REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P 294/12

In the matter between:

WILLEM RICHARD METJIELIES **Applicant**

~~and~~And

STRATOSTAFF (PTY) LTD t/a ADECCO **Respondent**

Heard: **9 September 2013**

Delivered: **27 January 2015**

Summary: The respondent's failure to explain to the applicant the contests of an agreement terminating the employment relationship by mutual consent rendered the agreement null and void.

JUDGMENT

LALLIE J

Introduction

[1] In this application the applicant seeks an order directing that the settlement agreement concluded by the parties be set aside in terms of section 77 (3) read with section 77(A)(e) of the Basic Conditions of Employment Act 75 of

1997 (“the BCEA”) alternatively, declaring the settlement agreement entered into between the parties null and void.

[2] The facts of this matter are briefly that the applicant was employed as a driver by the respondent which is a labour broker. He performed his duties at UTI, a client of the respondent. In February 2012, the respondent suspected the existence of a theft syndicate which stole parts which belonged to VW, a car manufacture. As part of its investigation it had a number of its employees including the applicant subjected to a polygraph test. The applicant was amongst employees who failed the polygraph test. On 13 March 2012, UTI terminated its agreement with the respondent in terms of which the applicant performed his duties. The following day the respondent informed the applicant of the decision taken by UTI. An agreement was subsequently reached between the applicant and the respondent in terms of which their employment relationship was terminated by mutual consent and the applicant paid all statutory money due to him. The agreement was signed by both parties. When the applicant referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (“the CCMA”) the respondent raised a *point in limine* that the CCMA lacked the necessary jurisdiction as the employment relationship between the parties had been terminated by mutual agreement. The applicant submitted that at the time of entering into the agreement he was of the view that he was acknowledging receipt of documents from UTI and not aware of the fact that he was entering into the agreement. He therefore approached this Court to have the agreement declared null and void. His application is opposed by the respondent. When the application was set down for hearing there was a dispute of fact as a result of which the matter was referred to oral evidence.

[3] The applicant’s version was that on 12 February 2012,(the applicant conceded that the incident took place in March) he was informed by Mr Kukkuk (“Kukkuk”), a manager at UTI, that Ms Celest Dorfling (“Dorfling”), an employee of the respondent wished to see him. He then joined Kukkuk and Dorfling in the office where the latter told him that UTI did not need his services any more because he had failed the polygraph test. His response

was that he did not want to fight and Dorfling told him not to worry and promised him that the respondent would find him another position elsewhere. He added that he was disappointed and cried because he had done nothing wrong. Dorfling told him to sign a document and further gave him his letter of the termination of his contract of employment. He noticed later that the letter had been signed on behalf of the respondent by his supervisor, Mr Behr who was not even at the meeting. He challenged the fairness of his dismissal at the CCMA where he was shown for the first time the agreement of the termination of his employment by mutual consent. He conceded that the signature appended to the agreement on behalf of the employee was his. He however, stated that he was misled into signing the agreement by Dorfling who put a file on the document and told him to sign it. He signed the agreement under the impression that it was a letter confirming UTI's decision that it no longer required his services. He submitted that had the agreement been read out to him he would not have signed it as it deprived him of his right to approach the CCMA and the Labour Court. He denied that Dorfling raised the issue of his investigation or anything related to his dismissal with him.

[4] Dorfling testified on behalf of the respondent. The difference between her version and the applicant's is that she never misled the applicant into signing the agreement. The documents she had were clearly marked and as she was explaining them to the applicant, the applicant interrupted and told her that it did not help to fight. She denied covering the agreement with a file. She further denied that the applicant was emotional.

[5] It was argued on behalf of the applicant that the agreement was void ab initio. The applicant sought to rely on the following dictum in *Eastwood v Shepstone*[1] which was relied on in *Sasfin (Pty) Ltd v Beukes*:[2]

> 'Now this court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised, but when once it is clear that any arrangement is against public policy, the Court

[1] 1902 TS 294 at 302.
[2] 1989 (1) SA 1 (A) pp 8J-9A.

> would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not it's actually proved results'.

The Applicant further sought to rely on Christie, the Law of Contract in South Africa, fifth edition at page 345 where the author confirmed that a contract or its term may be declared contrary to public policy if it is clearly inimical to the interest of the community, contrary to law or morality, or is contrary to social or economic experience, or is plainly improper and unconscionable, or unduly harsh and oppressive.

