

SOUTH AFRICA / JUDGMENT

Beyer and Others v Alleyroads Construction (Pty) Ltd (JS 1542 / 2019) [2023] ZALCJHB 338 (29 November 2023) [2023] ZALCJHB 338

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JS 1542 / 2019

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 1542 / 2019

In the matter between:

ALBERTUS
CHRISTIAAN BEYER (JS 1542/2019)
First
Applicant
FERDINAND
JULIUS BRAUCKMANN (JS 1543/2019)
Second
Applicant
CEDRIC
FOURIE (JS 1544/2019)
Third
Applicant
And
ALLEYROADS
CONSTRUCTION (PTY) LTD
Respondent

Heard: 16 November 2023
Delivered: 29 November 2023
This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand down is deemed to be 29 November 2023.

JUDGEMENT

PRINSLOO, J

Introduction

- [1] The Applicants were employed by the Respondent until February / March 2019, whereafter they individually approached this Court for relief in terms of the provisions of section 189 of the Labour Relations Act (LRA)[1], claiming that they were unfairly retrenched and they claim relief in terms of the Basic Conditions of Employment Act[2] (BCEA).
- [2] On 23 July 2021, the three matters under case numbers J 1542/19, J 1543/19 and J 1544/19 were consolidated and the Court ordered that they be dealt with together under case number J 1542/19. The Applicants will be referred to individually where necessary and collectively to as the 'Applicants'.
- [3] The Respondent opposed the referrals and raised a point in limine which goes to the issue of jurisdiction. The point in limine is effectively challenging the existence of an employment relationship and denies that the Applicants were dismissed. The Respondent's case is that the Applicants were employees but ceased to be employees after signing a consultancy agreement. The Applicants had entered into consultancy agreements with the Respondent, effective from date of signature in January 2019, which terminated their employment contracts by mutual consent. The Applicants were not employees of the Respondent at the time their relationship terminated, and therefore they cannot claim that they were unfairly dismissed or that they are entitled to any payments in terms of the BCEA.
- [4] The Applicants disputed the consultancy agreement on the basis that they either did not sign the agreement or that it was signed under duress. In disputing the Respondent's point in limine, the Applicants must show that the consultancy agreement did not terminate their employment with the Respondent and that they were still employed, as at the date of their alleged retrenchment.

[5] It is common cause that the Applicants were all employees of the Respondent up until around the end of January

2019. The written contracts of employment entered into between the Applicants and the Respondent prior to 29 January 2019, and the terms thereof, were admitted by the Respondent. What is in dispute is whether the relationship changed from an employment relationship to one of consultancy.

[6] The point in limine must be determined prior to the matter proceeding to trial as it could dispose of the trial in its entirety.

[7] The matter was set down for hearing on 16 November 2023, on which occasion the Respondent was absent, notwithstanding the fact that its attorneys were properly notified about the set down on 22 March 2023. There was no notice of withdrawal filed by the Respondent's attorneys of record. I was satisfied that the Respondent was notified about the set-down of the matter and that its absence was not due to unawareness of the matter proceeding on 6 November 2023. The Applicants adduced evidence in respect of the point in limine and their testimony will be dealt with only insofar as it provides a background to the dispute and is relevant to the consultancy

agreement and the signing thereof.

The Third Applicant

[8] The Third Applicant (Mr Fourie) was employed by the Respondent as a quantity surveyor, on a fixed term contract from July 2017 until 31 July 2018. Mr Fourie's

contract of employment was extended on 10 July 2018 for an indefinite term.

[9] Mr Fourie denied that he ever signed the consultancy agreement.

[10] Mr Fourie testified that on 7 December 2018, a consultancy agreement was sent to all the Applicants to sign. It was attached to an email from Keenan Smith (HR) and it was expressly stated in the email that this "was proposed by Rowan (attorney) and does not change any terms to your existing employment" and that the agreement "allows for you to invoice the Company and able (sic) to handle your taxation matters as a Consultant / Provisional Tax Payer".

[11] Mr Fourie testified that he was concerned about the consultancy agreement because the email stated that there was going to be no change to existing terms of employment, yet the consultancy agreement clearly provides that there would be no employment relationship. As he was very concerned he sought advice from his wife, who is an attorney, and she advised him not to sign the consultancy agreement.

