IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE No. JS 554/02

In the matter between:

MPILO MAKIWANE **Applicant**

And

INTERNATIONAL HEALTHCARE DISTRIBUTORS
Respondent

JUDGEMENT

P. ZILWA AJ:

[1] The applicant had been in the employ of the respondent from 21 June

1999 until 5 April 2002. The versions between the parties differ as to what caused the applicant to leave the respondent's employment. On the applicants version he left because he was compulsorily retrenched by the respondent whereas on the respondent's version he, on his own initiative, had applied for and was granted a retrenchment package as he wished to join

his wife who had relocated to Durban.

[2] The present application arises from the applicant's contentions that he was never consulted before his retrenchment was decided; that he was never offered any alternative employment; and that his retrenchment package was never negotiated with him.

[3] Responding to the averments in the applicants Statement of Claim the respondent contends that:

(i) it wasthe applicant who had approached it requesting a voluntary retrenchment,

(ii) consultations and negotiations took place over an extended period of time between the parties with regard to the proper retrenchment package payable to the applicant,

(iii) such negotiations culminated in the parties reaching an agreement with regard to such retrenchment package,

(iv) the Retrenchment Agreement (the agreement) was reduced into writing and duly signed by both parties to signify their assent to its contents on 15 August 2002 and is, as such, binding on the parties,

(v) the respondent has duly paid the applicant in terms of the agreement and the latter has accepted such payments.

[4] In his response to the respondent's contentions regarding the agreement the applicant has averred that he had been verbally informed by an official of the respondent, one Ms Rekha

Ramjatan, that the agreement would be nullified if the applicant did not withdraw his unfair dismissal claim which he had since lodged with the Commission for Conciliation, Mediation and Arbitration (CCMA). As he had not withdrawn his claim with the CCMA, so contends the applicant, he had assumed that the agreement had automatically lapsed.

[5] On the pleadings it thus remains in issue as to how the applicant's retrenchment came about i.e whether it was voluntary and initiated by the applicant himself as the respondent contends, or it was forced upon him by the respondent as he avers. However, for the reasons which will become apparent later, it is not necessary for me to decide this issue.

[6] When the matter came up for hearing before me the applicant appeared in person while the respondent was represented by Mr Ross.

[7] In its Notice of Intention to Oppose Applicant's Notice of Motion / Statement of Claim the respondent had raised a point in limine, contending that this court lacks jurisdiction to adjudicate the matter since the parties had settled the dispute through the agreement. At the hearing it was agreed between the parties that before any evidence is led on the merits the point in limine should first be argued and determined since its determination could be dispositive of the entire case. I shared the same sentiment.

[8] Arguing for the respondent Mr Ross submitted that the agreement effectively and completely settled the dispute

between the parties and that as such there is no valid reason for the matter to come before this Court at all. The applicant has been paid the settlement figure in terms of the agreement in full and final settlement of any claims that may arise from the employment relationship and the subsequent termination thereof. In the premises, since the dispute has been settled, this Court lacks the jurisdiction to entertain such (settled) dispute, so ran the argument.

[9] In his papers the only manner in which the applicant deals with the agreement and the respondent's averments threreanent is in the following terms:

> "*It is a matter of record that the package was never negotiated but was presented as a fait accompli with the proviso that it will be nullified if I had not withdrawn the matter with the CCMA. This was a message relayed verbally by A Miss Rekha Ramjatan on behalf of Warren Elsworth and subsequently confirmed by her in a telephonic conversation between us on the 23 April 2002.... I wish to bring to the Court's attention that as a confirmation of the nullification of the so-called agreement the company failed to pay the money into my account as per agreement on the 26 April 2002.*"

[10] In his argument against the point in limine the applicant made a number of rather startling submissions and made crucial allegations regarding the agreement which do not appear anywhere in his papers. He argued that he first saw the agreement on 15 April 2002 when it was shown to him at the respondent's offices by the respondent's Ms Ramjatan. By then he had already lodged his claim for the alleged unfair dismissal with the CCMA. Ms Ramjatan ordered him to sign the agreement, failing which he would have to resume his work with the respondent. He glanced at the first page of the agreement and saw that it was a retrenchment agreement between himself and the respondent. He requested an opportunity to first study the agreement before signing it but Ms Ramjatan refused to afford him such opportunity. He thus had no option but to sign the document without first reading it. When he so signed the document he knew that his signature signified his concurrence with whatever was contained therein. After he had signed the agreement he was verbally advised by Ms Ramjatan that if he did not withdraw his complaint before the CCMA the agreement would be nullified. He only read a copy of the agreement later on the same day i.e 15 April 2002 and when he became aware of its contents he regarded them as unfair. He then phoned Ms

Ramjatan and told her that he had made a mistake by signing the document but the latter insisted that its contents were binding on all the parties as he had signed it. When he enquired about the later verbal agreement that the agreement would be nullified if he failed to withdraw his complaint before the CCMA Ms Ramjatan reconfirmed that the respondent would abide by such verbal agreement also. The monies set out in the agreement as payable to him were not paid by the respondent on the stipulated dates but later. When he noticed that such amounts had been deposited in his bank account he left them there.

