

SOUTH AFRICA / JUDGMENT

Makhothokho and Others v Pick n Pay Supply Chain (Pty) Ltd and Another (JS345/17) [2022] ZALCJHB 114 (24 May 2022)

[2022] ZALCJHB 114

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JS345/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

case no: JS 345/17

In

the matter between:

N
W MAKHOTHOKHO AND 34 OTHERS
Applicants
and
PICK
N PAY SUPPLY CHAIN (PTY) LTD
First Respondent
CAPITAL
OUTSOURCHING (COSTARS)
Second Respondent

Heard:

16, 17 and 18 May 2022

Delivered:

24 May 2022

(In

view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 24 May 2022.)

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicants filed a statement of case wherein they claim that their dismissal was unfair, as their retrenchment did not comply with the provisions of section 189 of the Labour Relations Act[1] (LRA).
- [2] The Applicants stated that they were employed by the First Respondent, Pick ‘n Pay (P&P). They also stated that on 14 April 2016, their contracts of employment were transferred to the Second Respondent, COSTARS (Respondent) through a section 197 transfer. Their case in short is that they were retrenched without any compliance with the provisions of section 189 of the LRA because no section 189(3) notice was issued, no consultation took place and that their dismissal was substantively unfair as there was no reason for retrenchment.
- [3] The Applicants filed a withdrawal notice wherein they withdrew their challenge regarding the procedural fairness of their retrenchment and Bayi Attorneys, acting for the Applicants, withdrew the case in respect of Mr Christian Baloyi and Ms Neli Dlamlenze.
- [4] The Respondent filed a statement of defence and raised a point in limine. It was specifically pleaded that the Applicants have entered into voluntary retrenchment agreements with the Respondent in full and final settlement of all and any of the claims between them. As a result, this Court does not have jurisdiction to determine the Applicants’ unfair dismissal dispute.
- [5] P&P also filed a statement of defence and raised a point in limine, as follows:
notwithstanding P&P’s case set out in the statement of defence that it was not the Applicants’ employer

(and without abandoning it), P&P contends that in the event that the validity of the retrenchment agreements concluded between the Applicants and the Respondent being upheld, and the Applicants not resiling therefrom, the Applicants are bound by their election to settle any dismissal dispute with the Respondent and cannot pursue the same dismissal dispute as against P&P.

- [6] The parties filed a pre-trial minute, wherein they agreed that the points in limine raised by the Respondents would require the leading of evidence and that the said points be determined prior to a hearing on the merits of the case. The points in limine were to be enrolled for trial, as it may fully dispose of the matter without considering the merits of the claim.

- [7] The matter was enrolled for trial and the parties filed a joint practice note wherein they recorded that the points in limine regarding the retrenchment agreement and its application will be determined first.

The evidence adduced

The Respondent's case

- [8] The Respondent called Mr Ryan Diedericks (Mr Diedericks) who testified that in 2016, he was employed by the Respondent as an operational manager and he oversaw the outbound department at P&P, which was outsourced to the Respondent at the time. The Applicants were working as handlers and jockeys in the outbound department, on-site at P&P.
- [9] He explained that on 1 September 2014, Anglo African became the employer of the Applicants. On 14 April 2016, the Respondent informed the Applicants that with effect from 2 May 2016 their contracts of employment would be transferred to the Respondent as a result of a transfer in terms of section 197 of the LRA and their employment contracts remained intact.
- [10] P&P terminated the outsourcing agreement with the Respondent and as a result, the 125 employees (employees), which included the Applicants, in the outbound department were affected. On 31 October 2016, the said employees were informed by way of SMS to meet with the Respondent on 1 November 2016, as the agreement with P&P came to an end and the employees had to be transferred to another client. The contract between the Respondent and P&P was terminated with effect from 1 November 2016.
- [11] The meeting was set for the morning of 1 November 2016 between the affected employees and the Respondent at the premises of P&P Longmeadow, where the employees were stationed. Mr Diedericks explained that he was present at the meeting, which took place in an open parking lot between the grocery section and the administration block of P&P. He requested the employees to move to another location, but they refused. The employees were informed about the process that led to the situation at the time, that the Respondent was given notice by P&P and that the positions occupied by the employees were no longer required at P&P. Mr Diedericks explained that the employees were employed by the Respondent and that they were informed that they could be assisted and accommodated in alternative positions.
- [12] In cross-examination, it was put to Mr Diedericks that the employees would testify that there was no firm commitment to alternative positions, but instead that it was only mentioned in passing and that there was no meaningful consultation on the issue of alternative positions. Mr Diedericks disputed the version of the Applicants and insisted that he made an effort to ensure that alternatives were explored. He re-iterated that it was explained to the employees that picking positions at P&P were immediately available and further alternatives in the Respondent's sister company would be explored. No retrenchment was discussed at the P&P premises, only alternative positions were discussed.