[12] In an email from Keenan Smith, dated 12 December 2018, the Applicants were informed that only three contracts were received and that he would not be able to submit any salary payments going forward, unless the consultancy agreements were signed. Another email

from Keenan Smith, dated 14 January 2019, and addressed to all the Applicants, indicated that their consultancy agreements were not received and stated that if the consultancy agreements were not received the next morning by 09:00, payment would not be added to the month-end schedule. The Applicants understood this to be a threat - if they did not sign the consultancy agreement, they would not be paid their salaries going forward.

[13] On 23 January 2019, Mr Fourie addressed an email to Keenan Smith, stating that he had questions about the consultancy agreement and had scheduled an appointment with Mr Pretorius to sort out the agreement.

[14] Mr Fourie testified about the consultancy agreement, which is attached to the Respondent's statement of response, and insisted that it is not his handwriting on the document and although it appears to be his signature, he never signed the document. He explained that he had sent documents to the Respondent containing his digital signature and it was possible that the Respondent could have used his digital signature and inserted it on the consultancy agreement.

[15] It appears from the consultancy agreement that it was signed on 29 January 2019 at Buccleuch. Mr Fourie however testified that he was not at Buccleuch on 29 January 2019 and this version is supported by an email that he had sent to Keenan Smith at 05:53 on 29 January 2019, indicating that he would be working from home until the payment of his January 2019 salary was sorted out. Mr Fourie testified that he did not have money for petrol to go to work and that is why he was making enquiries about the payment of his salary and stating that he would be working from home. He also referred to a C-Track vehicle tracking report which showed that

between 29 January and 4 February 2019 Mr Fourie did not drive far from his residence in Montana, Pretoria and certainly not to Buccleuch.

[16] On 4 February 2019, Keenan Smith sent another email to Mr Fourie regarding the consultancy agreement and he requested for urgent feedback on the agreement, to which Mr Fourie responded that he would send a response 'today', being 4 February 2019. On 6 February 2019, Mr Fourie sent an email to Keenan Smith, recording inter alia that he would like to call a meeting to discuss the consultancy agreement and amendments thereto in order to clear the way forward and to reach an understanding and he proposed a meeting for the following week.

[17] On 8 February 2019, Mr Pieter Terblanche asked Mr Fourie in a text message "wanneer gaan jy weer bietjie kantoor toe..." and he responded that "My volle salaris van Jan is steeds nie betaal nie, so ongelukkig kan ek nie kantoor toe gaan nie, want ek het nie petrol geld nie".

- [18] Mr Fourie testified that he saw the signed consultancy agreement for the first time when they received the Respondent's opposing papers in this matter. The original was never made available, notwithstanding a request from the Applicants' attorneys that it be made available.
- [19] Considering the facts placed before this Court, I am satisfied on a balance of probabilities, that it is improbable that Mr Fourie had signed the consultancy agreement. Not only is his version that it is not his handwriting or signature on the document uncontested, but his version is supported by emails which indicate that he was not at the Respondent's office in Buccleuch on 29 January 2019, when and where the agreement was allegedly signed. Furthermore, it is clear that as of 4 February 2019, Keenan Smith still requested for urgent feedback on the agreement, and on 6 February 2019, Mr Fourie still intended to call a meeting to discuss the consultancy agreement and amendments thereto in order to reach an understanding. This is indicative of the fact that as at 6 February 2019, the agreement was still not signed by Mr Fourie. It is highly improbable that these conversations would have taken place had the agreement indeed been signed by 29 January 2019.
- [20] The Respondent had access to Mr Fourie's electronic signature, which could have been used to 'sign' the consultancy agreement. The fact that the Respondent never provided the originally signed document, despite it being requested, is suspicious, more so where the alleged date of signature (29 January 2019) predates Keenan Smith's request for urgent feedback (4 February 2019) on the consultancy agreement, with a proposal from Mr Fourie (6 February 2019) to meet and to discuss the said agreement and to find a way forward.
- [21] The evidence shows that Mr Fourie had not entered into a consultancy agreement with the Respondent, which terminated his employment contract. This Court cannot accept that the consultancy agreement signed on 29 January 2019, was indeed signed by Mr Fourie, as all the facts point in a different direction. I cannot but find that Mr Fourie was still an employee of the Respondent by the time his services were terminated and the Respondent's point in limine must fail.

