**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Not Reportable

Case No: D 577/2021

In the matter between:

**DUMSANI SHANGE AND MUSA GASA** **APPLICANTS**

and

**UNICO TEC (PTY) LTD** **RESPONDENT**

**Heard:** **23-26 January**

**Closing arguments:** **29 February 2024**

**Delivered:** **This judgment was delivered electronically to the parties by email. The date and time for hand-down is deemed to be 20 May 2024.**

**JUDGMENT**

**WHITCHER J**

Introduction

[1] The applicants, Mr Shange and Mr Gasa, were employed by the respondent until 31 May 2021. The question in this case is whether they have established that the "Settlement Agreements" signed by them in May 2021 were signed as a result of duress[1] and thus may be avoided by them, and if so, whether they were unfairly retrenched.

[1] The applicants' pleadings read with their evidence demonstrates that applicants sought to avoid the agreements solely on this ground, and not for instance undue influence, mistake, misrepresentation or that the waiver clause in the agreement was against public policy (in terms of the test developed by the Constitutional Court in Barkhuizen v Napier. The claim that the applicants did not participate in the drafting of the agreement is neither here nor there. The settlement agreement constituted an offer by the respondent for acceptance or rejection by the applicants.

[2] The respondent manufactures brake fluid and anti-freeze. The applicants were employed by the respondent as filling operators. Mr Shange on 1 March 2018 and Mr Gasa on 1 September 1999.

[3] On 6 April 2021, the respondent informed its employees of its intention to restructure and rationalise the business due to various factors, including the loss of significant business from Shell, BP and Sasol and that the respondent intended to use LIFO subject to skills in all affected posts. On 8 April, the filling operators were informed that the business required only four filling lines and that the required positions of filling operators would be advertised. The applicants, together with certain employees from other affected posts applied for the advertised posts and were interviewed on 22 April 2021 with Mr Kanhai, the respondent's operations director, as the only interviewer.

[4] On 3 May 2021, in one-on-one meetings, Mr Kanhai informed the applicants that their applications for the filling operator positions had been unsuccessful.

[5] In the same one-to-one meetings, a document headed "Settlement Agreement" was presented to each applicant and pursuant to those meetings, the applicants signed the agreements: Mr Shange on 3 May, Mr Gasa on 4 May and the third applicant[2] on 5 May 2021.

[6] The respondent in its plea highlighted the following express terms of the agreement which are common to all the agreements:[3]

> ***2 Recordal***
>
> *The parties have consulted with the one another in terms of section 189 and 189A of the LRA with regard to the possible termination of the employee based on the Company's operational requirement and with regard to the payments arising therefrom (clause 2.2).*
>
> *Without admission of liability, the Company has offered the Employee an increased severance package (clause 2.3).*

[2] The third applicant's case was withdrawn at the commencement of the trial.
[3] The agreements are six pages long with thirteen clauses.

*The Employee has accepted the Company's increased package (clause 2.4).*

***3 Termination***

*Notwithstanding the dates of signature of the agreement, the Employee's position with the Company will terminate by mutual agreement on 31 May 2021 (clause 3).*

***4 Payment resulting from termination***

*The Employee will receive their full ordinary monthly remuneration and ordinary benefits for the month of May 2021 (4.1).*

*In addition, the Company will pay to the Employee (4.2):*

*(1) A severance payment of [Rx]…being the equivalent of one week's total cost to the company for every completed year of service.*

*(2) [Rx] being the equivalent of 1 months' notice pay.*

*(3) Accrued statutory leave.*

*(4) An* ex gratia *amount of [Rx]…being an amount equivalent to one month of the Employee's cash component.*

***10 Full and Final Settlement***

*This agreement and the Employee's acceptance of the payments are in full and final settlement of all disputes, claims and rights of action, whether in terms of statute, common law, delict or otherwise, and whether disclosed or undisclosed, which exist or might exist between the Employee and the Company arising out of the Employee's employment contract and relationship with the Company, their employment, and the termination of such employment contract. The Employee specifically agrees that thy have no claim, action, or right of action against the Company for compensation, damages, reinstatement, re-employment, remuneration, notice pay, the value of accrued leave, bonuses, unfair dismissal or for any other amount or remedy whatsoever, arising, other than what is contained in this agreement.*

***12 Enforcement of the Agreement***

*The parties agree that they consider the provisions of the agreement to be valid, reasonable and enforceable (12.1).*

***13 Sole Agreement and Non-Variation***

*This agreement constitutes the sole agreement between the parties regarding the termination of the employment relationship…*

[7] The headings were highlighted as above and clause 4 incorporated different amounts, according to the employee's monthly pay and years of service: 3 years' service in respect of Shange and 21 years in respect of Gasa.

