CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 41/16

In the matter between:

MUYIWA GBENGA-OLUWATOYE Applicant

and

RECKITT BENCKISER SOUTH AFRICA (PTY) LIMITED First Respondent

NADEEM BAIG N.O. Second Respondent

Neutral citation:	*Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another* [2016] ZACC 33
Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J
Judgment:	Moseneke DCJ and Cameron J (unanimous)
Decided on:	15 September 2016
Summary:	Right to access to courts — approximate equality of bargaining power — settlement agreement — full and final settlement — waiver of right to access to courts not against public policy

ORDER

On application for leave to appeal from the Labour Appeal Court, dismissing an appeal from the Labour Court:

1. The application for condonation of the late filing of the application for leave to appeal is granted.
2. The application for leave to appeal is refused with costs.

JUDGMENT

MOSENEKE DCJ and CAMERON J (Mogoeng CJ, Bosielo AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring):

[1] This is an application for leave to appeal against an order of the Labour Appeal Court.[1] The applicant, Mr Muyiwa Gbenga-Oluwatoye, came to South Africa to work for the first respondent, Reckitt Benckiser South Africa (Pty) Limited (Reckitt). Reckitt specialises in manufacturing and distributing household products like air fresheners, deodorisers and atmosphere enhancers. Reckitt opposes the application, as does the second respondent, Mr Nadeem Baig, whom the applicant joined to the proceedings as Reckitt's regional human resources director.

[2] The application raises questions whether: (a) the applicant's employment contract provided for a right to a pre-dismissal hearing in terms of the common law of contract; (b) if not, whether the common law tacitly provides for a right to a pre-dismissal hearing in all employment relationships governed by contract; and

[1] The applicant also asks this Court to condone the late filing of this application.

(c) whether, notwithstanding (a) and (b), the settlement agreement between the applicant and Reckitt is lawful.

[3] The applicant concluded a contract of employment with Reckitt on 16 June 2013. He started his employment as Reckitt's regional human resources director on 22 July 2013. An investigation for misrepresenting his qualifications and employment history began in February 2014. This resulted in his suspension. The quarrel was that during his employment negotiations with Reckitt the applicant untruthfully identified Unilever as his then current employer, whereas in truth it was Standard Chartered Bank. Reckitt found this misrepresentation material since it was on this basis that it paid the applicant a sign-on bonus of US$40 000. Soon after the investigation, on 3 March 2014, the applicant was dismissed for misrepresentation.

[4] The procedural fairness of the dismissal is in issue. The applicant alleges that there was no disciplinary hearing and this infringed his right to be heard. He says that clause 10.1 of his employment contract expressly or by implication provides for a right to a fair hearing before the termination of his employment.[2] The respondents deny that the applicant was not afforded a pre-dismissal hearing.

[5] A further, crucial, issue arose. A mutual separation agreement was entered into by the parties to determine their future relationship (separation agreement). The applicant argued that he was coerced into signing this. He also took issue with clause 3.4.2 of the separation agreement. This waived all recourse to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court.

[2] Clause 10.1, in relevant part, provides:

> "10.1 The Company may terminate your employment under this agreement with immediate effect if at any time you—
>
> . . .
>
> 10.1.3 are guilty of gross misconduct, mismanagement or neglect in the performance of any duty owed by you to the Company."

Litigation history

Labour Court

[6] The Labour Court[3] dismissed the applicant's urgent application for a declaratory order with costs.[4] It noted that the applicant's case was not based on the provisions of the Labour Relations Act[5] but rather on the common law of contract.[6] It concluded that there was no procedural unfairness even though the applicant had contended that his contract of employment expressly or by implication entitled him to a pre-dismissal hearing.[7] The Court concluded that the claim of undue duress in signing the separation agreement was not supported by the facts. And there was no economic duress because the situation was created by the applicant's own misrepresentation.[8] The Court examined the validity of clause 3.4.2 of the separation agreement that excluded recourse to the CCMA or the Labour Court. It expressed its disquiet that this issue was raised for the first time in the applicant's replying affidavit. The Court dismissed this claim anyhow. It found that the clause was "nothing but the expression of the full and final settlement".[9]

Labour Appeal Court

[7] This Court previously, in an order dated 7 August 2014, after the Labour Court judgment, dismissed an application for leave to appeal as it was not "in the interests of justice to hear the matter at [that] stage". The applicant then appealed to the Labour Appeal Court. That Court[10] also dismissed the appeal.[11] The Court endorsed

[3] Molahlehi J.

