IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN **CASE NO. C229/2006**

IN THE MATTER BETWEEN:-

HENK JAN JAAP ZONNESTEIN **APPLICANT**

AND

STEINHOFF SOUTHERN CAPE PROPRIETARY LIMITED T/A WOODLINE TIMBERS **RESPONDENT**

JUDGMENT

GUSH, AJ

1. Pursuant to an application lodged by the Applicant seeking an order declaring that he had been unfairly dismissed and after the pleadings had closed, the parties met and concluded a pre-trial minute.

2. In the pre trial minute it is recorded *inter alia:*

2.1. *"Paragraph 9 - "Party to begin":-*

1. The parties are unable to agree on who will begin adducing evidence.

2. The parties request leave to have the matter set down for argument on this aspect and the issue raised in clause 12"; and

2.2. Clause 12 - "Preliminary Point":-

"12.1. The respondent wishes to have decided separately from the merits of the matter;

12.1.1. *whether the settlement agreement entered into between the parties deprives the Honourable Court of jurisdiction to entertain the disputes;*

12.1.2. *whether the settlement agreement entered into between the parties;*

12.. 1.2.1. was induced by misrepresentation; or

12. 1.2.2. constitutes a valid settlement of an unfair dismissal dispute;

12.1.2.3. whether the Applicant was dismissed by the Respondent."

3. The pre-trial minute in addition records that the Applicant did not

agree that these preliminary points should be heard and decided separately from the merits of the matter.

4. When the pre-trial minute was filed the Court ordered that:-

"The matter is to be enrolled for argument on the limine points contained in clauses 9 and 12 of the pre-trial minute"

5. The matter was duly enrolled in accordance with a Court Order but at the outset the parties indicated that by agreement the issues which the Court was to decide were as follows:-

5.1. whether the points in limine as recorded in paragraphs 12.1. 1, 12. 1.2. and 12. 1. 3. should be decided separately from the merits of the matter; and

5.2. irrespective of whether the issues were to be decided separately, who bore the duty to begin adducing evidence.

6. One of the issues which the Respondent in the pre-trial minute wished to be decided separately from the merits was:-

"Whether the Applicant was dismissed by the Respondent", I was not asked to decide this issue but merely to determine whether or not it should be decided separately from the merits of the matter.

7. Dealing first with this point in limine (paragraph 12.13) namely whether the Applicant was dismissed by the Respondent or not (for the purposes of deciding whether or not it should be heard separately) there are two possibilities. Either the settlement agreement constitutes an acceptance by the Applicant of his

dismissal (retrenchment) by the Respondent or the settlement agreement is not a dismissal as defined in the Labour Relations Act but merely an agreement reached between the parties that the Applicant's employment was to terminate and to record the terms and conditions of such termination

8. In practice where the existence of a dismissal is challenged the onus on the employee is not dealt with separately from the merits nor the onus on the employer to establish that the dismissal was fair. The facts pertaining to both onuses constitute the merits It is the Respondent's contention in this matter that the existence of the settlement agreement justifies the separation of the issue of whether or not there was a dismissal that this should be heard separately from the merits.

9. In the matter of *Bekker vs Nationwide Airlines Proprietary Limited (1998) 2 BLLR 139 LC* the Court took the view that an agreement terminating the contract of employment in circumstances where the employee facing retrenchment agreed to be paid some form of severance pay was a dismissal. The Court held:-

"Die punt is dat 'n werkgewer moet homself of haarself voorberei om te handel met al die aktiwiteite wat deur Artikel 189 vereis word Een van die verpligtinge is om die werknemer in te roep en 'n konsultasie te voer met die oog op 'n moontlike bereiking van ooreenkoms.... Dit is wel waar dat by so 'n geleentheid kan 'n werkgewer 'n kortpad neem en vir 'n Werknemer vrae: "Aanvaar

U dat ons moet van u dienste onstlae raak en kan ons praat oor die terme daarvan en kan ons 'n ooreenkoms sluit?"" (At page 140EG)

10. This approach appears to have found favour in *Baudach vs United Tobacco Company Limited (2000) 21 ILJ 2241 (SCA)* and *ABSA Investment Management Services Proprietary Limited vs Crowhurst 2006 2 BLLR 107 (LAC)*

11. In these matters the underlying principle underpinning the agreement entered into between the parties is a dismissal The agreement is an acceptance by the retrenchee of the dismissal and the benefits that flow from such dismissal, The onus however remains upon the Applicant to establish that the agreement is an acceptance of his dismissal and to establish that he was in fact dismissed, In deciding whether this aspect should be heard separately from the merits it is necessary to consider whether the evidence dealing with the dismissal constitutes an integral part of evidence on the merits or not,

12. It is helpful to consider the answers provided by the Respondent in its statement of defence to the Applicant's paragraphs 5.13 and 5.14 of his statement of case The Respondent seems to suggest that the settlement agreement was a standard settlement agreement and that the severance element thereof was completed during discussions between the Applicant and the Respondent *"Severance pay"* is a term of art used in the Basic Conditions of Employment Act to denote

the payment which is required to be made to an employee who is dismissed for operational reasons.

