
SOUTH AFRICA / JUDGMENT

Nthite v Reitzer Pharmaceuticals (Pty) Ltd (JS450/13) [2014] ZALCJHB 326 (21 August 2014) [2014] ZALCJHB 326

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

JS450/13

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JS 450/13

In the matter between:

AMANDA NTHITE

Applicant

And

REITZER PHARMACEUTICALS (PTY LTD Respondent

Date heard: 03 December 2013

Date delivered: 21 August 2014

Summary: Unfair retrenchment claim. The respondent contending the Court has no jurisdiction because the termination of the employment contract done by mutual agreement. The enforceability of the voluntary retrenchment agreement.

MOLAHLEHI J

Introduction

- [1] The applicant in this matter has instituted an action in terms of which she seeks an order which inter alia should declare the retrenchment agreement to be illegal and invalid. She also contends that she was procedurally and substantively unfairly retrenched. The remedy she seeks if successful is reinstate on terms that are not less favourable to her than those that existed prior to her unfair dismissal.
- [2] The respondent has raised a preliminary point, the essence of which is that this Court lacks jurisdiction to entertain the dispute because according to it the applicant was not dismissed but the termination of the employment contract was by mutual consent.
- [3] According to the respondent the termination of the employment contract of the applicant occurred in the context where disciplinary proceedings were instituted against the applicant. On the day of the hearing and before the matter could proceed any further as the parties concluded an agreement which terminated the employment contract by mutual consent according to the respondent. The respondent further contends that the termination of the employment contract was on the basis of a “voluntary retrenchment.”
- [4] The applicant subsequently referred a dispute to the CCMA concerning an alleged unfair dismissal. The matter was set down for conciliation on 14 May 2014. On that day the CCMA ruled that it lacked jurisdiction to entertain the dispute because of the agreement that the parties had concluded. The agreement reads as follows:

“Voluntary Retrenchment agreement . . .

The parties hereby agree to the following terms:

- 1. Amanda Nthite to be voluntary retrenched with immediate effect.
- 2. Two month’s salary will be paid in full on named payment date.
- 3. Pro-rata leave will be calculated and be paid in terms of this agreement.
- 4. The Employer hereby agrees to give good reference if needed and applicable.
- 5. This agreement is in full and final settlement of any claims between the parties and no case will follow.
- 6. The Employee will submit the UI 19 form as reflected above.”
- [5] The matter was then filed with the Labour Court for adjudication. The applicant in the statement of case challenges the validity of the voluntary retrenchment agreement on the following basis:

“6.1 the agreement signed by her is unenforceable, unlawful and invalid as it does not comply with the provisions of the BCEA;

6.2 the Respondent failed to pay in lieu of notice and in so doing it contravened the provisions of the BCEA;

6.3 that the Respondent has substantively and procedurally retrenched her in that it failed to comply with the provisions of section 189 of the LRA 95.”

Evaluation

[6] It is common cause that the parties concluded an agreement terminating the employment relation, through what is referred to as “Voluntary Retrenchment Agreement.” The case of the applicant is that she is entitled to pursue her dismissal claim on the basis of unfair retrenchment despite the agreement. There is no dispute as the wording of the agreement. The pre-trial minutes records the relief sought by the applicant to be the following:

“5.1 Declaration that the Voluntary Retrenchment is illegal and invalid.

5.2 Retrospective reinstatement of the Applicant on the terms and conditions not less favourable to her than the terms and conditions that existed prior to her dismissal.”

[7] In the heads of argument it is submitted on behalf of the applicant that the agreement was concluded as a “result of misrepresentation verbally made to her.” It was also argued on behalf of the applicant that she did not waive her right to claim amounts prescribed under the Basic Condition of Employment Act of 1993.

Was there misrepresentation?

[8] The allegation of misrepresentation means that the consent of the applicant when she signed the agreement was improperly obtained through misrepresentation. The trite principle concerning misrepresentation and its consequences in the formation of an agreement is stated by Christie, The Law of Contract in South Africa, 6th edition at page 281, in the following terms:

“A party who has been induced to enter into a contract (agreement) by the misrepresentation of an existing fact is entitled to rescind from the contract (agreement) provided that the misrepresentation was material, was intended to induce him to enter into a contract and did induce him to contract and did so induce him. If the misrepresentation was fraudulent or negligent the innocent party is

also entitled to damages.”

[9] For the applicant to succeed in his claim of misrepresentation he had to show that the following:

- a. The representation was relied on.
- b. It was a representation as to a fact.
- c. The representation was false.
- d. The representation was material and that she was induced by it to enter into the agreement.

e. The representation was intended to induce her to enter into the agreement.

[10] The allegation of misrepresentation in this matter was not substantiated in any form whatsoever. It was also not pursued in argument during the hearing of this matter. The conclusion to be drawn is therefore that there was no misrepresentation that induced the conclusion of the agreement.

Did the applicant waive her rights?

[11] It seems apposite to deal with the issue of whether or not this was a termination of employment contract in general or it was voluntary retrenchment agreement first. As indicated earlier the contention of the respondent is that this was a termination of the employment contract not related to retrenchment and that the word “retrenchment” is only used as a heading. It was further contended that in fact it was at the request of the applicant that that approach was adopted.