- [13] As the operational manager for the outbound department, Mr Diedericks was responsible for facilitating the process with the employees. The employees were told that there were 100 or 101 picking positions immediately available at P&P, subject to the completion of a literacy and numeracy test. There was also the possibility of positions being available at the Respondent's sister company, which also required a literacy and numeracy test. Mr Diedericks explained that the aforesaid tests were done as part of the recruitment process and that on the day the tests were made available and they could be done immediately at the P&P premises. The employees requested an opportunity to caucus, where after they rejected all the proposed alternatives and indicated that they were not interested in any of the positions. The employees insisted that someone from P&P should address them, but they were informed that it was not possible. Mr Patrick Mathiba (Mr Mathiba), the Respondent's industrial relations officer, instead addressed the employees, but they insisted to be addressed by Mr Bruce Toerien (Mr Toerien), the Respondent's managing director.
- [14] Mr Toerien was called and he came to address the employees at the P&P premises. Ms Charlene Wilson (Ms Wilson), the general manager for the Respondent's outbound department, also came to the P&P premises to address the employees. The purpose of addressing the employees and the other efforts to engage them was to ensure that they are retained as employees and that they remained employed. The employees, however, rejected all alternatives and proposals.
- [15] Mr Diedericks confirmed that a meeting took place between Mr Toerien and the employees, of which he was not a part of. Mr Toerien subsequently requested that the discussion with the employees be continued at the Respondent's head office in Isando (Isando). Transport was made available to take the employees to the said office. Mr Toerien, Mr Hendrick Raath (Mr Raath), Ms Wilson and Mr Mathiba, and the employees thereafter went to Isando. Mr Diedericks remained at the P&P premises to deal with operational issues at the site and he had no further involvement in the matter.
- [16] Ms Charlene Wilson testified that she was the Respondent's general manager in 2016. On 1 November 2016, Mr Toerien had a meeting with the employees at the P&P premises and during the course of the meeting, he called her and said that the employees wanted to engage with her. She went to the P&P premises and everyone was standing outside the administration block. She managed to address the employees and requested them to move to Isando. The employees wanted the P&P management to address them and she made it clear that that was not going to happen.
- [17] In cross-examination, Ms Wilson confirmed that the initial meeting with the employees was held with Messrs Diedericks, Raath, Mathiba, Ms Naidoo and Sasha Lee, who was the recruitment manager. Mr Toerien joined the meeting later after he was called to the meeting. Ms Wilson went to the P&P premises after Mr Toerien had called her. She found Mr Diedericks at the site when she arrived there.

[18] It was put to Ms Wilson that alternatives were not discussed on 1 November 2016, but instead, it was only mentioned in passing and Mr Toerien said that it had to be discussed the next day. Ms Wilson disputed that and testified that on 1 November 2016 the employees were informed about the alternatives that were available immediately at P&P and the other possible alternatives available at other sites, but the employees objected to the requirement that they had to be tested and they opted to rather be retrenched. She re-iterated that a meeting was held on 1 November 2016 at the P&P site as well as at Isando where the alternative positions and the process to be employed in an alternative position were discussed. Discussions were also held regarding the issue of severance pay and leave payout.

[19] It was further put to her in cross-examination that on 1 November 2016 Mr Toerien produced two documents to the employees. The first document presented was a “full and final s 189 settlement proposal” which stated that an offer of full and final settlement was proposed in the following terms:

‘1. Notice pay of: 0-6 months of employment: 1 weeks’ notice

pay 6-12 months of employment: 2 weeks’ notice pay More than 12 months of employment: 4 weeks’ notice pay

2. Additionally, staff who do not request the company to seek an alternative job for them will be retrenched on the basis of 1 week of pay for each completed year of service.
3. All staff who choose retrenchment will additionally have all their annual leave days accrued, paid out to them.
4. The company will ensure that tax directives are secured for those staff that are retrenched to ensure tax efficiency of the payment.’

[20] Ms Wilson explained that the reason why it was recorded as a choice to be retrenched, was because alternatives were available and the employees could choose to either take up the available positions at P&P or at an alternative site or to be retrenched.

[21] Transport for the employees was arranged and they left to go to Isando. Ms Wilson testified that it was explained to the employees that the Respondent had lost the contract for jockeys and handlers at P&P, but that 100 positions of pickers and general workers at P&P were available, as well as other positions, but that the employees had to complete a test in order to be appointed in the available positions. Mr Mathiba also explained this to the employees.

[22] The employees were not prepared to consider any alternative positions and they objected to the testing that was required. It was explained to them that if they were not interested in the alternative positions, a retrenchment process would follow. The employees indicated that they wanted to be paid their severance pay, as they had no interest in the alternative positions available.

- [23] Ms Wilson, as well as Mr Mathiba and Pamela, explained to the employees that if they don't want to consider the alternative positions, but wanted to be paid, they would be paid one weeks' salary for each completed year of service. No decision was taken on 1 November 2016 and it was agreed that the parties would reconvene on 2 November 2016.
- [24] On 2 November 2016, the employees arrived at Isando and were issued with a section 189 notice of invitation to consult on proposed redundancy. In the said notice, the alternatives to retrenchment were recorded as 100 positions of pickers at P&P and general worker positions, to be offered to the employees, subject to passing a test. Ms Wilson testified that the employees refused to accept the section 189(3) notice and that they were not prepared to consult. The employees only wanted to be paid out.
- [25] The employees were issued with a proposed retrenchment agreement (agreement) regarding the process that was to be followed and they were informed about what they would be paid, should they not accept alternative positions for employment. The employees waived the right to be consulted and they proposed the severance pay to be paid to them. They disputed the leave days as calculated by the Respondent.
- [26] On 2 November 2016, Ms Wilson made a calculation as to the cost of paying the employees severance pay, leave days and a months' notice pay. In terms of the said calculation, severance pay was calculated based on one weeks' pay per completed year of service. Some employees would have been paid two weeks' severance pay and others nothing, as they had less than a completed year of service.
- [27] The employees were not happy with the calculations and they rejected the proposal. Ms Wilson was called to the training room, where the employees were gathered. She asked them what they wanted and they indicated that they were not happy with the leave days and severance pay. Ms Wilson testified that she explained to the employees that she could not change the calculation without the management's authority to do so, where after she was locked in the room and she could not leave. She called Mr Toerien, explained the situation to him and he said she should give the employees what they wanted so that the issue could be resolved.
- [28] After 45 minutes she was let out of the training room and she, with Messrs Raath and Mathibe looked at the employees' leave on the payroll system. They sat with each employee individually to check the system and in the end, they agreed to the number of leave days every employee claimed was due to him or her. This process carried on until late at night.
- [29] On 3 November 2016, Ms Wilson informed the employees that she had permission to pay out the leave days that they claimed were due to them and the employees were satisfied with her response in that regard. The employees took issue with the severance pay they were to receive. They indicated that they received short notice about the termination of the contract with P&P and they wanted more severance pay. After some engagement, the Respondent agreed that it would pay the employees two weeks' severance pay