[6] The respondent sought to rely on the *caveat subscriptor* principle which was expressed as follows in *George v Fairmead (Pty) Ltd*[3]:

> 'When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature. In cases of the type of which the three I have mentioned are examples, the party who seeks relief must convince the Court that he was misled as to the purport of the words to which he was thus signifying his assent…'.

The respondent also relied on *Afrox Healthcare Bpk v Strydom*[4] in arguing that the applicant's failure to read the agreement before signing it did not mean that he was not bound by it. The respondent further argued that the court to exercise the power to declare contracts contrary to public policy sparingly.

[7] The applicant has the onus to prove that he signed the agreement as a result of duress, undue influence and gross misrepresentation by Dorfling. In the founding and replying affidavit the applicant submitted that he was under the impression that he was acknowledging receipt of the letter of the termination of his services when he signed the agreement. It is only when he was giving oral evidence that he stated that the document he signed had been covered with a file when Dorfling told him to sign it. When the version presented in court is consider with all the other evidence including the answering affidavit,

[3] 1958 (2) SA 465 (A) at p472.
[4] [2002] 4 All SA 125 (SCA)

it becomes clear that the agreement was not covered with a file when the applicant signed it. What is however, consistent in the applicant's version is that the respondent did not make him aware of the contents of the agreement before he signed it. The circumstances under which the applicant said he did not want to fight, are in dispute. The applicant testified that he made the utterance after he was told that UTI no longer required his services and after Dorfling had promised to find him work somewhere else. His version is consistent with evidence that is common cause that the respondent found alternative work for its employees who were rejected by some of its clients. The respondent had found work for the applicant at UTI after he was rejected by one of its clients and based on the promise made by Dorfling it did find him alternative work after he left UTI. The applicant's version is therefore probable. He insisted that he was not afforded an opportunity to read the agreement before signing it.

[8] I have considered the respondent's version that the applicant interrupted Dorfling when she attempted to explain the agreement to the applicant. This is a concession that Dorfling did not explain the contents of the agreement to the applicant. The interruption did not relieve the respondent of its obligation to explain the contents of the agreement to the applicant. The duty on the respondent was more onerous because the agreement diminished the applicant's right to challenge the fairness of the termination of his contract of employment. The respondent was the sole beneficiary and, all the applicant got from the agreement was the reduction of his rights. The respondent's own version is improbable when viewed against its submission that the applicant benefited from the agreement in that he was spared investigation for misconduct and leaving the respondent under a cloud of dismissal because, consistent with the applicant's version, the respondent found alternative work for the applicant from one of its clients. As Dorfling did not explain the contents of the agreement to the applicant who did not read it, it is not probable that the respondent made the proposal to the applicant that he will not be subjected to discipline should he not sign the agreement. The applicant could only agree to the promise of being spared investigation after gaining knowledge of the contents of the agreement. I have noted the respondents'

attempt to rely on the principles of the law of contract which are undeniably relevant in Labour Law. However, the employment relationship is different from the relationship between other contracting parties. The authority of this Court to intervene in agreements of contracting parties should be used sparingly, however, the circumstances of this matter justify intervention as the respondent failed to explain to the applicant the contests of the agreement as well as its consequences. The respondent, represented by Dorfling, was a very powerful party with knowledge of the consequences of entering into the contract. The applicant lacked such knowledge and entered into the agreement to his detriment.

[9] It was argued on behalf of the respondent that the applicant waived his right to have the agreement explained to him. A right that has been waived gets extinguished. In order to establish waiver, the respondent must prove that the applicant took a decision to abandon his right either expressly or by conduct inconsistent with an intention to enforce the right relied on. Waiver is however, not implied easily. The decision must be taken with full knowledge of the right the applicant decided to abandon and must be conveyed to the other party. See *Feinstein v Niggle and Another*[5]. Dorfling's evidence that her failure to explain the contents of the agreement to the applicant before he signed it resulted from his interruption. The applicant's interruption does not constitute conduct consistent with the intention to abandon his right. The respondent did not discharge the onus that when the applicant interrupted Dorfling, he did so with full knowledge of his right to have the agreement explained to him particularly the clause which obliterated his right to challenge the fairness to the termination of his contract of employment. As the applicant did not waiver his right to have the agreement explained to him the respondent failed in its duty of placing him in a position to be party to the agreement with full knowledge of its contents.

[10] In the premises, the following order is made:

[5] 1981 (2) SA 684 (AD)

10.1 The agreement concluded by the applicant and the respondent on 14 March 2012 terminating the applicant's employment by mutual consent is declared null and void.

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Lallie J

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant: Mrs Van Staden of Justice Centre

For the Respondent: Ms Share of Kaplan Blumberg