According to the applicant he advised him that the employer would give him a letter of reference and that he must go and claim unemployment insurance fund money. The applicant claims he signed the settlement document in ignorance of his rights and under the impression this was normal CCMA practice. He thought another date would be set for the matter but in the meantime the company would give him a letter of reference. He did not understand that by signing the form his case would be closed.

8. The respondent alleges that it dismissed the applicant for gross misconduct. The misconduct consisted of giving his password to other employees which effectively improperly permitted them, when he was absent for a month, to order items from within the store where he worked to re-stock the in-house coffee shop. The respondent's representative at the enquiry denies anything untoward occurred in her presence at the conciliation and recalls that the commissioner asking the company if it would be prepared to provide a letter of reference in full and final settlement of the matter.

9. On the applicant's account the conciliation lasted less than 40 minutes, whereas the respondent says it took an hour and a half.

10. The respondent also attaches a letter received by it from the applicant after the conciliation hearing in which he complained about not receiving his letter of reference in terms of the settlement agreement. He then asks for reinstatement in view of the delay in complying with the terms of the settlement agreement. Another letter more than two months later from the applicant reiterates his demand for the letter of reference. Neither of the applicant's letters make any reference to him being misled into signing the settlement agreement or that he was under a false impression about what was going on. There appears to be some dispute about whether the letter of reference was ever sent or received by the applicant but that is of no relevance to the issue at hand.

Reviewing and setting aside the settlement agreement in terms of section 145 of the LRA

11. As mentioned above, it appears on the face of the record that the settlement agreement was not made an award. Thus, even though the review application is brought in terms of section 145 of the LRA, it does not seek to set aside an award by the commissioner. Consequently, the application to review the settlement agreement in terms of section 145 would appear to be misplaced.

12. 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.

13. In ***Shortridge v Metal & Engineering Industries Bargaining Council & Others* (2007) 28 ILJ 2328 (LC)**, Ngulwana AJ dismissed an application to review and set aside a settlement agreement, which also had not been made a CCMA award. In that case the grounds on which the applicant sought to set aside the settlement agreement was that the union which concluded it had no mandate to do so. The learned judge held that a settlement agreement which has not been made a CCMA award cannot be reviewed under section 145 of the LRA.[1]

14. ***In Mavundla & Others v Vulpine Investments Ltd t/a Keg & Thistle & others* (2000) 21 ILJ 2280 (LC)**, Stein AJ dealt with a claim in which certain individual applicants concluded an settlement agreement supposedly on behalf of all the

[1] At 2329, par [4] of the judgment.

applicants during conciliation proceedings. In that matter, the court found that the arbitrator had acted improperly in allowing a consultant to represent the employer party in the conciliation proceedings and set the conciliation proceedings aside.[2] The court also set aside the certificate of outcome on the basis that the commissioner had not properly considered if the settlement agreement had the consent of all the individual applicants, and therefore could have been satisfied that the dispute had been resolved in respect of all the applicants in the dispute.[3]

15. However, the court in *Mavundla* did not set aside the settlement agreement as a result of setting aside the conciliation proceedings. At 2286, par [34] the court held:

> "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 their dispute 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."

16. By contrast, in ***Kasipersad v Commissionn for Conciliation, Mediation and Arbitration and others*** **(2003) 24 ILJ 178 (LC)**, Pillay J set aside a settlement agreement and the certificate of outcome which emanated from a conciliaton process in which the commissioner had exercised improper influence in persuading the applicant to withdraw his case.

[2] At 2286-7, paras [36] – [39]of the judgment
[3] At 2287, paras [40] – [41] of the judgment.

Alternative relief under section 158(i)(g) of the LRA

17. Unlike in *Mavundla* or *Kasipersad*, the applicant has not sought relief in the form of setting aside the certificate of outcome, assuming one was issued. Thus he does not rely on this alternative basis of attack under the more general power of this court to review the commissioner's performance of this function under section 158(i)(g) of the LRA.

