IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

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Case No : C52/97

In the matter between

ASHLEY ROBERTS	First Applicant
JERIMIAH VAN DER RHEEDE	Second Applicant
KENNETH MORRIS	Third Applicant
WARREN JOHNSON	Fourth Applicant
JESSE BANTOM	Fifth Applicant
PHUMEZA MANGESI	Sixth Applicant
SAFWAAN MALLICK	Seventh Applicant

and

W C WATER COMFORT (PTY) LTD Respondent

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J U D G M E N T

REVELAS, J

[1] The applicants have referred a dispute arising from a dismissal for operational requirements to the Commission for Conciliation, Mediation and Arbitraiton (“CCMA”)where the matter remained unresolved. The matter has been referred to the Labour Court where it is to be placed on the trial roll. This application is brought by the respondent in the actual trial matter as a point *in limine*, to strike out the applicants’ claim.

[2] It is common cause in this matter that save for the second applicant, all the applicants, signed a document in terms of which they accepted monies from the respondent and this document further reflects that it purports to be a payment in full and final settlement of any dispute arising from the applicants’ retrenchment. The second applicant is not a party to this application. When the first applicant, Mr Ashley Roberts, was given the document to sign he did accept the package and wrote below his signature:

"Acceptance of retrenchment package put forth by W C Water Comfort without any negotiation taking place as no chance was given."

[3] The application brought by the respondent in this matter was supported by affidavits. The seven applicants have
opposed this application and have also filed affidavits. In this regard I refer to the founding affidavit of Mr Ashley Roberts (the first applicant), supported by the confirmatory affidavit of the other applicants as well as an affidavit by the seventh applicant, Mr Safwaan Malick, which goes further than a confirmatory affidavit and also describes the events that took place to a certain extent.

[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”).

[5] There are clear disputes of fact on the papers.

[6] Mr Bagraim, the attorney for the respondent in

this matter deposed to the respondent’s founding affidavit in which he states that he spoke personally to each and every one of the applicants, advising them of the make-up of the package and advised them that the respondent was prepared to pay an extra month's salary over and above what the respondent deems to owe, them as an incentive to settle any dispute that may have arisen already or might arise from the retrenchment, in the future.

[7] According to Mr Bagraim each every one of the applicants was fully aware of the nature of the settlement and in particular knew that if they were unhappy with the proposals offered, they could accept the retrenchment packages less the one month's pay which was offered as settlement of any dispute.

[8] Mr Bagraim stated under oath that he personally questioned each and every one of the applicants with regard to their understanding of the nature of the settlement and all the applicants, except the second applicant, indicated that they wished to accept and be bound by the settlement offer.

[9] The aforesaid is now denied and is placed in dispute by the seven applicants who contend that they signed the document because they desperately needed their salaries for December, the festive season which lay ahead and for credit transactions which needed to be serviced. The applicants, in this application, continue their challenge to the fairness and reasonableness of their retrenchment and question the circumstances in which the monies were paid out to them.

[10] 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.

[11] On the other hand, this matter has come before me on affidavit. There are disputes of fact. These were

not tested during cross-examination as I believe should be done in a matter such as this. I also do not believe it would be advisable to refer this issue to oral evidence. Such application was not made to me and, in any event, the issue could be dealt with adequately at the trial.

[12] 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.

[13] 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.

[14] I was referred to the matter of GOLIN t/a GOLIN ENGINEERING v CLOETE (1996) 17 ILJ 930 (L.C.N.) by the applicant's counsel. In this matter, O'LYNN, J, found as follows:

"When a party claims that there has been full and final settlement, the Court should recognise the settlement as a termination of the issues on the merits, once the Court has, upon investigation of the settlement issue, been satisfied that there indeed was a settlement and that the settlement was voluntary, i.e. without duress or coercion, unequivocal and with full knowledge of its terms and implications as a full and final settlement of all the issues. The onus is on the party who relies on the settlement to prove that the alleged settlement complies with these requirements and ..."

[15] In the aforesaid matter the employer opposed the

proceedings before the District Labour Court of Namibia for monies arising out of an employee's unfair dismissal on the grounds that the proceedings had been settled. The alleged settlement was based on a cheque paid to the respondent in full and final settlement and was paid into the respondent's account. The amount was for considerably less than the amount claimed by the employee. In consequence of the findings of O'LYNN, J, above, the District Labour Court rejected the argument that payment of the cheque in question constituted a settlement.

[16] I must emphasize that in this matter the Court cannot, upon reading the affidavits which contain the most material of disputes of fact, be satisfied that there was a settlement agreement which was unequivocal, with full knowledge, of its terms and implications, in particular knowledge by the applicants that they have waived all their rights under section 189 of the Act. Mr Ashley’s handwritten note on the agreement, strongly suggests the contrary.

[17] In the circumstances the application must fail. Insofar as costs are concerned this is a matter where

costs should follow the result.

[18] It is ORDERED:

The application is dismissed with costs.

E. REVELAS

For the Applicant

Adv Alma de Wet

instructed by PETUSA

For the Respondent

Mr M Bagraim

MICHAEL BAGRAIM AND ASSOCIATES

Date of Judgement

14 August 1998