[11] As already stated, most of the averments set out above by the applicant in argument do not appear in any of his papers before the Court. They are very crucial averments which, of necessity, should have been made in the applicant's papers, particularly in his reply to the respondents Statement of Defence. In such statement the agreement is attached as an annexure and it is stated in very clear and unequivocal terms that full reliance would be put on it by the respondent. Clearly this was an ideal opportunity for the applicant to distance himself from the written agreement if he had been forced to sign it without knowing its contents as he alleged only at the argument stage. In fact this contention is so crucial that the applicant would have been expected to allude to it even in his Statement of Claim because at that stage he already knew about the agreement and its contents. On his own version the applicant signed and read the agreement (in that order) on 15 April 2002. His Statement of Claim is dated 13 May 2002.

[12] Even though I am quite mindful of the fact that the applicant handled this entire litigation on his own without any legal assistance I am of the view that the necessity for making the averments referred to above by the applicant in the pleadings is so glaringly obvious that it does not require a legal mind to realise it. When he appeared and

argued the matter in person before me the applicant struck me as a person of ordinary, if not even above average, intelligence. He could not explain his failure to make the necessary averments in his papers. I got the distinct impression that the applicant's averments as to how he came to sign the agreement are of recent fabrication and I am not inclined to attach any weight to them. I consider it improbable that the applicant, who seems to be so aware of his legal rights that by the time the agreement was signed he had already lodged a claim with the CCMA, could knowingly sign a Retrenchment Agreement without first satisfying himself that its terms were acceptable to him.

[13] His explanation that he signed the agreement because the other alternative given to him if he were not to sign the agreement there and then without first having read it, would be to resume his old job, does not make a great deal of sense to me. If he had been given that kind of an alternative I would have expected him to seize that opportunity with both hands and resume his old job, especially given that one of the reliefs he wanted was reinstatement. If his averments are to be believed, the reason he felt pressurised to sign the agreement, without first reading it, was to avoid reinstatement, which defies comprehension and logic. In the premises I have no hesitation at all in accepting that the applicant voluntarily and knowingly signed the agreement after duly satisfying himself that its terms were acceptable to him and I reject any contention to the contrary. The fact that the applicant kept the monies paid to him in terms of the agreement puts the matter beyond doubt.

[14] This then brings me to the final issue of what the effect of the agreement is on the present proceedings.

[15] Sub paragraph 1.2 of the agreement provides that "*the parties have*

> *reached agreement on the terms of the employee's termination of employment on a basis deemed to be fair to both parties and thus wish to record the terms in writing"*

Sub-paragraph 1.4 provides that *" payments recorded in this agreement are made in full and final settlement of any/or all claims which the employee may have against the company arising from her (sic) employment with the company, its termination or otherwise"*

[16] I further deem it opposite to quote the terms of paragraph 9 of the agreement verbatim. It reads thus:

> "9. <u>WHOLE AGREEMENT, NO AMENDMENT.</u>
>
> 9.1 This agreement constitutes the whole agreement between the parties relating to the subject matter hereof.
>
> 9.2 No amendments or consensual cancellation of this agreement or any provision or term shall be binding unless recorded in a written document signed by the parties. Any such amendment or cancellation which is so given or made shall be strictly construed as relating to the matter in respect whereof it was made or given.
>
> 9.3 To the extent permissible by law no party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein, whether it induced the contract and/or whether it was negligent or not."

[17] The above quoted paragraph 9 of the agreement clearly puts paid to any reliance by the applicant on any purported subsequent verbal representations or promises such as those that he alleges were made by Ms Ramjatan with regard to the agreement being subject to his withdrawal of his claim before the CCMA. Each page of the agreement is initialled by each of the parties and their witnesses and they have all put their full signatures at the last page thereof.

[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.

[21] In the result, the point raised in limine succeeds, which effectively disposes of the whole matter. After a careful consideration of all the relevant facts I have decided to make no order as to costs.

[22] In the premises:

(i) The applicant’s claim is dismissed,

(ii) There will be no order for costs.

P.H.S ZILWA, A.J.

APPEARANCES:

FOR THE APPLICANT : In person

FOR THE RESPONDENT : Mr D Ross

Date argued : 29 July 2003
Date of Judgement Delivery: 06 August 2003