The settlement agreements

*The pleadings*

[8] In amplification of their case that they did not sign the agreements freely and voluntarily but signed them under duress, Mr Shange and Mr Gasa pleaded that when the agreements were presented to them, they requested some time to consider the settlement agreements as the terms had not been explained to them at all and they had not been given an opportunity to apply their minds to same or to seek legal advice. Mr Kanhai refused to grant the indulgence they requested and instead pressured them into signing the agreements on the basis that if they refused to sign the agreements, they will be dismissed with no payment of their last salary or any severance payment. They succumbed to the pressure by Mr Kanhai and ended up signing the settlement agreements without fully understanding the legal implications of doing so.[4]

[9] The respondent pleaded that in one-on-one meetings on 3 May 2021, the terms of the agreements were explained to the applicants in detail by one Ms Jacobs, an external labour consultant specifically employed to guide the respondent in compliance matters. Mr Kanhai insisted that the applicants not sign the agreements immediately but take time to first consider them and to obtain advice if they deemed it necessary to do so. Mr Shange signed his agreement on the same day, having indicated that he did not require additional time to consider same; Mr Gasa signed his on 4 May 2021, the day following it having first been presented to him and the third applicant[5] on 5 May 2021, two days after it had first been presented to him.

*The evidence adduced*

[4] Emphasis added.

[5] The referral on behalf of the third applicant was withdrawn at the commencement of the trial.

[10] Mr Shange explained how he came to sign the settlement agreement in response to the following questions by his attorney [emphasis added].

[11] Did he [Mr Kanhai] explain this document? “No, he just gave me the document and said sign here. When I refused, he said its ok, you won’t get ***anything*** from the company. I ***thought*** that meant that if I did not sign this document, I won’t get the severance package – when he instructed me to sign the document, I signed.”

[12] Did you take the time to read the document before you signed it? “No, I did not read this document – even a copy was not given to me – I was told to sign *as I was leaving* – that is why I decided to take this letter [agreement] to lawyers to advise me.”

[13] Did you request an opportunity to go through the document? “I did not get an opportunity.”

[14] Did you ask for an opportunity to read what you were signing? “I was never given an opportunity and I never asked for an opportunity.”

[15] Later, Mr Shange said Mr Kanhai told him he is signing the document because he no longer has a job.

[16] In cross-examination, Mr Shange said: “I did not agree to the document – he just said I no longer had a job and take all the papers.”

[17] When it was put to him that Jacobs read out the agreement, Mr Shange said he prefers not to answer that question.

[18] When it was put to him that Mr Kanhai will testify that he was told to take some time to read the document, Mr Shange said “He said he wants us to sign the document.”

[19] When it was put to him that Mr Kanhai will testify that Ms Jacobs explained that if he did not agree to the settlement, he would not be paid the *ex gratia* payment, Mr Shange said: “He said if you do not sign he was not going to give us ***this*** money.”

[20] In re-examination, Mr Shange explained the last statement thus: “I thought all my money. I asked him to explain the figures – he did – but I could not see.”

[21] According to Mr Gasa, Mr Kanhai presented the agreement to him with no explanation at all and instructed him to sign, failing which “he would not get ***[his] money***.” He did not understand what money Mr Kanhai was referring to.

[22] He did not ask Mr Kanhai to explain the document because Mr Kanhai’s manner was that he “just wanted us to leave”.

[23] Before he signed the agreement, he took it home and showed it to his wife but did not read it “because “everyone knows he left school early.”

[24] When he met with Mr Kanhai again the following day, he signed the agreement because Mr Kanhai told him that if he did not, he would not get ***his money*** and “this was the last opportunity.”

[25] In cross examination, he conceded that Ms Jacobs spoke during the meeting. When it was put to him that the document and the amounts were explained to him, he said he could not remember. When asked to look at the document, he said he did not have his glasses.

[26] Mr Kanhai testified that the agreements were read out paragraph by paragraph by Jacobs, the applicants were asked if they understood what she had read out and it was explained that should they not wish to sign the agreement they will be paid only the amounts required by law. It was explained that if they agree they will be paid the *ex gratia* amount plus they would not be required to work until the end of May.

[27] Mr Shange said he will take the money and signed on the spot. Mr Gasa and the third applicant, on the other hand, asked for time to consider the matter, which was granted. On their return, they signed the agreements, Mr Gasa on 4 May and the third applicant on 5 May.

Findings

*No clear and plausible version*

[28] In my view, the applicants case ought to have been dismissed at the end of their case.[6] They failed to provide a clear (never mind plausible) factual version as what happened in the meeting of 3 May and what led them to sign the agreements. They did not provide a clear version as to what Mr Kanhai conveyed to them and allegedly threatened.

[29] They were evasive when confronted with important questions and their factual case suffered from material contradictions.

[30] By way of example, when it was put to Mr Shange that Ms Jacobs read out the document, he said he prefers not to answer that question.

[31] When Mr Gasa was asked by respondent's counsel to look at the agreement in court for the purposes of questioning him on it, he claimed he did not have his glasses, despite coming to court to address the very document.