[4] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another* unreported judgment of the Labour Court, Case No. J580/14 (12 March 2014) (Labour Court judgment).

[5] 66 of 1995.

[6] Labour Court judgment above n 4 at para 20.

[7] Id at paras 20-1.

[8] Id at para 35.

[9] Id at para 39.

[10] Savage AJA (Waglay JP and Coppin JA concurring).

the Labour Court's findings regarding the separation agreement.[12] It was thus unnecessary to pronounce on the contractual right to a pre-dismissal hearing under the employment contract – the separation agreement superseded that employment contract.[13]

[8] On duress, the Labour Appeal Court noted that there were genuine disputes of fact. The applicant elected to proceed by way of notice of motion. He sought no referral to oral evidence or trial. Hence all claims had been settled and the applicant had waived his right to approach the CCMA or the Labour Court.[14]

[9] The Labour Appeal Court rejected the argument that the separation agreement violated public policy in limiting the applicant's right to access to court.[15] *Barkhuizen*[16] set out the test to determine whether terms of a contract were contrary to public policy (*contra bonos mores*). Having regard to the parties' relative positions, including their bargaining power and their level of knowledge of the contract, there was no inequity here. The applicant was employed in a senior management position. He had ample previous experience at senior level. There was no indication that he did not understand that the separation agreement limited judicial redress. The clause was meant to bring the relationship between the parties to finality. It was not unlawful. It should be upheld.

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[11] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another* [2016] ZALAC 4; (2016) 37 ILJ 902 (LAC).

[12] Id at paras 24-5.

[13] Id at para 27.

[14] Id at para 20.

[15] Id at para 24. Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[16] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

In this Court

[10] The applicant asks for condonation for a minimal delay of one day. The explanation is adequate. Condonation should be granted.

[11] The applicant stands or falls on two grounds of appeal: (a) that he has a right to a pre-dismissal hearing under the common law; and (b) that the separation agreement is contrary to constitutional principles. He appears to have abandoned his claim of duress.

[12] The applicant maintains that his contract of employment expressly or tacitly implied the right to a pre-dismissal hearing. More so, South African law, he says, recognises an implied term in all contracts of employment to the effect that employees are entitled to a pre-dismissal hearing. The applicant submits that, if this Court finds that no right to a pre-dismissal hearing vests in him, it ought to develop the common law to include it. This he says raises an arguable point of law, as the Supreme Court of Appeal has given conflicting decisions on the right to a pre-dismissal hearing under the common law.[17]

[13] The applicant submits that the separation agreement limits or contradicts his rights under sections 4 and 5 of the Labour Relations Act. These mean that any clause restricting an employee from recourse to the CCMA or the Labour Court is contrary to fair labour practices under section 23 of the Constitution. The separation agreement is also against public policy as it deprives him of the right to challenge his dismissal. He says that the Labour Appeal Court misapplied *Barkhuizen*.

[17] See *Boxer Superstores Mthatha v Mbenya* [2007] ZASCA 79; [2007] 8 BLLR 693 (SCA); and *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] ZASCA 52; [2007] 4 All SA 866 (SCA), which held that there is a common law right to a pre-dismissal hearing; but see *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2; [2010] 3 All SA 1 (SCA); and *Transman (Pty) Ltd v Dick and Another* [2009] ZASCA 38; [2009] 3 All SA 183 (SCA), which held that there is no common law right to a pre-dismissal hearing.