The agreement of settlement not only refers to a *"severance package"* but in addition refers in paragraph 2 thereof to the tax benefits accruing to an employee who is dismissed for operational reasons. I am not convinced that in these circumstances the question of whether the Applicant was dismissed or not constitutes a matter distinguishable from the merits,

13. Mr Nieuwoud argued that as the Applicant was relying on his dismissal being automatically unfair that this placed an additional onus on the Applicant to establish not only the dismissal but that the dismissal was for reasons which fell within the ambit of Section 187 of the Labour Relations Act,

14. I have considered the cases he referred to namely *"Croukam vs SA Airlink Proprietary Limited (2005) 12 BLLR 1172 (LAC)* and *JANDA vs First National Bank (2006) 12 BLLR 1156 (LAC)* both of which deal with the onus on the employee to show that he was unfairly dismissed (and that the reason fell within the ambit of the Section 187).

15. I am satisfied that the Applicant bears the onus to prove not only that he was dismissed but in addition that his dismissal fell within the ambit of Section 187.

16. The issue which remains is whether it automatically follows that as the Applicant bears this additional onus he should begin adducing evidence. This question cannot be answered without reference to the remaining points in limine

17. The remaining issues to be considered are those raised in paragraphs 12.1.2.1 and 12 1.22 of the pre-trial minute These two points are not distinct and separate points in limine but the one flows one from the other. The question to be decided is whether the settlement agreement was induced by misrepresentation and if not whether it constitutes a valid settlement of the dispute which in turn would deprive the Court of jurisdiction to consider the dispute

18. It is so that the party relying on the settlement agreement as being in full and final settlement of the dispute bears the onus to prove that the dispute is settled In this matter the Respondent bears the onus of showing that the Applicant in signing the settlement agreement settled the dispute

19. The issue of whether or not the settlement agreement settled the dispute as provided for in paragraph 5 thereof could therefore resolve the matter, However the signing of the settlement agreement formed part of a consultation process. If the agreement was induced by misrepresentation then it is conceivable that no dismissal took place and that the Applicant remains in the employ of the Respondent If however the settlement agreement was entered into as

an acceptance of his dismissal the misrepresentation (if established) which lead the Applicant to accepting the dismissal simply vitiates that acceptance but the Applicant remains dismissed.

20. I am therefore satisfied that the Respondent in this matter bears the onus of showing that the settlement agreement entered into between the Applicant and the Respondent settled the dispute between the parties and therefore the duty to begin adducing evidence in respect of the points in limine raised in paragraphs 12.1.2.1 and 12,1,2,2 of the pre-trial minute is that of the Respondent.

21. The issues in dispute surround not only the finalisation of the agreement but the circumstances and facts leading up to the conclusion of the s settlement agreement, and will determine the question of whether or not the Applicant was dismissed, All these issues however constitute *"the merits"* and are not separable to the extent that it justifies the separation thereof nor that they should be heard separately.

22. I am not persuaded that any purpose would be served by separating these issues, In resolving the question of whether or not the agreement settled the dispute the remaining issues of whether the agreement was freely and voluntarily entered into, whether it constituted dismissal, whether the Court has jurisdiction or not and whether the dismissal was fair will all be resolved These are *"the merits".*

23. I am therefore of the view that it is fair and expedient in the circumstances that there should be no separation of the issues and that the Respondent should commence adducing evidence. This will ensure that all the matters in dispute are resolved most expeditiously.

24. I therefore make the following Order:-

24.1. That the preliminary points raised in paragraph 12 1 of the pre-trial minute be decided together with the merits of the matter; and

24.2. that the Respondent begins adducing evidence; and

24 3 that the costs of this application be costs in the cause.

GUSH AJ

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES

FOR THE APPLICANT: ADV C S KAHANOVITZ
Instructed by BERNADT VUKIC POTASH & GETZ

FOR THE RESPONDENT: MR H C NIEUWOUDT (ATTORNEY):
DENEYS REITZ ATTORNEYS

DATE OF HEARING: 30 AUGUST 2007

DATE OF JUDGMENT: 15 JANUARY 2008