IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C168/2007

In the matter between:

FREDERIC JOHAN DU PLESSIS **Applicant**

and

KAAP AGRI BEDRYF LTD **Respondent**

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the applicant sought to challenge the termination of his employment on the basis that it was an unfair dismissal based on operational reasons by the respondent. The respondent contended that the employment relationship was terminated by mutual agreement between the parties.

[2] The applicant abandoned issue of procedural fairness at the beginning of the hearing.

[3] The issues to be determined in terms of the agreement between the parties are whether:

"5.1 The settlement agreement entered into between the parties deprived the Honourable Court of jurisdiction to entertain the dispute;

5.2 The settlement agreement entered between the parties :

5.2.1 Was induced by misrepresentation; or

5.2.2 constitutes the valid settlement of an unfair dismissal dispute;

[4] If it was to be found that the agreement was induced by a misrepresentation and that the Court had jurisdiction to entertain the dispute, then the remaining issue would be whether or not the dismissal was substantive fair.

Background facts

[5] It is common cause that the respondent experienced difficult trading conditions during the first months of its financial year 2005/2006.

[6] The applicant who was employed as General Manager: Packaging was concerned about the performance of his division and as a result motivated for the reduction of staff as a cost saving measure. At that stage there were three managers reporting to the applicant and he reported to the Operations Manager.

[7] As a result of these trading difficulties that respondent embarked on cost cutting measures during January 2006 and when this did not yield any positive results, a meeting was convened with all staff members on 20 February 2006. At this meeting the respondent informed the staff that it intended to commence with consultation regarding the proposed restructuring and that would done in terms of s189(3) of Labour Relations Act 66 of 1995 (the Act).

[8] Thereafter, and on the 22 February 2006, Mr Liebenberg, the General Manager and Mr J du Toit, the Senior Manager, met with the applicant and advised him that his position would be made redundant. The applicant did not contest the issue of making his position redundant. What then followed after this announcement was consultation between the parties regarding the severance pay for the applicant.

[9] The consultation resulted in an agreement between the parties on amount of severance to be paid to the applicant. Although the applicant left the employment of the respondent on 28 February 2006, the employment terminated on 31 March 2006.

[10]It is common cause that the applicant appointed Mr Andre Du Toit was appointed to the position of General Manager: Packaging Material, a fact the applicant claims he became aware of on 13 November 2006. The applicant further testified that this is the same position he occupied before termination of his employment with the respondent. It was also arising from this that the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA).

[11]The conciliation process having failed to settle the dispute and Commissioner Warwick having ruled that the CCMA did not have jurisdiction to hear the dispute, the applicant instituted these proceedings.

The case of the applicant

[12]The thrust of the applicant's case is that he signed the agreement terminating his employment due to the misrepresentation by the respondent. The misrepresentation according to him arose from the presentation by the respondent during the consultation that his previous position, that of the General Manager: Packaging would be done away with.

[13]He conceded during cross examination that he had made the proposal for rationalisation which would result in the reduction of staff complement as a cost saving measure. He further conceded that despite the fact that the rationalisation process was to render certain positions redundant, it was not intended to do away with the functions of those positions. The functions were according to him to be absorbed into other positions which were unaffected.

[14]When asked whether he would have accepted the position regard being had to the fact that it paid R10 000.00 less than what he earned at the time the applicant indicated that he would seriously consider it.

The case of the respondent

[15]The respondent closed its case without leading any evidence and applied for the dismissal of the applicant's case with costs. The respondent contended that the case should be dismissed because the applicant had failed to prove that he was dismissed. The applicant contended that in the alternative, the case should be dismissed because the matter was res judicata, the dispute having been settled by agreement.

Evaluation

[16]It is clear that the applicant sought to have the agreement concluded between him and the respondent set aside on the basis of misrepresentation.

[17]The legal principles to apply when dealing with a plea of misrepresentation are summarised in *Novick And Another v Comair Holdings and Others 1979 (2) SA 116 (WLD)* as follows:

> "*(a) That the representation relied upon was made.*
>
> *(b) That it was a representation as to a fact. A promise, prediction, opinion or estimate or exercise of discretion is not a representation as to the truth or accuracy of its content; it can, however, often be construed as a representation that the person making it is of a particular state of mind.*
>
> *(c) The representation was false. In relation to an ordinary representation of fact, what must be shown is not merely that it was, or turned out to be, erroneous, but that it did not represent the bona fide view, at the time when it was expressed, of the person who expressed it.*
>
> *(d) That bit was material, in the sense that it was such as would have influenced a reasonable man to enter into the contract in issue.*

(e) That it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided."

