**v IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG** **CASE NO JR367/01**

In the matter between:

**NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION** Applicant

and

**PUBLIC HEALTH AND WELFARE SECTORAL BARGAINING COUNCIL** First Respondent

**J LE ROUX** Second Respondent

**MEMBER OF THE EXECUTIVE COUNCIL: HEALTH AND WELFARE NORTHERN PROVINCE** Third Respondent

---

**JUDGMENT**

---

**JAMMY AJ**

1. The Director-General: Commission for Administration, in the government of the former Republic of Venda, on or about 15 May 1990, issued Circular Number 39 of 1990 to all Heads of Department in that government titled "Implementation of Parity in the Venda Public Service". The circular in essence required the implementation of identical appointment or promotion

requirements in Venda to those applicable in South Africa and, in that regard, the application of what was known as the "Personnel Administration Standard ('the PAS')". Resultant salary scale revisions and other measures contained in the circular were to be applied retrospectively to 1 March 1990 and, in its terms, the circular also served "as authority for the amendment of salary scales applicable to posts on the establishments of departments".

2. For some reason, the circular was not implemented and, in March 1994, an exchange of correspondence and memoranda commenced between the Director-General: Health and Welfare and the Director-General: Commission for Administration relating to the translation of "Provisioning Administration Clerks" to "Provisioning Administration Officers" in compliance with the directive in the circular and the relevant PAS. The union representatives of the Provisioning Administration Clerks who would be affected by such translation brought concerted pressure to bear on the department to effect the direction and authorisation in Circular 39, disputes in that regard arose regarding the existence or otherwise of grounds upon which that could be done, negotiations between the then acting Director-General and the union failed and the department was in consequence subjected to concerted industrial disruption involving strikes, go-slows and the unlawful occupation by the Provisioning Administration Clerks of administration offices. The PAS in question, of which the clerks and their representatives had now become aware, was utilised in the exertion of this pressure and the Acting Director-General in due course, and in the face of the industrial unrest, found himself under considerable pressure in the context of the ongoing administration and operation of the hospitals within his jurisdiction.

3. Further attempts at mediation failed and eventually, on 6 May 1994, the Acting Director-General: Department of Health and Welfare, Dr McCutcheon, representing the "Department of Health and Welfare of the Venda government" signed an agreement with "representatives of employees of the health stores section of the Venda Department of Health and Welfare" in terms of which, *inter alia*, "the Department will immediately commence to translate to the appropriate ranks in the PAS for Provisioning Administration Officer … those officials currently in the ranks of Provisioning Administration Clerk, whose duties and experience qualify them for this translation". Implementation was to commence immediately and in consideration thereof "the stores section of the Department of Health and Welfare shall terminate the strike and resume their duties". It is not in dispute that the agreement was drafted and signed by Dr McCutcheon in the face of what he perceived to be the imminent collapse of the Department of Health and to ensure the ongoing functioning of its hospitals. He had at all times stressed that the industrial action embarked upon by the clerks was illegal and his own hope was that in due course the agreement would be reversed.

4. Normality having thereby been restored, a new department, the Northern Province Department of Health and Welfare, was eventually established and Dr McCutcheon was directed and authorised to reverse the promotions of Provisional Administration Officers back to what was perceived as their proper status as Provisioning Administration Clerks, on the basis that the agreement of 6 May 1994, was of no force or effect.

5. Not surprisingly, that directive was challenged and was suspended pending the determination of the issue. A Commission under the chairmanship of Judge C S White was established for that purpose but, for

various reasons, found itself "unable to make any finding insofar as the promotions and/or translations" in question were concerned.

6. The matter was then referred to arbitration under the auspices of the First Respondent, with the Second Respondent as arbitrator and following a protracted hearing, the Second Respondent, on 22 February 2001, handed down his Award in terms of which he determined that the employees represented by the Applicant "are not legally entitled to be regarded as Provisioning Administration Officers". It is an order reviewing and setting aside that Award, which the Applicant seeks in these proceedings.

7. Advocate Mnguni, representing the Third Respondent, submits, correctly in my view, that this dispute relates to the interpretation and application of a collective agreement and to the legality of the purported translation or promotion, pursuant thereto, of the Applicant's members from one occupational class, clerks, to another, officers. The Applicant, as will now be apparent, contends that such translations were effected in accordance with the then applicable PAS as well as pursuant to the agreement concluded between its members and the Department of Health and Welfare of the Venda Government as represented by Dr McCutcheon.

