IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 1394/2018**

In the matter between:

TARGET STORES **APPLICANT**

and

VELAPHI Z. DLAMINI N.O. **1ST RESPONDENT**
SABELO SHABANGU **2ND RESPONDENT**
CONCILIATION, MEDIATION ARBITRATION COMMISSION **3RD RESPONDENT**

Neutral Citation	:	**Target Stores and Velaphi Z. Dlamini & 2 Others (1394/18) [2019] SZHC 123 (16 JULY 2019)**
Coram	:	**MABUZA – PJ**
Heard	:	**15 APRIL 2019**
Delivered	:	**16 JULY 2019**

SUMMARY

Labour Law: Industrial Relations – Employer and Employee – Termination of employment – Employee successfully claims terminal benefits for automatic unfair dismissal - Applicant (Employer) seeks review and setting aside of Arbitration Award by CMAC Commissioner on grounds inter alia that Commissioner failed to apply his mind resulting in gross irregularity – Applicant fails to prove said ground – Application dismissed with costs.

JUDGMENT

MABUZA -PJ

[1] The Applicant herein seeks an order in the following terms:

(a) Reviewing the 1st Respondent's award dated 30th July 2018 in the matter with reference number NHO 088/16.

(b) Setting aside the award as aforesaid.

(c) Costs of suit in the event of unsuccessful opposition.

(d) Further and/or alternative relief.

[2] The application is opposed by the 2nd Respondent.

[3] The Applicant employed the 2nd Respondent on the 26th April 2007 as a shop

Assistant and the 2nd Respondent was in continuous employment until the Applicant terminated his services on 14th June 2016. At the time of termination 2nd Respondent was earning E1,470.00 per month.

[4] The 2nd Respondent reported a dispute for automatic unfair dismissal to the 3rd Respondent (CMAC) on the 12th September 2016. The dispute was conciliated, however it remained unresolved and CMAC issued a Certificate of Unresolved Dispute No. 467/16. On the 3rd October 2016 the parties requested that the dispute be decided through arbitration under CMAC's auspices and the 1st Respondent was appointed to arbitrate it (see No. NHO 088/16).

[5] When the matter came before the 1st Respondent, the 2nd Respondent had lodged a claim wherein he sought terminal benefits arising from what he alleged to be automatic unfair dismissal as follows:

"Notice Pay	E1,577.40
Additional Notice Pay	E1,941.44
Leave Pay	E1,213.68
Underpayments	E3,790.36
Overtime Due (Saturdays)	E4,190.36
Overtime Due (lunch hrs)	E3,245.13
Maximum Compensation for	

Automatically unfair dismissal	<u>E37,857.40</u>
TOTAL..	**<u>E53,815.77</u>**

[6] He succeeded and was awarded the following:

"7.3.1	Notice Pay	E1,577.40
7.3.2	Additional Notice Pay	E1,941.44
7.3.3	Leave Pay	E1,213.68
7.3.4	Underpayments	E3,790.36
7.3.5	Overtime Due (Saturdays)	E4,190.36
7.3.6	Overtime Due (lunch hrs)	E3,245.13
7.3.7	Fifteen months compensation for	
	Automatically unfair dismissal	<u>E23,661.00</u>
		<u>E39,619.14</u>
	E39,619.14 – E5,000.00 =	**<u>E34,619.14</u>"**

[7] It was further ordered that the Applicant (Respondent then) pay to Mr. Shabangu the sum of E34,619.14 at the CMAC offices at SWSC Siyalu Building by the 30th August 2018.

[8] It is that order of the 30th July 2018 that the Applicant seeks to review in this Court.

[9] Earlier on in the matter, the 2nd Respondent had accepted a sum of money from the Applicant in full and final settlement. The amount of money involved was the amount of E5,000.00 (Five thousand Emalangeni).

[10] At arbitration the Applicant resisted the 2nd Respondent's claim on the basis that the 2nd Respondent had accepted a sum of money in full and final settlement and that the 2nd Respondent had waived his rights for further claims against the Applicant.