per completed year of service and for employees with less than a years' service, the Respondent would pay one weeks'

severance pay. Agreement was reached on the aforesaid aspects.

- [30] Ms Wilson subsequently prepared another calculation of the payments that were due to the employees. It is evident from the second calculation that the number of leave days and the severance pay had been increased, in accordance with the agreement that was reached with the employees.
- [31] Ms Wilson explained that once an agreement was reached on the leave days and severance pay, the individual employees were each taken to the offices upstairs where the content of the retrenchment agreement was explained to the employees on a one on one basis. Some of the employees took the agreement home, but they all subsequently signed the agreement.
- [32] Ms Wilson referred to the signed agreements and the payslips, indicating what amount of money was paid to each of the Applicants. She reiterated that the employees did not want to participate in a consultation process, that they had agreed to the agreement voluntarily and that they were not forced in any respect. In cross-examination, Ms Wilson explained that the employees did not want to go through the retrenchment process, they wanted their money and they were prepared to consult on the issue of the amounts to be paid to them only. They said they did not want the alternative positions as they did not want to go for the tests but instead

requested to be retrenched and be paid out what was due to them.

- [33] Ms Wilson explained that the reference to notice pay for October 2016 was a typing error, as the employees worked in October 2016 and were paid their salaries for the services tendered, the notice pay was indeed paid for November 2016. She further explained that reference to one weeks' severance pay was also a typing error, as the parties had agreed that the severance pay would be increased to two weeks' per year. She explained that the agreements were prepared under pressure and after working extended hours, which resulted in typing errors. Furthermore, the documents were changed continuously due to the ongoing negotiations. She explained that any error in the agreement was a typing error.
- [34] The agreement was explained to each and every employee before it was signed and it was eventually signed between 7 and 8 November
2016. The agreement was entered into in full and final settlement, without further recourse to pursue claims arising from employment.
- [35] In cross-examination, it was put to Ms Wilson that the agreement was signed without consultation and that it was never discussed with the employees. Ms Wilson responded that she 'disagreed 100%' as the agreement was discussed with every employee, all questions were addressed and responded to between 1 and 8 November 2016 and it was signed when the parties agreed on the terms of the agreement. Between 2 and 8 November 2016 the

employees attended at the offices in Isando to get the agreement finalized. The employees initially refused to sign the agreement, but after the amendments to the leave days and severance pay were made, they signed it. It was amended and agreed to as a result of ongoing negotiations on the leave payout and severance pay.

- [36] The Applicants' version was that on 8 November 2016, management told them that they had to sign the agreement in order to get paid and the only reason why they had signed the agreement, was the ultimatum issued to them and the fact that they would not get paid. Their case is that they had no choice but to sign the agreement. Ms Wilson disputed the version and testified that management did not give anybody an ultimatum to sign the agreement. She explained that the employees demanded an increased severance pay and more leave days and after negotiations, the Respondent agreed to pay the employees in accordance with their demands, whereupon an agreement was reached.

The Applicants' case

- [37] Ms Tshinakaho Ravhanga (Ms Ravhanga) testified on behalf of the Applicants. She confirmed that on 31 October 2016 the employees had received an SMS from the Respondent which called for a meeting on 1 November 2016.
- [38] On 1 November 2016, the employees were called to the training room where Messrs Mathimba and Raath and Dineo were present. The employees were told that P&P terminated the contract with the Respondent on 31 October 2016. The employees were requested to sign an attendance register, but on the register, it was indicated that it had an attachment, but as the attachment was not attached to the register that they were requested to sign, they refused to sign the register. The employees requested to liaise with P&P, but they were informed that P&P was not going to address them. She testified that security officers were called in to forcefully remove them from the training room and they moved outside to an open space.
- [39] Ms Ravhanga testified that Mr Mathiba and his crew were in the training room, but they had no discussions with the employees. They had a discussion amongst themselves about the alternative positions available, which discussion was overheard by the employees, but it was not directly discussed with the employees. According to Ms Ravhanga, it was a private discussion that the employees had overheard. She denied that the 100 available positions at P&P were discussed at all or that they were told about it. The

Applicants' version that was put to the Respondent's witnesses in cross-examination was that the alternatives were

mentioned to the employees, but only in passing. The version put to the Respondent's witnesses differed from Ms Ravhanga's

evidence that there was no discussion about alternatives with the employees and that it was only discussed amongst Mr Mathiba and his crew.