8. The grounds of review submitted by the Applicant are set out in its notice of motion as follows:

"1 The Second Respondent committed a gross irregularity when formulating one of the issues to be determined as 'whether or not the employees were legally entitled to be regarded as Provisioning Administration Officers', when the dispute referred by the Applicant was that the moratorium placed on further in-rank promotions by the Third Respondent be declared an

unfair labour practice.

2 The Second Respondent misdirected himself in law when finding that the alleged pressure brought to bear on Dr McCutcheon, the then Acting Director-General of Third Respondent, amounted to duress, rendering the agreement of 6 May 1994 as voidable".

A third ground, relating to the alleged acceptance by the Second Respondent of Dr McCutcheon's evidence and his disregard of purportedly conflicting evidence from other witnesses is also submitted.

9. I do not propose to traverse the first of these grounds in unnecessary detail. In an explanatory affidavit filed in these proceedings, and in which he indicates his intention not to oppose the application but to abide the decision of this court, the Second Respondent sets out the substance of handwritten notes made by him at the outset of the Arbitration in which he records that the issues as defined by him in his Award, were those agreed upon by the parties following his request to them for concise statements of their respective cases, and inter-action between them in that regard. His formulation of the issues, he says, was read out by him to both parties who were requested to confirm its correctness and who did so. That agreement is endorsed by the Third Respondent in its replying papers. I am satisfied therefore that no substance can be attached to the first of the grounds for review upon which the Applicant relies.

10. The question of duress, however, merits more detailed examination and the following extract from the Second Respondent's Award is relevant in that context –

***"In accepting the evidence of Dr McCutcheon, it was clear that a threat of considerable evil hung, not only over his head, but also over the heads of the various patients in the various hospitals in the erstwhile Venda. The threat was simple and clear. If the Provisioning Administration Clerks stopped working it would result in suppliers not being paid and stores not working properly. The result of that would be that suppliers would stop providing hospitals with the necessary items and the stores would stop distributing the items. The effect of that would be detrimental to the health of the various patients.***

***Dr McCutcheon said that the Department of Health and Welfare was close to a state of collapse. The reason for that was, as set out in the previous paragraph the fear was reasonable, because objectively speaking the withholding of those services and items must lead to the conclusion, (even for a layman) that services in hospitals would collapse to the detriment of patients.***

***It is because this threat was imminent, and in fact in the process of happening that the agreement was concluded".***

11. The disregarded evidence of which the Applicant complains as an additional ground for its application related to the disputed existence of that threat but a review of the record of the evidence does not suggest to me any irregularity or impropriety on the part of the Second Respondent in evaluating the evidence, presumably on the basis of weight of probability, in the manner in which he did so. This complaint by the Applicant would manifestly have more relevance in appeal, as opposed to review,

proceedings. There is no valid or acceptable suggestion that in preferring the evidence of Dr McCutcheon in that regard, the Second Respondent failed properly and responsibly to apply his mind to the issue.

12. Of greater relevance however is the Applicant's submission that the threats alleged by Dr McCutcheon to have induced him to sign the agreement of 6 May 1994 are not of such a nature as to render the agreement voidable or invalid in law. The Applicant alludes to the following extract from **Amler's Precedents of Pleadings: 5th Edition**, referred to by the Second Respondent in the following terms –

"A contract concluded as a result of duress can be voided if the following requirements are met:

(i) a threat of considerable evil to the person concerned or his family which induced a fear;

(ii) that the fear was reasonable;

(iii) that the threat was of an imminent or inevitable evil;

(iv) that the threat or intimidation was unlawful, and;

(v) that the contract was concluded as a result of the duress".

The Second Respondent, as I have stated, consequently concluded that "services in hospitals would collapse to the detriment of patients …(and) it is because this threat was imminent, and in fact in the process of happening that the agreement was concluded".

13. No aspect of the evidence presented to him, the Applicant submits, indicated the existence of any of these criteria as inducing Dr McCutcheon to sign the agreement, as the Second Respondent found to have been the case. In determining therefore, that the agreement was invalid and unenforceable for that reason, the Second Respondent misdirected himself and in doing so, committed a gross irregularity rendering his award reviewable.

14. Relying on the same purported criteria, namely that a contract may be vitiated by duress where intimidation or improper pressure renders the consent of the party subjected to duress no true consent, and citing case authority to that effect, the Third Respondent contends that all the elements constituting duress as outlined in the authorities referred to were properly found by the Second Respondent to have been established and that he was accordingly correct in holding, on the facts and evidentiary material placed before him, that they constituted duress in law which rendered the agreement in question invalid and unenforceable.