[11] The Applicant states that essentially the issue for determination by the 1st Respondent was whether the 2nd Respondent had waived his rights for further relief against the Applicant in particular as the Applicant had raised the issue that the 2nd Respondent was estopped from making further claims and did not challenge the merits of the case.

[12] The Applicant contends that in determining the matter, the 1st Respondent held that the settlement between the parties was invalid because of undue influence and fraudulent misrepresentation that the 2nd Respondent was subjected to.

[13] The Applicant contends further that there was no evidence led to prove either undue influence or fraudulent misrepresentation and that the 1st Respondent's ruling was precipitated by his failure to apply his mind to the matter before him, hence the belief by the Applicant that the 1st Respondent's reasons were biased and unreasonable.

[14] Consequently the extractable ground of review from the founding affidavit is that the 1st Respondent did not **apply his mind** to the facts before him thereby committing a gross irregularity. Other "review" words that have been banded randomly into the air are "biased" and "unreasonable" without any specific reference/application to the matter at hand.

[15] The Applicant upon its own admission elected not to defend the 2nd Respondent's claims on the merits but was content with relying on the point of law. And now pleads on the facts that no evidence was led to prove undue influence or fraudulent misrepresentation. I disagree.

Undue influence and fraudulent misrepresentation

[16] According to Wikipedia, in jurisprudence **undue influence** is an equitable doctrine that involves one person taking advantage of a position of power

over another person. This inequality in power between the parties can vitiate one party's consent as they are unable to freely exercise their independence.

Elsewhere, it is the influence by which a person is induced to act, otherwise than by their own free will **or without adequate attention to the consequences** (my emphasis).

[17] When read holistically all the evidence that unfolded before the 1st Respondent is about pressure and undue influence by a powerful employer over a powerless employee. The award succinctly captured this imbalance of power at the following paragraphs:

> **5.11 The Applicant alleged that after the Labour officer had seen that the document bearing the offer was not in his handwriting she directed that it should be written by him. According to the Applicant, what then transpired was that RW2 roped in his attorney to assist him; they both put pressure until he succumbed. He then copied the letter on to a piece of paper, which was eventually submitted to the Labour officer.**
>
> **5.12 Since RW2 was present throughout the arbitration and heard the Applicant's version, he was not led during his evidence-in-chief to state his version of what transpired at his attorney's office when the Applicant was there. Furthermore, during cross-examination, RW2 never denied that he led the Applicant to his attorney's office to**

discuss his claims; RW2 only denied that the Applicant was put under pressure to accept the sum of E5,000.00.

5.13 No evidence was led that while the Applicant held a meeting with RW2 and his attorney, he was advised that he had a right to have his legal representative present during the discussions, but he elected to waive his right. If the negotiations were between the parties and were voluntary, why involve an attorney for one party?

5.14 Attorneys are legal experts whose opinion on legal matters is very influential. Ethically, it is improper for an attorney representing one party to preside over settlement negotiations unless the rights of the other party are explained to him and he elects to waive those rights. Even then, the attorney must proceed with caution. The reason is simply that the attorney represents the interest of one party and as such, he or she is conflicted to mediate.

5.15 The High Court in Busisiwe Manana v Franco Colauonno Civil case No. 2014/2011 dealt with the question of validity of a deed of settlement where the Applicant alleged undue influence. The Court held that where negotiations lead to signing of a deed of settlement, the Court may examine the events that occurred during negotiations to determine if there was undue influence.

5.16 At page 19 of the Busisiwe Manana case (supra), the Court cited the case of Armstrong v Magid and another 1937 AD 260, where the following was said:

> **"It is admitted and seems clear law that a contract induced by undue influence is on the same footing as a contract induced by fraudulent misrepresentation."**

[18] I cannot fault the 1st Respondent's findings and elucidation of the law. From my point of view, this is a sorry tale which did not need to progress as far as it did.

[19] In terms of the law the relationship between the Applicant and the 2nd Respondent should have been one of employer and employee however, reading the evidence as it enfolded before the 1st Respondent, one can easily conclude that the relationship herein was that of master and servant in the feudal sense, in which case the law was hardly followed.

[20] The Regulations of Wages in this case (retail) are there for all to access and use, but the Applicant never bothered itself to follow them choosing instead to flout them with impunity.