[40] In cross-examination, Ms Ravhanga testified that on 1 November 2016 the employees were told that the contract between the Respondent and P&P was terminated as well as that their employment contracts were terminated. This was a clear contradiction, considering Ms Ravhanga's evidence in chief.

[41] In her evidence in chief, Ms Ravhanga testified that Mr Diedericks was unknown to her and that she saw him for the first time in Court. Her version was that Mr Diedericks did not address the employees at all on 1 November 2016. Mr Diedericks was called as a witness in Court and notwithstanding the fact that he was subjected to cross-examination, the version presented on behalf of the Applicants was never put to him. Instead, he was questioned on the events that transpired on 1 November 2016 at the P&P

premises.

[42] Ms Ravhanga testified that as they were standing at the P&P premises, Mr Toerien approached them and told them that they had to nominate two individuals who could engage with him as he was not going to address the group of employees. Walter and Baloyi were nominated and after they had discussions with Mr Toerien, they presented a document, stating that the employees chose retrenchment. The employees did not agree with that as they did not choose retrenchment and they sent Walter and Baloyi back to Mr Toerien. The document was changed and paragraph 3 of the document was accordingly amended. Mr Toerien said that they must go to Isando where they would receive all the relevant documentation.

[43] In cross-examination, Ms Ravhanga conceded that she had read the document on 1 November 2016 and that she understood it, but that she was not in agreement with paragraph 3 of the document. She agreed with the rest of the content of the document. Paragraph 3 initially read that: "[a]ll staff who choose retrenchment will additionally have all their annual leave days accrued, paid out to them". After the amendment, paragraph 3 read: "[a]ll staff retrenched will additionally have all their annual leave days accrued, paid out to them".

[44] Paragraph 2 of the same document mentioned alternative positions and that employees who do not request alternative positions would be retrenched. Ms Ravhanga did not ask the Respondent for an alternative position and the reason for not doing so was because she was told that the contract with P&P had terminated on 31 October 2016 and Mr Toerien had said that the Respondent was retrenching as the employees' contracts terminated on 31 October 2016. There was no reason to ask for an alternative if her contract had already terminated. This version was not put to any of the Respondent's witnesses.

[45] In cross-examination, Ms Ravhanga was asked as to why, when the employees heard that the employer talked about alternatives on 1

November 2016 and it was mentioned in the document issued to the employees that those who do not request an alternative job would be retrenched, she made no effort to ask about an alternative position. Ms Ravhanga said that they were told that their employment contracts had terminated on 31 October 2016, that the Respondent raised the issue of retrenchment and therefore the Respondent was supposed to approach them regarding alternatives, not the other way around.

[46] It was put to Ms Ravhanga that the document that was presented to the employees on 1 November 2016 did not state that the employees were retrenched, but rather that if they do not request an alternative position, they would be retrenched.

[47] Ms Ravhanga disputed that Ms Wilson addressed the employees or that she had a discussion with them at all on 1 November 2016. In fact, her evidence was that nobody had addressed them on 1 November 2016 and that the only event on that day was that Mr Toerien came to the P&P premises, he had a discussion with Walter and Baloyi, who subsequently presented the document to the employees. This version was not put to either Mr Diedericks or Ms Wilson during their cross-examination, notwithstanding their evidence in cross-examination that alternative positions were indeed discussed with the employees.

[48] Ms Ravhanga testified that they were told to go to Isando, but only went there on 2 November 2016, as it was late on 1 November 2016 when they left the P&P premises and they decided to go home. They only went to the Respondent's office in Isando on 2 November 2016, which version is in conflict with the version presented by Mr Diedericks and Ms Wilson. Ms Ravhanga's

version was never put to the Respondent's witnesses in cross-examination.

[49] On 2 November 2016 when they arrived at Isando, they were given the agreement but refused to sign it because they knew that their retrenchment was not voluntarily. Ms Wilson and Mr Mathimba requested the employees to sign the agreement. Ms Ravhanga testified that no agreement was reached and that the Applicants were not voluntarily retrenched. She disputed the Respondent's version that the employees refused to sign the agreement because they did not agree with the leave days and the severance pay and insisted that they refused to sign because they knew that it was not 'voluntary'. On 2 November 2016, the employees were not consulted about the issues and they did not sign the agreement.

[50] Ms Ravhanga testified that no one explained the agreement to them and they were against the agreement mentioning 'voluntary'. Ms Wilson and Mr Mathimba wanted them to sign the agreement, but they were against it. She did not understand the agreement and confirmed that she would not sign a document that she does not understand. The employees were told to return to Isando the following day.

[51] On 3 November 2016, the Respondent once again provided transport for the employees to go to Isando and when they were at the Respondent's office, the agreement was presented to them for a second time, but they still refused to sign it. According to Ms Ravhanga, no discussion was held with the employees on 3 November 2016. Mr Mathiba requested them to

sign the agreement without any explanation as to why they had to sign the agreement. She also disputed that the issues relating to leave payout and severance pay were discussed or addressed.