The Second Applicant

- [22] The Second Applicant (Mr Brauckmann) was appointed as a programme manager by the Respondent and he signed an employment contract on 1 October 2017, for an indefinite period. His position subsequently changed to that of quality manager, and later he became a junior site foreman.
- [23] Mr Brauckmann denied that he ever signed the consultancy agreement.

- [24] Mr Brauckmann testified that when he received the consultancy agreement, he immediately contacted his parents, who because of their professions, had knowledge of legal issues. They advised him not to sign the consultancy agreement. On the other hand, he was told by the Respondent that if he did not sign the consultancy agreement, he would not receive his salary.
- [25] Mr Brauckmann testified about the consultancy agreement, which was attached to the Respondent's statement of response, and insisted that it is not his handwriting on the document and although it looks similar to his signature and appears to be his signature on the last page of the consultancy agreement, he never signed the document. On the signature page, there appears to be a signature 'for consultant', the date is inserted as 29 January 2019, but there is no name or place recorded and those lines are empty on the document. No schedules accompanied the version of the purportedly signed consultancy agreement presented by the Respondent to the Court.
- [26] Mr Brauckmann only became aware of the consultancy agreement, which the Respondent claims he had signed, when the Respondent opposed the Labour Court proceedings.
- [27] Mr Brauckmann testified that the Respondent had access to his signature as he had filed signed documents and there was a record of his signature on the Respondent's system. Mr Brauckmann further testified that he had been asked by Mr Terblanche to sign a piece of paper and write his ID number on it. He complied with the request. It was probable that his signature, to which the Respondent had access to, was used on the consultancy agreement, as Mr Brauckmann insisted that he had not signed the agreement.
- [28] The original was never made available, notwithstanding a request from the Applicants' attorneys that it be made available. Mr Brauckmann testified that he had not signed the consultancy agreement and he never saw the originally signed document.
- [29] Considering the facts placed before this Court, I am satisfied on a balance of probabilities, that it is improbable that Mr Brauckmann had signed the consultancy agreement. His version that it is not his handwriting or signature on the document, is uncontested. The Respondent had access to Mr Brauckmann's electronic signature, which could have been used to 'sign' the consultancy agreement. The fact that the Respondent never provided the originally signed document, despite it being requested, is suspicious.
- [30] The evidence shows that the more probable version, which is accepted by this Court, is that Mr Brauckmann had not entered into a consultancy agreement with the Respondent, which terminated his employment contract. This Court cannot accept that the consultancy agreement signed on 29 January 2019, was indeed signed by Mr Brauckmann or that he was no longer an employee of the Respondent by the time his services were terminated. As a result, the Respondent's point in limine must fail.

The First Applicant

[31] The First Applicant (Mr Beyer) was appointed as a contracts manager for the period 1 July 2017 until completion of the project or 31 July 2018. He received a petrol

allowance, a cell phone and cell phone contract and he was issued with a laptop and software to use. Mr Beyer's cost to company

was increased around May 2018 and a further employment agreement was concluded with effect from 1 August 2018. This was a renewal of the previous employment contract, and the contract term was indefinite.

[32] Mr Beyer admitted that he had signed the consultancy agreement on 28 January 2019, but he had done so because the Respondent threatened that he would not be remunerated, should the consultancy agreement not be signed. He believed that the Respondent would carry out the threat and but for the threat, he would not have signed the consultancy agreement.

[33] Mr Beyer testified that the consultancy agreement was forced on them as they were threatened that they would not get paid if they did not sign the agreement. He had discussions with the Second and Third Respondents about it and the general feeling was one of 'do I have a choice'? Messrs Fourie and Brauckmann told him that they were not going to sign the consultancy agreements, but at the time, they were financially in a better or different position than Mr Beyer. Unlike them, he had a family to take care of.