[21] The evidence reveals that from the outset the relationship between the parties was a bad one resulting in a bad and unlawful settlement which was skewed in favour of the Applicant to the disadvantage of the 2nd Respondent. This in itself would create anxiety in a weaker employee against a stronger employer. Anxiety in such circumstances breeds fear. The entrance of a

lawyer into this equation compounds the anxiety even further as the scales were crazily tilted against the employee.

[22] In fact I am at pains to understand why the Applicant would want to enforce an unlawful agreement. The claims by the 2nd Respondent are lawfully due to him and the Applicant cannot pretend otherwise.

[23] It is unfortunate that the applicant did not challenge the matter on the merits. Consequently it is the author of its own misfortune. Once again after perusing the 2nd Respondent's evidence holistically, I cannot fault the 1st Respondents conclusion based on the evidence.

[24] In **Armstrong v Magid and Another** 1937 AD 260 (supra) discussed in the High Court case of **Busisiwe Manana v Franco Colasuonno** Civil case No. 2014/2011 the element of fraudulent misrepresentation was discussed. Dealing with the validity of a deed of settlement where the Applicant alleged undue influence, the Court held that where negotiations lead to signing of a deed of settlement, **these prior negotiations are not privileged.** Put differently, the Court may examine the events that occurred during negotiations to determine whether there was undue influence.

[25] The 1st Respondent thereafter proceeded to examine said events and in the Award states as follows:

> **5.20 It was proven that the Applicant's indefinite contract of employment was varied to fixed-term employment, which was later declared to have expired. Moreover, his position was declared redundant. The Respondent did not allege and prove that the Applicant was first paid his accrued benefits before the fixed-term contract was introduced. Furthermore, the Respondent failed to show that it had a bona fide reason for declaring the Applicant's position redundant.**
>
> **5.21 The Respondent did not establish that the Applicant was consulted to explore alternatives to retrenchment. What is evident from the proven facts is that, the motive for terminating the Applicant's contract was Respondent's incapacity to pay him the benefits due to him in terms of the Wages order. Put differently, the termination of the Applicant's contract of employment had everything to do with him lodging a grievance for underpayment and overtime.**
>
> **5.22 Now, considering the above factual background leading to the signing of the agreement, I find that it was improper for the Respondent to rope in his attorney to tell the Applicant that he was not entitled to any amount in excess of the E5,000.00. Clearly, the presence of the Respondent's attorney made the negotiations to be unevenly balanced. Worse still, it was fraudulently misrepresented that the Applicant was not entitled to his claims.**

5.23 I hold that the agreement cited in full in paragraph 5.10 above, which purports to be a full and final settlement of the dispute was unlawfully obtained and as such is invalid. The fact that RW1 (Labour officer) asked the Applicant if he was voluntarily entering into the agreement is immaterial because at that point the Respondent's attorneys had convinced the Applicant that the other claims were not legally due. The Applicant's consent was improperly obtained.

5.24 In fact, the Respondent's letter to the Applicant marked "A4" demonstrates the former's attitude toward the latter's claims. "A4" resembles the utterances Applicant alleged were made by the Respondent's attorney to him during negotiations. RW2 said the letter was written by a friend, but did not state his friend's name. The language used in "A4" shows that the Respondent's friend had a legal background.

5.25 Having found that the agreement was void, I also find that the termination of the Applicant's services was automatically unfair. Section 2 of the Industrial Relations Act 2000 (as amended) provides thus "automatically unfair dismissal means a dismissal where the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee."

[26] In support of his stance above the 1st Respondent cited the following authorities:

"5.17 The Court further cited the case of Preller and others v Jordaan 1956 (1) 483 where it was held thus:

“The grounds of *restitutio in intergrum* in the Roman Dutch Law are wide enough to cover the case where one person obtains an influence over another which weakens the latter’s resistance and makes his will pliable, and where such a person then brings his influence to bear in an unprincipled manner in order to prevail upon the other to agree to a prejudicial transaction which he would not normally have entered into of his own free will. The words ‘undue influence’ or such words as … (Improper influence) constitute an altogether suitable name for the ground of action which exists in these circumstances.”