18. The only remaining basis for relying on the general review powers of this court under section 158(1)(g) is that the commissioner's alleged misconduct requires the conciliation proceedings and the settlement agreement to be set aside along the lines of reasoning in *Kasipersad*'s case. However, as *Mavundla*'s case illustrates, even where there are good grounds for invalidating the conciliation process it might not necessarily mean that any settlement agreement concluded between the parties in the course of those proceedings must be set aside too.

19. In *Kasipersad'*s case, the court found that the misconduct of the commissioner consisted of improperly inducing the conclusion of the settlement agreement by giving him one sided advice on his prospects which resulted in the applicant withdrawing his claim. By contrast with that case, the applicant in this matter says he resisted the commissioner's pressure to withdraw his case. Accordingly, he cannot rely on that alleged misconduct for setting aside the settlement agreement.

20. The reason why the applicant says he signed the settlement agreement was that he was ignorant of what it really meant and the commissioner was being aggressive towards him and pressurizing him to sign the document because he had another matter to attend to. The applicant assumed that the agreement was merely one of the proceedings in the mater and not the end of his case. In the meantime, the employer would provide him with a letter of reference.

21. Assuming, for the sake of argument that the settlement agreement in this case could be set aside on review on the principles which appear to have been applied in *Kasipersad*'s case, I do not believe the evidence supports the applicant's contentions.

22. Firstly, the respondent denies the applicant had no opportunity to ask what the form was about or that the commissioner was aggressive towards him. The applicant provides no other explanation for not having considered the express terms of the agreement. On the principles in ***Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)**, I must accept the respondent's version of what transpired when the settlement agreement was concluded insofar as it conflicts with that of the applicant.

23. Secondly, the express terms of the agreement leave little doubt that it concluded the dispute and there is no basis for believing the whole dispute was merely one step in the CCMA proceedings. Even if regard is had only to the handwritten portion of the agreement, it is inexplicable why the applicant would not have queried the omission of any mention of further steps in that section. If I accept, as I must, that the applicant was not denied an opportunity to consider the document, he has only himself to blame for signing it without acquainting himself with its terms. Further, the letters of the applicant show that he was articulate and more than able to express himself in English. Moreover, he was a Commercial Departmental Manager before his dismissal. There is no basis for believing he would not have understood the importance of the document he was signing, and given it the consideration it required.

24. Thirdly, the applicant's conduct subsequent to the settlement agreement as evidenced in his correspondence with the third respondent, is at odds with the misunderstanding he claims to have been labouring under when the settlement agreement was signed.

25. Thus, the settlement was signed on 9 July 2008, yet in his first letter of 4 March 2009 to the company, the applicant makes no mention of any concerns he ought to have had by then that the CCMA proceedings had not resumed. What he does request is the letter of reference. He further claims that because he has not received it the company is effectively in breach of the settlement agreement, he now requests reinstatement by

the company and a transfer to another division. He does not call for a resumption of the supposedly pending CCMA proceedings. His supposed understanding that the CCMA proceedings would be resumed in some form is not even mentioned in his later letter of 22 May 2009.

26. Further, there is no evidence, even on the applicant's own version, that he ever approached the CCMA at any time after July 2008 to enquire why CCMA proceedings had not been reconvened. This would have been the most obvious course of conduct if he understood matters as he claimed he did.

27. In short, on the probabilities, the evidence does not support the applicant's contention that the settlement agreement was in some way obtained without his informed consent.

28. Thus, even if it were possible in law to set aside the settlement agreement under sections 145 or 158(1)(g) of the LRA, on the basis argued for by the applicant there is no factual basis for doing so. For this reason it is not necessary to consider further whether such claims could be sustained on the kind of reasoning applied in *Kasipersad'*s case.

Conclusion

29. Accordingly,

    29.1. the application to review and set aside the settlement agreement concluded on 9 July 2008 between the applicant and the third respondent in the course of conciliation proceedings conducted by the second respondent is dismissed.

    29.2. the applicant is ordered to pay the third respondent's costs.

ROBERT LAGRANGE

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 26 February 2010

Date of judgment: 15 April 2010

Appearances:

For the applicant:

M K Moholo of Karabo Labour Organisation

For the respondent:

Attorney: G M Kirby-Hirst