[34] Mr Beyer testified that the Respondent informed them that they would not get paid if they did not sign the consultancy agreements, and this threat was repeated on 14 January

2019. He understood that if he did not sign the consultancy agreement, he would not get his salary at the end of January 2019. At that point his son was 2 years old and his wife was pregnant and close to labour and they needed medical aid. If Mr Beyer was not paid his salary at the end of January 2019, he would not be able to pay for the medical aid, which his family desperately needed. He had signed the consultancy agreement by the end of January 2019, to ensure that he would be paid his salary to enable him to pay for their medical aid. Mr Beyer testified that he was forced to sign the consultancy agreement and due to his circumstances, he did not have a choice but to sign. In any event after he had signed the consultancy

agreement, nothing changed at all and they never sent invoices to their employer for work done.

[35] In the event that this Court finds that there is an enforceable consultancy agreement, Mr Beyer contends in the alternative, the consultancy agreement does not reflect the true nature of his relationship with the Respondent, which is that of an employer and employee.

[36] In *SA Municipal Workers Union and others v City of Johannesburg Metropolitan Municipality*[3] the Court considered the nature of an agreement and held that:

‘An agreement more often is a product of compromise between two or more parties. In most cases, it is embodied in a written document which records the compromise made and is held up as an enforceable deal. The written agreement is therefore conclusive as to the rights and obligations of the parties.’

[37] A contract or agreement may however be vitiated by duress as intimidation or improper pressure renders the consent of the party

subjected to duress no true consent. Where a person seeks to set aside a contract or resist the enforcement of the contract on the grounds of duress, the principles relating to duress as set out in *Arend and Another v Astra Furnishers (Pty) Ltd*[4] should be considered. The Court held that the following elements should be established:

‘(i) The fear must be a reasonable one.

(ii) It must be caused by the threat of some considerable evil to the person concerned or his family.

(iii) It must be the threat of an imminent evil or inevitable evil.

(iv) The threat or intimidation must be unlawful or contra bonos mores.

(v) The moral pressure used must have caused damage.’

[38] In *Buthlezi v Liberty Group Ltd*[5] this Court accepted the principles laid down in *Arend* and held that:

‘Is the settlement agreement valid and binding between the parties? If yes cadit quaesto. It is correct as submitted by the respondent's representative that as a general rule a person is bound by the terms of a signed agreement - the caveat rule. The rule applies even where the signatory has not read the agreement... A party seeking to resile from the agreement has to prove that the agreement is not binding on him or her...

... A party seeking to raise duress, like the applicant before me must allege and prove a threat of considerable evil to the person or his family which induced fear, the fear was reasonable, the threat was imminent or inevitable, the threat was unlawful and that the contract was concluded as a result of a threat (*Arend v Astra Furnishers (Pty) Ltd*).’

[39] The question is whether the Respondent's indication that Mr Beyer would not be paid his monthly remuneration if he did not sign the consultancy agreement, constituted duress.

[40] It is evident from Mr Beyer's testimony that he had signed the consultancy agreement because of the Respondent's threat that he would not be remunerated if the agreement was not signed. Effectively the duress claimed by Mr Beyer, is financial duress.

[41] In *Medscheme Holdings (Pty) Ltd and Another v Bhamjee*[6] (*Medscheme*) the SCA held that:

‘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 Beampptes 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 Beampptes* 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.’

[42] There is a distinction to be drawn between hard bargaining versus economic duress and the courts have agreed that hard bargaining, even to the point of threatening harm or economic ruin does not necessarily constitute duress.

[43] In *Kgwedi v Bidvest Protea Coin (Pty) Ltd*[7] (Kgwedi) the applicant employee challenged the substantive and procedural fairness of his dismissal based on the respondent's operational requirements. He sought to be retrospectively reinstated and alleged that he had signed the settlement agreement under economic duress in that he was advised that his failure to do so would result in him not receiving his money. The Court, in evaluating the bargaining power between the parties held that[8] it will take into account the position and status of the employee to the contract.

[44] In *Experian South Africa (Pty) Ltd v Haynes and another*

[9] it was held that:

‘The law is clear: a contract concluded as a result of duress can be assailed. In *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) para 36, the court re-affirmed that the party wishing to rely on duress in order to set aside a contract, must allege and prove that there was a threat of considerable evil to the person concerned, or to his or her family, such as to induce a reasonable fear of an imminent or inevitable evil; that the threat or intimidation was unlawful or contra bonos mores; and the moral pressure used must have caused damage (see also *Arend and another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306A–B).’