5.18 The Court continued to quote dicta from the Preller case (supra), where that Court further held as follows:

“In determining whether a transaction induced by fraud or undue influence is void or merely voidable the test is whether the person seeking to set it aside entered into the transaction willfully and knowingly, with intention to bring about the legal consequences which is entailed or not. If so, it is a valid transaction until it is declared invalid although it may be voidable at his instance on the ground that he was induced to enter into it in unlawful manner. If, however, it was not his intention to enter into the transaction, then the transaction has no legal consequences.”

5.19 In Fathoos Investments (Pty) Ltd and Others v Misi Adam Ali civil appeal Case No. 49/12 SZSC at page 12, the Supreme Court held thus:

“It is a trite principle of our law that when a contract has been reduced to writing, no extrinsic evidence may be given of its terms except the document itself nor may the contents of such document be contradicted or varied by oral evidence as to what passed between the parties during negotiations leading to the conclusion of the contract; and the written contract becomes the exclusive memorial of the transaction. This

principle of our law is referred to as the Parol Evidence rule and its purpose is to prevent a party to a written contract from seeking to contradict or vary the writing by reference to extrinsic evidence at the risk of redefining the terms of the contract. **Notable exceptions exist where the contract is vitiated by mistake, fraudulent misrepresentation, illegality, or duress.** See the cases of **Johnson v Leal** 1980 (3) SA 927 (A) at 943; **Soars v Mabuza** 1982-1986 SLR 1 at 2G – 3A." (Emphasis added)."**"**

[27] In conclusion this is what the 1st Respondent states:

"6.1 The Respondent elected not to defend the Applicant's claims on the merits, but was content with relying on the point of law. In fact, RW2 conceded that but for the deed of settlement, the Applicant was entitled to all his claims.

6.2 In the premises, I ought to award the Applicant what he claimed. Furthermore, in awarding compensation to the Applicant, I have taken into account the fact that he had worked for eight (8) years and was dismissed after he had raised a grievance. Section 16 (7) of the Industrial Relations Act 2000 (as amended) reads as follows:

> "The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of twenty-four (24) months' remuneration calculated at the employee's rate of remuneration at the date of dismissal."

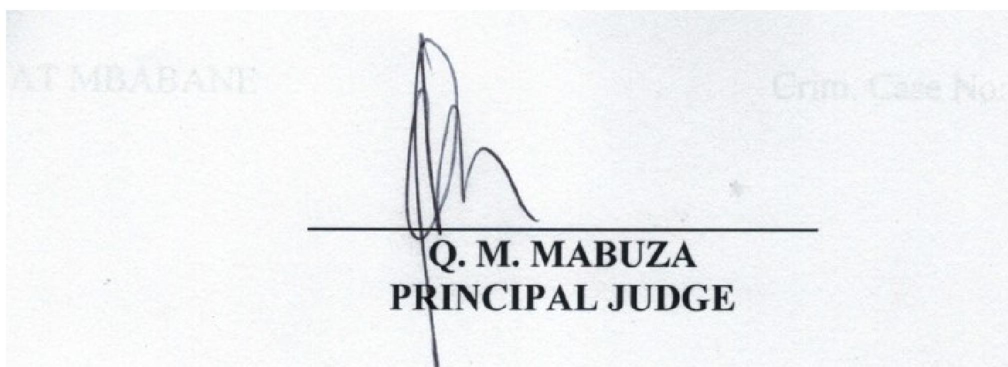
6.3 I hold that it is just and equitable to award the Applicant fifteen (15) months' wages as compensation for automatically unfair dismissal."

[28] I agree with the 1st Respondent and it is my finding that there was undue influence and fraudulent misrepresentation. I further find that the analysis by the 1st Respondent of those two concepts clearly show that he properly applied his mind to the facts. He cannot therefore be accused of any irregularity let alone gross irregularity.

Costs

[29] The Applicant in its notice of motion prayed for an order of costs against the 2nd Respondent in the event of unsuccessful opposition. The converse holds true

[30] In the event the application is dismissed with costs.



For the Applicant : Mr. Simelane

For the Respondent : Mr. Manda