[32] Mr Shange and Mr Gasa suggested that they have a very poor understanding of spoken and written English, despite evidence that their jobs required reading technical instructions and writing up technical reports and that they drafted in English articulate motivations when they applied for the posts of filling operators. I pause to emphasize here that their case in their pleadings and testimony was not that the

[6] The respondent had been entitled to pray for and to be granted absolution from the instance.

agreement was drafted in legalese which a lay person would not have understood, especially a person whose second language is English.[7]

[33] They pleaded that they asked for time to consider the agreements, but Mr Kanhai refused the request. In stark contradiction, Mr Shange testified that he did not ask for time to consider the agreement and on Mr Gasa's own testimony he was in fact given time to consider the agreement (he was permitted to take the agreement home with him before he signed), and then implausibly did not attempt to read the agreement during that time.

[34] Mr Shange at first testified that the agreement was not explained at ***all*** and he did not ask for an explanation, but later in his testimony, he said he asked Mr Kanhai to explain the figures and he did, but he did not understand.

[35] They categorically pleaded that Mr Kanhai threatened to withhold their last salary and severance payment, but in their testimony provided no clear version as to what Mr Kanhai allegedly threatened to do. Their testimony was largely based on speculation, what they *thought* he was threatening to withhold.

[36] Mr Shange and Mr Gasa gave the impression in their evidence-in-chief that they met with only Mr Kanhai on 3 May – yet it was an undisputed fact that Ms Jacobs attended the meetings and Mr Gasa conceded under cross-examination that she participated in the meeting.

[37] They claimed in their pleadings that the respondent did not serve a section 189(3) notice and did not explain the reasons for the restructure but abandoned same in the pre-trial and in Mr Gasa's testimony.

[38] The court, of course must look at all the evidence adduced. I found nothing in Mr Kanhai's evidence (and the fact that he did not call Ms Jacobs) that assisted the applicants' version.

[7] Their counsel tried to make such a case in his cross-examination of Mr Kanhai.

[39] Mr Kanhai gave a clear consistent version as to what happened in the meetings of 3 May.

[40] Importantly, his version on a decisive aspect of the case, namely that he gave the applicants an opportunity to think about and seek advice about the agreement before signing it was corroborated by Mr Gasa's own testimony, namely that he was not required to sign the agreement in the meeting on 3 May but was given a copy to take home and only signed it the next day. This aspect of Mr Kanhai's evidence was also corroborated by documentary evidence that the third respondent similarly signed his agreement two days after it was presented to him, namely on 5 May.

[41] Finally, turning to the probabilities of the applicants' version, I find it improbable that Mr Shange and Mr Gasa, who did not strike me as unsophisticated naïve employees, would have signed the agreements just because Mr Kanhai (allegedly) instructed them to sign without more. It is more likely than not that they were attracted to the consideration, namely immediate extra money (the *ex gratia* payment) and the requirement that they did not have to work until 31 May 2021, and then later for some reason regretted their decision. It was not averred by the applicants that the consideration was not that good for them to have agreed to forfeit their rights to judicial redress for it.

*Duress*

[42] Given my findings above, that the applicants did present a clear version as to what occurred in the meetings of 3 May, it is not necessary to delve into the elements required to establish that an agreement was signed because of duress.

[43] In any event, in respect of financial and economic duress which the applicants claim, the Supreme Court of Appeal in *Medscheme Holdings (Pty) Ltd and Another v Bhamjee (Medscheme)* held as follows:

> 'English and American law both recognise that economic pressure may, in appropriate cases, constitute duress that allows for the avoidance of a contract. As pointed out by Van den Heever AJ in *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK 1999 (1) SA 780 (T), that

principle has yet to be authoritatively accepted in our law. While there would seem to be no principled reason why the threat of economic ruin should not, in appropriate cases, be recognised as duress, such cases are likely to be rare. (The point is underlined by the dearth of English cases in which economic duress was found to have existed.) For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with Van den Heever AJ (in *Van den Berg & Kie Rekenkundige Beamptes* at 795E - 796A) that hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more - which is absent in this case - would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress.'

[44] No evidence in any event was adduced to the effect that a threat not to pay a month's salary and severance pay (if I had found that this was what had been threatened) would have amounted to or did amount to financial ruin for Mr Shange and Mr Gasa.

[45] A further requirement necessary to establish duress is that the threat of harm giving rise to duress must be imminent and inevitable. On this ground too, the applicants' claim of duress would have failed. This is apparent from the undisputed evidence pertaining to the dates of signature of the agreements by the applicants (and by the erstwhile third applicant). In this regard, I found that on the evidence the applicants were not immediately required to sign the agreements and were offered time to consider the agreements before signing, which opportunity was taken by Mr Gasa and the third applicant. In light thereof it cannot be contended that there was any immediacy to the alleged threat giving rise to the duress.

Conclusion

[46] The applicants have failed to establish that the voluntary separation agreements signed by them were signed as a result of duress, or that they are entitled to avoid said agreements on any other basis, the effect of which is that they have failed to establish that they were in fact dismissed by the respondent.

Order

[47] The referral is dismissed, with no order as to costs.

**Benita Whitcher**
**Judge of the Labour Court of South Africa**

APPEARANCES:

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|---|---|
| For the Applicants: | Mr Hlogwane, from Mhlanga Incorporated |
| For the Respondent: | Mr D Aldworth |
| Instructed by | Lott Attorneys |