- [52] Ms Ravhanga testified that the section 189(3) notice was not handed to the employees and it was never explained to them. She had seen the document for the first time in Court. This version is astonishing. Ms Wilson testified that the section 189(3) notice was presented to the employees on 2 November 2016, but they refused to accept the document as they were not interested in a consultation process, but instead wanted to be paid out. Ms Wilson's version was not disputed in cross-examination.
- [53] Ms Ravhanga further testified that on 7 November 2016, the same agreement was presented to the employees, but they still refused to sign. On 8 November 2016, the employees once again went to Isando and Mr Mathimba approached them with the same document that they were handed between 2 and 7 November 2016. He told the employees to sign the agreement as the failure or refusal to sign would mean that the employees would not be paid according to the document. They signed the document as it was close to December 2016 and they were desperate to get money. It was an indirect form of duress, according to Ms Ravhanga, who ultimately signed the document.
- [54] Ms Ravhanga conceded that the notice pay that was paid to the Applicants was for November 2016 and that she had received four weeks' severance pay, which represented payment of two weeks' salary per completed year of service. It was put to her that the employees signed the agreement as they were satisfied with the fact that they were paid more money than what they were actually entitled to. Ms Ravhanga conceded that the employees were paid more than the minimum prescribed in the applicable legislation, but disputed that that was the reason why they had signed the agreement. Her case was that the employees had signed the agreement because they were told that if they did not sign, they would not be paid in accordance with the agreement. She conceded that the employees wanted the money to be paid, in accordance with what was in the agreement, as that was a higher amount than what they were entitled to.
- [55] It is evident from the agreement that the document that was presented to the employees on 2 November 2016 made provision for one weeks' severance pay per year of service, yet the final agreement reflected severance pay equal to two weeks' pay. It was put to Ms Ravhanga that the employees came to Isando on numerous occasions for the purpose of negotiation and the payments

effected to the employees changed from the initial offer as a result of such negotiating process. Ms Ravhanga disputed that and said that the employees went to Isando and all they were doing for the whole day, on all the occasions they went there, was to sit. No discussions or negotiations took place.

Analysis

[56] The parties adduced evidence in respect of the agreement that was concluded and the evidence so adduced has to be assessed in accordance with the applicable principles. I deem it prudent to set out the general principles that guide this Court in the assessment and analysis of evidence.

Evidence and cross-examination

[57] After a witness has given his or her evidence in chief, the other party is given the opportunity to cross-examine the witness. The intended purpose of cross-examination is inter alia to reveal weaknesses in the evidence adduced, to challenge the truth or accuracy of the witness's version, to bring to light

facts

reinforcing the cross-examiner's case, to elicit favourable facts, to place a defence on record and to put the version of the cross-examining party.

[58] A party has a duty to cross-examine on aspects which he or she disputes. The rationale of the duty to cross-examine is that the witness should be cross-examined so as to afford him or her an opportunity of answering points supposedly unfavourable to him.

[59] The failure to cross-examine a witness about an aspect of his or her evidence may have the result that the evidence may not be called into question later. The cross-examiner who disputes what the witness says has a duty to give the witness an opportunity to explain his or her evidence, to qualify it or to reveal its basis. Failure to do so has been dubbed extremely unfair and improper[2]. Apart from the injustice to the witness, failure to cross-examine may indicate acceptance, comparable with an admission by silence[3]. From this point of view, such evidence will carry more weight than evidence disputed by means of cross-examination and the failure to cross-examine, will be a factor increasing evidential value[4].

[60] A failure to cross-examine a witness on any aspect is generally considered to be an indication that the party who had the opportunity

to cross-examine, did not wish to dispute the version or aspects of the version of the particular witness who was available for

cross-examination[5]. A cross-examiner is duty bound to put his or her defence or version on each and every aspect he or she wishes to place in issue to the witness.

[61] In *Masilela v Leonard Dingler (Pty) Ltd*[6], the Court was faced with a scenario where a version was not put to a witness in cross-examination and held that:

‘The problem that I have with the applicant's version where it differs from that of Masina is that none of it was put to Masina while he was testifying. This court has been denied the benefit of Masina's response. It is trite that if a party wishes to lead evidence to contradict an opposing

witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters that it will be alleged make his evidence unworthy of credit. In *Small v Smith* 1954

(3) SA 434 (SWA) Claassen J said at 438:

“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved”.’

[62] This Court has to assess the evidence with due consideration of the aforesaid principles. However, faced with factual disputes, this Court has to apply the technique as set out in *Stellenbosch Farmers’ Winery Group Limited and another v Martell et Cie and others (SFW)* [7], where the Supreme Court of Appeal (SCA) held that:

‘To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.’

[63] In casu, I am inclined to accept the Respondent’s evidence regarding the events that transpired between 1 and 8 November 2016. This is so for a number of reasons.

[64] Firstly, the Respondent’s witnesses were credible and reliable witnesses, who do not stand to gain anything by giving evidence in Court. Their versions did not contradict each other and Ms Wilson’s evidence regarding the events was further supported

by documentary evidence. Considering the sequence of events, the documentary evidence and the overall probabilities, the Respondent’s

version is probable.