[18]In the pleadings and his evidence the applicant does not reveal the nature or form of the representation made by the respondent. His contention is that the redundancy of his position was not properly thought through. In his testimony the furthest he could go in relation to this issue was that had the position mad available he would have considered it.

[19]Unlike in the case of *Baudach v United Tobacco (200) 21 ILJ 2241 (SCA)*, where the misrepresentation was found to be the cause of the inducement for the employee to accept the settlement, in the present instance there is no basis to arrived at that conclusion. Both the pleadings and the evidence of the applicant do not reveal how the applicant was misled into entering into the agreement. Mr Grobler counsel for the applicant argued that the applicant would not have signed the agreement but for the fact that he was told that if did not sign at that stage he ran the risk of not receiving the same amount of severance pay should the respondent not succeed in making savings in that period. that, if there was no improvement in the performance of the respondent he could receive a lesser severance pay. It was not

stated as a fact that if he did not sign at that stage he would receive a lesser severance pay. There existed a possibility that he and other affected employees would receive what they ultimately received even if they did not sign at that stage depending on the improvement in the financial performance of the respondent.

[20]It is also important to note in relation to the issue of representation that the applicant testified, when asked whether he would have accepted the position despite the fact it was paying R10 000.00 less then what he earned before termination of his employment, that he might have considered the position. He did not say that he would have accepted the position.

[21]Mr Grobeler further argued that the applicant would not have signed the agreement but for the presentation that his post was redundant. This argument does not assist the case of the applicant because on his own version the proposal came from him that there was a need for the respondent to embark on a cost saving exercise. It is undisputed that this exercise resulted in significant savings for the respondent.

[22] It is also not dispute that the person who the respondent appointed was not an outsider but an employee who was transferred horizontally

and earned a salary far less than that of the applicant. Whilst the title of the post occupied by the person who was transferred from Trade Devision, was the same as that which was occupied by the applicant, General Manager: Packaging, the content of the post is different. This transfer which is recorded as part of the common cause facts in the pre-trial minute occurred as a result of a further restructuring which occurred in 2007. It is however strange as the applicant contended, that the appointment was made retrospective to October 2006. However, this does not assist the case of the applicant and as I pointed out to the applicant's counsel the critical issue is that the parties agreed that the appointment happened as a result of another restructuring process.

[23] Another attack which was raised during argument against the agreement was that it contained a common error such that it could not be said that there was a meeting of the minds of the parties. The argument relates to the fact that whilst this was a termination based on operational reasons, it was in the signed agreement titled "resignation." This argument has no merit. The approach to name the termination "resignation" arose from the concern by the applicant about the implication of securing future employment if it was to be stated that he was retrenched. He requested that the agreement should

record the termination of his employment with the respondent as being due to resignation. This proposal was acceptable to the respondent and accordingly the reason for termination was titled as such in the agreement which was signed on the by both parties on 27 February 2007.

[24]Prior to signing the agreement and on 22 February 2006, the applicant confirmed the agreement that the termination will be treated as a resignation rather than termination based on operational reasons. The memorandum reads as follows:

> "***BEDANKENG***
>
> *Beste Johan,*
>
> *Hiermee gee ek formeeel kennis date ek my dienste as Hoofbestuurder: Pakmateriaal sal be-eindig met effek 31 Maart 2006.*
>
> *Ek maak graag van hierdie geleentheid gebreuk om my uit te spreek teenoor die Direksie en Bestuur van Kaap Agri (Edms) Bpk vir die voorreg om deel van 'n wonderlike span te gewees het.*
>
> *Voorspoed vir toekoms*
>
> *Vriendelike groete."*

[25] As stated above the agreement was signed by both parties on 27 February 2006. In its introduction the agreement provides as follows:

> *"ANNGESIEN Kaap Agri met Du Plessis begin konsulteer het oor sy moontlike diensbeeindiging weens operassionele redes;*
>
> ***EN AANGESIEN** Du Plessis op 22 February 2006 skriftelike kennis gegee het dat hy met effek van 31 Maart 2008 uit die diens van Kaap Agri bedank."*

Clause 7 of the provides that the agreement is in full and final settlement of any claim that the applicant may have against the respondent.

[26] In the light of the above I do not agree that there was a confusion as to what was agreed upon by the parties. In any event the use of the word resignation is not significant in my view as what is significant is that the facts indicate clearly that the employment relationship was terminated by agreement.

MOLAHLEHI J

DATE OF HEARING **:** 24 JUNE 2006

DATE OF JUDGMENT **:** 12 JUNE 2008

APPEARANCE

For the Applicant :Adv Grobelar

Instructed by : J Gruss Attoneys

For the Respondent: Attorney H Nieuwoudt

Instructed by : Deneys Reitz Inc