[12] In some way the respondent seeks to introduce extrinsic evidence and circumstances in the reading of the agreement. It is apparent from the proper reading of the agreement that the use of the word “voluntary retrenchment” is not confined to the heading of the agreement but in fact is used even in the body of the agreement. In this respect clause 1 of the agreement reads as follows:

“Amanda Nthite to be voluntary retrenched with immediate effect.”

[13] There are essentially three consequences that flow from a voluntary retrenchment agreement; namely:

- a. the employee’s employment contract is terminated by agreement;
- b. compulsory or forced retrenchment is avoided
- c. the employee waives any right he or she may have concerning the fairness or otherwise of the termination.

[14] It is apparent from the reading of the agreement that, in particular clause one thereof, the employment of the applicant was terminated by voluntary retrenchment and accordingly forced retrenchment was avoided. The consequence of this is that the applicant had waived the right to challenge the fairness of her dismissal in terms of the Labour Relations Act. In other words the consequences of a voluntary retrenchment is that the employment contract of the employee is terminated and that the employee loses the right to claim unfair dismissal in terms of s186 (1) (a) of the LRA.[1]

[15] Before dealing with the principles governing waiver, it is important to note that in forced retrenchment an employee is entitled in terms of the Basic Condition of Employment to the following:

- a. Annual leave

- b. Notice pay if he or she is not required to work the notice period
- c. Severance pay, the computation of which is set out in the BCEA.

[16] Although it has been accepted that the Court shall give due regard to and uphold voluntary retrenchment agreements, it has also been accepted that these agreements are not immune from interrogation by the Court to determine their enforceability. The waiver of the right to challenge the dismissal in cases involving voluntary retrenchment is enforceable only if the employee is given something in addition to those benefits set out in the BCEA.

[17] In *Roberts and Others v WC Water Comfort (Pty) Ltd*[2] the Court held that :

“[4] Even though the applicants have, as contended by the respondent in this matter, signed purported settlement agreements, they now contend that they never conceded the fairness of their dismissal and that they believe they may still exercise their rights under the Labour Relations Act, 66 1995 (“the Act”).

I agree with Mr Bagraim, who appeared on behalf of the respondent, that in certain circumstances where employees received packages in full and final settlement, they should not be able to renege on their word, otherwise it would mean that no employer could ever

successfully attempt to settle a dispute between itself and its employees to avoid future litigation costs.”

[19] The Court further held that:

Section 189 of the Act has set out extremely far-reaching obligations for an employer to fulfil when the employer contemplates to dismiss one or more of its employees for operational requirements. This section of the Act quite plainly reflects that a proper procedure must be followed when employees are to be retrenched. The Constitution, particularly section 24 thereof, guarantees fair labour practices. Therefore, this Court must be very cautious before it makes orders in terms of which employees' claims could be dismissed without hearing oral evidence when they dispute the fairness of their dismissal, even though they have signed documents to the effect that they accept their severance packages in full and final settlement of all claims arising out of the dispute.”

In effect, what is argued by the respondent is that by accepting the monies, the applicants have waived their right to challenge the fairness of their dismissal. For the reasons set out hereinbefore I do not believe that the Court could come to a finding that the applicants have waived such rights on the papers before it. Each case will have to depend on its own facts but on the evidence and in the circumstances now before me, I decline to make such an order.”

[22] The applicant's case is that the agreement is not a "voluntary retrenchment agreement" but rather termination of the employment agreement that rose from the special facts of this case. It was further submitted on behalf of the respondent that if this was a retrenchment, then other employees would also have been retrenched. This argument seems to suggest that a retrenchment exercise has to involve more than one person. That is clearly wrong on the facts of this case.

[22] In my view, whilst accepting that the parties did conclude a voluntary retrenchment agreement, which terminated the employment relationship, the fairness of the termination remains in issue. It is for this reason that I believe that the agreement is enforceable.

Security of costs

[23] The respondent has applied for security of costs in the amount of R15 000.00 before the matter can proceed to trial, and that the matter should be stayed pending the payment of such an amount. The respondent further contends that she should be allowed leave to move for dismissal of the applicant's claim should she fail to pay the costs.

[24] The issue of costs in labour matters is governed by s 162 (1) of the LRA which provides that: 'The Labour Court may make an order as to costs, according to the requirements of law and fairness'

[25] In my view awarding costs of security in the present matter would be unfair as it would be a prohibition of the right of access to the court.

[26] It is further my view that the point in limine raised by the respondent is unsustainable. As concerning costs for these proceedings, I am of the view that on the facts and the circumstances of the case it would not be proper to allow costs to follow the results.

Order

[27] In the premises the following order is made:

1. The point in limine raised by the respondent is dismissed.
2. The application for security of costs is dismissed.
3. There is no order as to costs.

E Molahlehi

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Melatong Ramushu of Ramushu Mashile Twala Inc.

For the Respondent: Jacqueline Keet of Keet Attorneys

[1] (1998) 9 ILJ 836 (LC) at page 849 G-H; J829/97

[2] 1999

(1) BLLR 33 (LC)

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