[14] The respondents urge that the application for leave to appeal be dismissed with costs. They support the reasoning of the Labour Appeal Court. This Court has decided the application without written submissions or oral argument.

Leave to appeal

[15] This application engages the jurisdiction of the Court. It raises the right to access courts and also the development of the common law in accordance with the Bill of Rights.

Merits

[16] None of the grounds of appeal bar one bear any prospect of success. Given the conclusion we reach on the separation agreement, the applicant's complaint in regard to a pre-dismissal hearing does not arise.

[17] The remaining issue is whether clause 3.4.2 of the separation agreement is against public policy for excluding judicial redress. That agreement, significantly, is titled "Settlement Agreement". Clause 3.4.2 provides:

> "3.4 The [applicant] hereby and herewith voluntarily and unconditionally waives—
>
> . . .
>
> 3.4.2 his right to approach any Relevant Authority including the CCMA and/or the Labour Court or any other Court for any relief against [Reckitt] emanating from his Employment and/or his resignation and/or this Agreement."

[18] Clause 4 is headed "FULL AND FINAL SETTLEMENT". It provides, in relevant part:

> "4.1 This Agreement and in particular the terms contained in clause 3 above, is in full and final settlement of all claims of whatsoever nature and howsoever arising between the Parties."

[19] Clause 4.2 contains an exception – Reckitt is allowed to sue if the applicant fails to make repayments of his sign-on bonus.

[20] The Labour Court held that the bar to judicial redress in clause 3.4.2 amounted to nothing more than a means of giving effect to a final settlement agreement. The Labour Appeal Court, with reference to *Barkhuizen*, found that the bar to judicial redress was permissible, considering the relationship between the contracting parties. It is arguable that the manner in which the Labour Court dealt with the judicial redress extols *laissez-faire* notions of freedom of contract at the expense of public notions of reasonableness and fairness in the face of section 34 of the Constitution that guarantees the right to seek the assistance of courts. We therefore prefer to express no view on whether *Barkhuizen* is on point here.

[21] In *Barkhuizen*, this Court held that constitutional challenges to contractual terms give rise to the question whether the disputed provision is contrary to public policy.[18] The question is thus whether clause 3.4.2 is against public policy. *Barkhuizen* grappled with a limitation clause that restricted access to courts if a certain period of time had passed. This Court signalled a red light against limitation clauses that are so unreasonable that they make it impractical to seek judicial redress at all. Ngcobo J warned:

> "I accept that there may well be time limitation clauses that are so unreasonable that their unfairness is manifest. A clause I have in mind is one that requires a claimant to give notice of a claim and to sue within 24 hours of the occurrence of the risk insured against."[19]

[22] As against this, we must consider the importance of giving effect to agreements, solemnly concluded, by parties operating from the necessary position of approximate equality of bargaining power. Here, the power of the

[18] *Barkhuizen* above n 16 at para 28.

[19] Id at para 60.

Labour Appeal Court's approach is obvious. What is at issue here is a powerful consideration of public policy – the need for parties to settle their disputes on terms agreeable to them. That need arises in their own interests, and the interests of the public.

[23] Here, the applicant had engaged in outright material deceit and misrepresentation. He himself, confronted with the misrepresentation in his curriculum vitae, confessed he had no defence.[20] It was then that he entered into a final agreement to put a *present* dispute to bed. He did so full knowingly, with his eyes open to his own future interests. It may have been different if he had agreed to abjure recourse to the courts in *future* disputes. But here the dispute was hot and fresh, and present. He agreed to part ways with Reckitt on terms that were final, and that protected him from further action by his employer – including the possibility of a disciplinary process that could wound his career irremediably. That finality included an agreement that the courts would not be involved. The parties would go their ways without more.

[24] The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.

[25] The application must be dismissed with costs for lack of prospects of success.

[20] He said "there is really nothing that I am going to say to justify my actions".

Order

[26] The following order is made:

1. The application for condonation of the late filing of the application for leave to appeal is granted.
2. The application for leave to appeal is refused with costs.