15. The Applicant argues that even on the basis of Dr McCutcheon's disputed, but accepted, evidence regarding the prevailing circumstances, no threat existed which would satisfy the legal criteria relating to the presence of duress upon which the Second Respondent based his finding. There was no threat of any nature to Dr McCutcheon or his family nor any reasonable apprehension on his part that this existed. There was no imminent, inevitable or considerable evil which would reasonably have justified the fear which he contends that he felt and in the result the contract was not concluded by him for those reasons.

16. In my view, the evidence presented to the Second Respondent would seem to support that contention. It is conceded by the Third Respondent

that Dr McCutcheon, on his own testimony, signed the agreement not out of fear of any danger or threat to his own person or that of any member of his family, but because, had he not done so, health services would have collapsed with attendant detrimental consequences to the health and welfare of patients in the hospitals under his jurisdiction.

17. The matter however does not end there, since neither party to this dispute, nor the Second Respondent himself, appears to have taken cognisance of the further relevant legal concept of *economic duress*. This concept was comprehensibly examined in a Note by Adolph A Landman (a Judge of this court) published in 2001 (22)ILJ 1509 under the heading **"Protected Industrial Action and Immunity from the Consequences of Economic Duress"**.

18. The principal thrust of that article – the examination of employee immunity and remedies and relief available to employers in that context has no specific application in the instant case in that the Third Respondent's contention that the industrial action in question was unlawful and unprotected, was not seriously challenged. What is of relevance however is the author's reference to the decision of the Appellate Division (as it then was) decision in –

**Malilang and Others v MV *Houda Pearl* 1986 (2) SA 714 (A)**

in which the court, in the course of an exploration of the English Doctrine of Consideration and its application to the facts of the matter, came to deal with the defence of duress. At page 1511 of the Journal, this is stated –

"The court's investigation of the defence of duress can be summarised as

follows:

- commercial pressure exerted on one party to a contract to induce that party to enter into the contract may amount to economic duress entitling that party to avoid the contract, provided the pressure amounts to a coercion of the will which vitiates consent;

- the contract must have been entered into unwillingly, but not necessarily under protest, although the absence of protest will be highly relevant. The party must have had no realistic alternative but to submit to the demands and the consent must have been exacted by improper pressure exerted by or on behalf of the Defendant. The contract must have been repudiated as soon as the pressure was relaxed.

The onus of showing that the contract was vitiated by duress, the court held further, rests on the party who wishes to avoid the contract".

19. There is, as I have said, little doubt that, in the context of its nature and its illegality, the pressure exerted by the Applicants' members on the Third Respondent, in the person of Dr McCutcheon, was improper. I am also left in no doubt, from the evidence submitted in the arbitration, that his unwillingness to conclude it was made abundantly clear at the time and whilst it is unclear at what stage formal repudiation of the contract was indicated, there is nothing to suggest that in the political transformation climate prevailing at the time, there was any undue delay in the signifying by the authorities of their rejection of the May 1994 contract, once the reconstituted Department of Health and Welfare came into being. In short, all the elements and requirements of economic duress as identified by the Appeal Court were to my mind present when that contract was concluded.

20. In essence therefore the Second Respondent, in determining that Dr McCutcheon acted under duress, has misconstrued its legal character, but not its consequence. It is unnecessary in my view for me to examine the question of whether or not that misconstruction constitutes an error of law which is reviewable. The fact of the matter is that, having been concluded in the circumstances and climate which prevailed at the time, the contract cannot be allowed to stand. In consequence, the Second Respondent's ultimate finding, albeit for technically the wrong reasons, that the employees in question are not legally entitled to be regarded as Provisioning Administration Officers, must stand and the application for its review and setting aside cannot succeed.

21. In the ordinary course, an award of costs in matters of this nature will follow the result but I find myself in some difficulty in that regard. The main thrust of the challenge to the Second Respondent's Award is sourced, as is the core basis of opposition thereto, on an incorrect interpretation of the legal concept of duress as it is applicable to the facts of this matter. The application must fail because of the conclusion which I have reached, independently of the Third Respondent's opposition, that the Second Respondent, albeit on a basis of flawed reasoning, has made the correct Award. Equity suggests to me that an order for costs against any party in these circumstances would be inappropriate.

22. The order that I make is accordingly the following:

22.1 The application is dismissed;

22.2 There is no order as to costs.

_____

**B M JAMMY**
**Acting Judge of the Labour Court**

**30 January 2002**

Representation:

**For the Applicant:**

Advocate G Malindi instructed by Nicholls Cambanis & Associates

**For the Respondent**

Advocate J Mnguni instructed by the State Attorney