[65] The Applicants' only witness, Ms Ravhanga, was a very poor witness who contradicted herself on many occasions, she was obstructive in answering simple questions and overall the version she presented was inherently improbable or far-fetched. To illustrate this point, I will refer to some aspects of the evidence: Ms Wilson testified that between 1 and 8 November 2016 the Applicants attended

the offices in Isando on numerous occasions in order to negotiate and finalise the agreement. The employees initially refused to sign the agreement, but after the amounts to be paid to them were increased, they signed the agreement. This is supported by evidence showing that the Respondent's initial calculation of severance pay and leave credit pay outs was based on a calculation of one weeks' pay per completed year of service and the Respondent's record of the individual's leave day credits. After engagement with the employees in respect of the leave days they claimed were due to them and an increased offer on the severance pay to be paid, another calculation was done, reflecting the increased and amended amounts. After this was approved and finalised, the agreement was amended and signed on 8 November 2016. This version is probable and supported by documentary evidence. Ms Ravhanga's version as to what had happened between 1 and 8 November 2016 was that no discussions took place, nobody discussed the agreement with the employees and they merely went to the office in Isando to sit there, for an entire day, doing nothing. They repeated this sitting exercise on numerous days. The version presented by Ms Ravhanga is so improbable that it is untrue. Furthermore, both the Respondent's witnesses testified that on 1 November 2016, the employees were informed and told about the available alternative positions. Ms Ravhanga presented no more than a bare denial, stating that no discussion took place and that the employees were not told about alternative positions. Her version is once again unbelievably improbable.

[66] Secondly, in the cross-examination of the Respondent's witnesses, the Applicants failed to contradict material aspects of the Respondent's version, failed to put a different version to the Respondent's witnesses and in material respects, the Applicants' version was not put to the Respondent's witnesses and their evidence was uncontested in material respects. On this score, the Respondent's version is to be accepted.

[67] The Respondent's version is a probable version, considering the evidence, and is the one accepted by this Court.

The Respondent's point in limine and duress

[68] The main question relating to the Respondent's point in limine to be decided is whether the Applicants entered into voluntary retrenchment agreements in full and final settlement of all and any

of the claims between them.

[69] The Applicants conceded that they had signed the agreement and it is common cause that the agreement signed and entered into by the Applicants and Respondent on 8 November 2016 provided that the agreement constitutes “full and final settlement of all and any claims or labour dispute that may arise either now or at any time in the future for any reason whatsoever”.

[70] The agreement further provided that the employment contract between the parties is terminated by way of retrenchment and that “the parties hereby settle each and all claims arising from the employment contract between them”.

[71] It is also common cause that the Applicants were paid in accordance with the terms of the agreement and that they had received the benefit of the agreement. At no point did the Applicants tender to pay back the benefits they had received in terms of the agreement.

[72] In *South African Municipal Workers Union and others v City of Johannesburg Metropolitan Municipality*[8], 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.’

[73] 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*[9] (*Arend*) 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.’

[74] In *Buthelezi v Liberty Group Ltd*[10], the Court accepted the principles laid down in *Arend* and held that:

[7] Is the settlement agreement valid and binding between the parties? If yes cadit quaestio. 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...

[8] 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, that the fear was reasonable, that the threat was imminent or inevitable, that the threat was unlawful and that the contract was concluded as a result of a threat (*Arend v Astra Furnishers (Pty) Ltd*).'

[75] Ms Ravhanga testified that she read, understood and signed the agreement, but the only reason why she had done so was because Mr Mathimba had told the employees that their failure or refusal to sign the agreement, would mean that they would not be paid according to the document. They signed the document as it was close to December 2016 and they were desperate to get money. It was an indirect form of duress, according to Ms Ravhanga.

[76] The question is whether Mr Mathimba's indication that the employees would not be paid in accordance with the agreement if they did not sign the agreement constituted duress.

[77] In my view and based on the evidence before me, the only possible duress that could be alleged by the Applicants is financial duress.

[78] In *Medscheme Holdings (Pty) Ltd and Another v Bhamjee*[11] (*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 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.'

[79] In *Pinnacle Technology Shared Management Services (Pty) Ltd and another v Venter and another*[12], the applicant sought to enforce a restraint of trade agreement signed by the respondent employee (employee) who had resigned from her position and accepted

employment with a competitor of the applicant. The employee alleged in her answering affidavit that the employees were required to sign new contracts of employment which incorporated a restraint of trade and that she was informed verbally by the personal assistant of the sales manager that failure to sign the new contract would result in her not receiving her salary. This communication was followed up by way of an email from the same assistant to all staff confirming that if they did not sign the new agreement, they would not be paid their salaries. The employee took the threat of non-payment to be serious and imminent and alleged that she had signed the new contract of employment and the restraint of trade in fear that she would not be able to meet her monthly financial commitments, especially in light of her husband having taken a salary cut and her family being dependant on her. The Court accepted the employee's version of events surrounding the signing of the restraint but was however not convinced that it amounted to duress and held that:

‘...Although the first respondent was entitled to payment of her salary because she was already in the employ of the applicants when she was asked to sign the contract and the threat emanating from the applicants representative was one of material financial harm, something more (as contemplated in *Medscheme*), which is absent in this case, would need to exist for the applicant's conduct to be considered an illegitimate or unconscionable threat and for the first respondent to have reasonably felt induced thereby to sign to the contract. In this case, that something would have been, prior to the threat, a clear indication from the first respondent to the first applicant that she does not accept the restraint of trade provisions in her contract.’

[80] In its concluding remarks, the Court referred to *Medscheme* in respect of the issue of hard bargaining versus economic duress and agreed that hard bargaining, even to the point of threatening harm or economic ruin does not necessarily constitute duress.

[81] In *Kgwedi v Bidvest Protea Coin*[13] (*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[14]:

‘...the Court will take into account the position and status of the employee to the contract. In the current matter, the threat not to pay the applicant for failure to sign the settlement agreement cannot amount to a reasonable fear on the part of the applicant.’