[45] Mr Beyer testified that he signed the consultancy agreement on 28 January 2019, around the time that salaries were to be paid, because the Respondent had threatened to not pay him for the month if he did not sign the agreement. At the time, he had a two-year old child and his wife was pregnant and nearly due with their second child. He had no choice but to sign,

as it was critical for him to receive his salary and to ensure that his medical aid was paid. He completed the schedules to the consultancy agreement, wherein he set out the exact same services, remuneration and benefits which applied to him as an employee of the Respondent. On schedule B of the agreement, he specifically recorded that “nothing changes to previous contract, continue with same duties”. His financial position was different to that of Messrs Fourie and Brauckmann, who had refused to sign the consultancy agreements.

- [46] This was not merely hard or commercial bargaining in a competitive environment. There was an imbalance of power, which was exploited by the Respondent in a manner which was unconscionable. Mr Beyer’s circumstances were such that he desperately needed to be paid his January salary. A threat of serious financial prejudice was made to Beyer, which was a “threat of considerable evil to the person concerned, or to his or her family, such as to induce a reasonable fear of an imminent or inevitable evil”.[10]
- [47] In my view Mr Beyer demonstrated the requisite elements of duress and a contract induced by duress, is voidable at the option of the innocent party.
- [48] Furthermore, the evidence adduced by the Applicants indicated that even after the signing of the consultancy agreement, nothing changed and their positions, responsibilities, benefits and remuneration remained the same. They never submitted invoices, as per the consultancy agreement and in my view, the relationship remained one of employment until the date of termination of the Applicants’ services.
- [49] There is no merit in the Respondent’s point in limine and the matter is to be decided on the merits.

Costs

- [50] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.
- [51] Ms Withaar for the Applicants submitted that the Respondent raised the point in limine, however made no efforts to participate in the adjudication of the point, despite being aware of the enrolment of the issue. Under the circumstances, this Court should express its displeasure at such conduct, by ordering the Respondent to pay the costs of the determination of the point in limine, on an attorney and client scale.
- [52] In *Zungu v Premier of Kwa Zulu-Natal and Others*[11] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should rather seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that ought not have been brought to Court in the first place.

[53] This is a case where the Court must strike a balance, considering the requirements of law and fairness.

[54] In my view this is a case where it is appropriate to make a cost order. A cost order is a method of ensuring that decisions on how to conduct litigation in this Court are taken with due consideration of the law and the prospects of success.

[55] This Court found that there is no merit in the point in limine raised by the Respondent. The effect of the approach taken by the Respondent is that, notwithstanding the fact that the matter could proceed to trial on the merits, the matter is not one step closer to finality. The Applicants had to adduce evidence on the point in limine, they had to instruct counsel at a cost to them and this Court was burdened to write a judgment on the Respondent's point, when the merits could have been considered and the matter could have been finalised.

[56] The resources of this Court are notoriously scarce and the merits of the matter are still to be decided and another Court day(s) will have to be allocated for a hearing on the merits and more resources will have to be spent on this matter.

[57] The Respondent raised and persisted with a meritless point in limine and as a result, another date will be set to deal with the merits of the case. Fairness dictates that the Applicants cannot be expected to endure costs, occasioned by a meritless point in limine, which ultimately caused the waste of costs and a further delay, which will result in further costs.

[58] In the premises, I make the following order:

Order

1. The Respondent's point in limine is dismissed;
2. The Registrar is directed to enrol the matter for hearing on the trial roll on notice to all the parties;
3. The Respondent is to pay the Applicants' wasted cost, occasioned by the raising of the point in limine.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate J D Withaar

Instructed by: Len Dekker Attorneys Inc

[1] Act 66 of 1995, as amended.

[2] Act 75 of 1997, as amended.

- [3] (2013) 34 ILJ 1944 (LAC) at para 20.
- [4] 1974
- (1) SA 298 (C) at p306 A-C.
- [5] (2012) 33 ILJ 607 (LC) at paras 7 and 8.
- [6] 2005
- (5) 339 (SCA) at para 18.
- [7] [2019] 6 BLLR 562 (LC).
- [8] Kgwedi (Ibid) at para 38.
- [9] (2013) 34 ILJ 529 (GSJ) at para 32.
- [10] Experian South Africa (Ibid).
- [11] (2018) 39 ILJ 523 (CC) at para 24.
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