[82] The Court noted that not only did the applicant sign the settlement agreement on the last page but had also signed the clauses relating to the reason for termination of employment, the last day of employment and the payment of severance pay. The applicant had never raised any concerns regarding the settlement agreement nor did he raise the issue of coercion in the letter he had sent to the respondent and was unable, under cross-examination, to give reasons why he failed to complain of the alleged coercion in his correspondence to the respondent. The Court held that "the only reasonable conclusion that

could be drawn is that he read and understood the contents of the settlement agreement prior to signing it.”[15]

[83] The Court in Kgwedi ultimately found that the applicant had failed to prove the existence of duress or coercion and that with the signature of the settlement agreement not being in dispute, the agreement was binding on the parties.

[84] The Constitutional Court in Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and another[16] held that:

‘The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.’

[85] Mr Mathimba’s statement did not constitute duress, but rather a factual statement of something that should have been obvious to the Applicants. If the agreement was not signed, payment could not have been effected in terms of the agreement. This was no more than a factual statement.

[86] It is evident from Ms Ravhanga’s testimony that they signed the agreement because they wanted the higher amount of money as per the agreement, which the Applicants knew they would not otherwise be entitled to and because they were desperate and wanted their money as it was close to the end of the year. Nowhere in her testimony did Ms Ravhanga mention any threat whatsoever, nor did she adduce any evidence that the Applicants were pressurised to sign the agreement. The only reason why the Applicants signed the contract was because Mr Mathimba said that the employees would not be paid in accordance with the agreement if they did not sign the agreement. The agreement was signed early in November 2016 and it is opportunistic to claim that the Applicants were desperate for money as it was close to the end of the year. There were still 8 weeks left until the end of the year, as well as a possibility of alternative employment.

[87] In my view, the Applicants had an option. A person who is under threat or duress will ordinarily be without an option. The evidence shows that the Respondent had alternative positions available for the employees and that only in the event that they were not prepared to accept an alternative position, they would face retrenchment. The employees were not interested in the available alternative positions, they were not interested to go through a retrenchment process only to be paid the minimum benefits and they opted for an agreement that provided them with more benefits and which ensured that they were paid substantially more than what they were entitled to in terms of the applicable legal prescripts.

[88] The Applicants had the option to reject the agreement and to refuse to sign it, they had the option to tell the Respondent that they wanted to proceed with a formal retrenchment process or that they wanted to discuss the matter further and explore alternatives to remain employed. They did nothing of the sort but instead signed the agreement as they accepted that it was the most beneficial outcome for them. The Applicants wanted the better monetary deal and in order to get that, they had to sign the agreement, which they did voluntarily so.

[89] There is a further difficulty facing the Applicants. In *Makiwane v International Healthcare Distributors*,^[17] the Court, with reference to the payment and acceptance of money in accordance with the terms of an agreement, dealt with the effect of an agreement where payment was effected as full and final settlement of all claims the employee might have against the employer and held as follows:

‘[18] It is common cause between the parties that the applicant has been paid all the monies set out in the settlement agreement, that he has kept such monies and has made no tender to return them to the respondent. To my mind this clearly signifies his acceptance of such monies in full and final settlement of his claims against the respondent.

[19] Our law is trite that where a party accepts the benefits under any settlement agreement in full and final settlement of the benefits owing to him by his former employer arising from the termination of his employment relationship with such employer, and has abided by such acceptance of those benefits, he has placed himself beyond the jurisdiction of this court (see *United Tobacco Co Ltd v Baudach*(1997) 18 ILJ 506 (LAC)).

[20] Similarly, in the present case I am of the view that when the applicant signed the agreement, thereby signifying his acceptance of its terms, and later accepted the benefits paid to him in terms thereof, the dispute between him and the respondent was finally settled. From that time onwards there was no live dispute between the parties (see also *Spillhaus & Co (WP) Ltd v CCMA & others* [1997] BLLR 116 (LC)). There being no live dispute for this court to determine, it follows that this court has no jurisdiction to deal with this

matter.’

[90] In casu, the Applicants accepted the money paid to them and they never made any tender to pay back the monies they received in terms of the agreement.

[91] As far back as 1912, the Court had held in *Hlatshwayo v Mare and Deas*^[18] that:

‘...at bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent

with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate.’

- [92] The Applicants cannot dispute or deny the validity of an agreement on the one hand and retain the benefits they had received from the same agreement on the other hand. That is simply incompatible. The Applicants cannot have their cake and eat it.
- [93] In conclusion: the Applicants did not demonstrate the requisite elements of duress and they failed to adduce any evidence on which this Court could reasonably find that the agreement they had signed and which constituted a full and final settlement of the disputes between the parties, is invalid. As a result, this Court has no jurisdiction to adjudicate the dispute that was settled between the parties in full and final settlement.
- [94] It follows that the Respondent's point in limine is upheld.

P&P's point in limine

- [95] P&P contends that in the event of the validity of the retrenchment agreements concluded between the Applicants and the Respondent being upheld, and the Applicants not resiling therefrom, the Applicants are bound by their election to settle any dismissal dispute with the Respondent and cannot pursue the same dismissal dispute as against P&P.
- [96] This Court already indicated that the agreement is upheld and it is evident from the facts that the Applicants have taken no steps to resile from the agreement.
- [97] The Applicants concluded the agreement with the Respondent on 8 November 2016, received the benefits thereof and thereafter filed a statement of case on 24 March 2017, claiming that their dismissal was substantively unfair and seeking compensation from P&P and the Respondent.
- [98] On 8 September 2015, the judgment of Assign Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others[19] (Assign Services) was delivered. The Court found that the deeming provision of section 198A(3)(b) of the LRA gave rise to parallel or dual employment

relationships between the worker and the TES on the one hand and between the worker and the client on the other hand.

- [99] Seven of the Applicants were party to an arbitration award which was issued on 8 March 2016, wherein the arbitrator found that section 198A(3) of the LRA applied and that P&P was the applicants' employer for purposes of the LRA and that the Respondent retained its employer/employee relationship with the applicants in the arbitration. The award was based on the aforesaid Assign Services judgment, which was the prevailing position at the time the statement of case was filed on 24 March 2017.
- [100] On 10 July 2017, the Labour Appeal Court (LAC)[20] overturned the Assign Services judgment, with the LAC's judgment being upheld by the Constitutional Court[21] on 26 July 2018. The Constitutional Court held that the deeming provision gives rise to a single employment relationship between the worker and the client[22].

[101] Mr Myburg for P&P submitted that the Applicants' statement of case must now be read and assessed in the light of the Assign Services Constitutional Court judgment. The Applicants pleaded that P&P was "deemed to be the employer in terms of section 198A(3)(b) of the LRA". In light of the Assign Services Constitutional Court judgment, P&P was the sole employer and the relief sought by the Applicants, namely a declaration that their dismissal was substantively unfair and an order for compensation, must be directed solely at their employer, P&P.

[102] However, the Applicants settled any such unfair dismissal claim with the Respondent (qua employer) in November 2016 and the agreement has the effect of *res iudicata*[23].

[103] In *Xaba and others v I G Tooling & Light Engineering (Pty) Ltd and Others*[24], the employer, union and representative employee's forum entered into a retrenchment settlement agreement which resulted in the termination of employment of the applicants. The applicants approached this Court to review and set aside the settlement

agreement on the grounds that, at the time the agreement was entered into, crucial information was unknown or not divulged to them and had such information been divulged the applicants would not have been a party to the agreement. Notably, the applicants had been paid in accordance with the terms of the agreement and had made no tender to repay the money they received. The Court held that without any tender to repay the money received, the applicants were not in a position to seek that the agreement be declared void[25].

[104] Mr Myburg submitted that the Assign Services Constitutional Court judgment made it clear that the Applicants only had one employer – it was either the Respondent or P&P. It follows that the settlement of any unfair dismissal claim with the Respondent (qua employer) and the institution of such a claim against P&P (qua employer) are mutually exclusive and inconsistent choices, which cannot be exercised at the same time.

[105] In conclusion: the Applicants do not have two claims against two separate entities, both on the basis of an employment relationship and unfair dismissal. They have only one claim in respect of unfair dismissal against only one employer. The issue relating to the Applicants' retrenchment was settled with the Respondent in November 2016 and they do not have a similar claim against another party as employer. Before the Applicants can pursue a claim against P&P qua employer, they have to first resile from the agreement they had entered into with the Respondent, as already alluded to *supra*, and until they have done so successfully, the agreement remains valid and they cannot pursue a claim against P&P.

[106] It follows that P&P's point in limine is upheld.

[107] In the premises I make the following order:

Order

1. The First Respondent's point in limine is upheld;

2. The Second Respondent's point in limine is upheld;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

M Bayi of Bayi Attorneys

For the First Respondent: A Myburg SC

Instructed by:

Bowmans Attorneys

For the Second Respondent: L Erasmus

Instructed by:

Kirchmanns Inc Attorneys

[1] Act 66 of 1995, as amended.

[2] Small v Smith 1954

(3) SA 434 (SWA), Barry v Mxaisa 1977

(4) SA 786 (O).

[3] S v Boesak 2000

(3) SA 381 (SCA).

[4] CWH Schmidt and H Rademeyer, "Law of Evidence", Lexis Nexis, pp 9-54 – 9-72.

[5] See: President of the Republic of South Africa and others v South African Rugby Football Union and others 2000

(1) SA 1 (CC).

[6]

(2004) 25 ILJ 544 (LC) at para 28.

[7] 2003

(1) SA 11 SCA at para 5.

[8]

(2013) 34 ILJ 1944 (LAC) at para 20.

[9] 1974 (1) 298 (C) at 306A-C.

[10]

(2012) 33 ILJ 607 (LC) at paras 7 and 8.

[11] 2005 (5) 339 (SCA) at para 18.

[12] Unreported judgment. Case no: J1095/15 delivered 14 July 2015 at para 16.

[13]

[2019] 6 BLLR 562 (LC).

[14] Ibid at para 38.

[15] Ibid at para 39.

[16]

(2016) 37 ILJ 2723 (CC) at para 24.

[17]

(2003) 24 ILJ 2150 (LC) at paras 18 – 20.

[18] 1912 AD 242.

[19] (2015) 36 ILJ 2853 (LC).

[20] National Union of Metalworkers of SA v Assign Services (Pty) Ltd and others (2017) 38 ILJ 1978 (LAC).

[21] Assign Services (Pty) Ltd v National Union of Metalworkers of SA and others (2018) 39 ILJ 1911 (CC).

[22] Ibid at para 83.

[23] Murray & Roberts (Pty) Ltd v CCMA and others (2019) 40 ILJ 2510 (LAC) at para 40.

[24]

(2019) 40 ILJ 638 (LC).

[25] Ibid at para 27.

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