

SOUTH AFRICA / JUDGMENT

Lawrie v Nursing Response CC and Others (CA 331/2014) [2016] ZAECHGC 30; [2016] 3 All SA 186 (ECG) (19 May 2016)

[2016] ZAECHGC 30

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Bloem, Hartle, Bacela

CASE / FILE NUMBER

CA 331/2014

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA 331/2014

DATE: 19 MAY 2016

In the matter between:

DIANE ELEANOR LAWRIE.....Appellant

And

NURSING RESPONSE CC.....First Respondent

LIFE HEALTHCARE GROUP (PTY) LIMITED.....Second Respondent

JULIA CAMERON.....Third Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION.....Fourth Respondent

APPEAL JUDGMENT

Bloem J.

- [1] The appellant launched an application in the court a quo for an order that an agreement, styled Deed of Settlement and hereinafter referred to as “the settlement agreement”, between her, on the one hand, and the first and second respondents, on the other hand, be set aside alternatively that the settlement agreement be declared void ab initio. On 17 October 2013 Dukada J dismissed the application with costs. The learned Judge thereafter

passed away and on 27 August 2014 Chetty J granted the appellant leave to appeal against the dismissal of the application. This is accordingly an appeal against the refusal by the court a quo to set aside the settlement agreement alternatively that it be declared void ab initio.

- [2] The appellant is a qualified registered psychiatric nurse, the first respondent is Nursing Response CC, the second respondent is Life Healthcare Group (Pty) Ltd, the third respondent is cited in her capacity as a commissioner appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA) and the fourth respondent is the CCMA. The third respondent was appointed to arbitrate the dispute between the appellant and the first and second respondents. Only the second respondent opposes the appeal. There is a dispute as to whether or not the second respondent was in any manner involved with the appellant's employment by the first respondent. The first respondent admitted the appellant's allegation that at all times material to the dispute herein it employed the appellant. In the arbitration proceedings the second respondent was joined as a further party at the appellant's instance. The second respondent was joined in these proceedings because it was a signatory to the settlement agreement. It seems from the papers that, although the first respondent employed the appellant, the latter executed her professional duties at the second respondent's hospital in Port Elizabeth under the second respondent's direct control and management. That issue is not material for the determination of the issues raised in this appeal.
- [3] The undisputed material facts are that on 8 January 2009 the appellant concluded an employment agreement with the first respondent, on 25 November 2010 after convening a disciplinary enquiry the appellant was dismissed by the first respondent because she allegedly breached a disciplinary rule at her workplace by sleeping on duty during an official lunch break and the appellant referred the dispute about the fairness of her dismissal to the CCMA. An arbitration under the auspices of the CCMA was set down for hearing before the third respondent on 28 September 2011. The appellant and the second respondent were legally represented at the arbitration. In an attempt to settle the dispute the parties reverted to conciliation. The negotiations during the conciliation process gave rise to the settlement agreement. Clauses 4 and 5 of the settlement agreement form the subject matter of this appeal. They read as follows:
- "4. The contract of employment between the Applicant and the 1st Respondent terminated as a result of the expiration of the fixed period agreed to between the Applicant and the 1st Respondent;*
5. The parties record that the Applicant was never placed on suspension in terms of 1st Respondent's internal procedures and policies nor had 1st Respondent had cause to report any matter concerning the Applicant to the Nursing Council."

- [4] The appellant claimed that the settlement agreement contains two falsehoods. Firstly, it records that she was not suspended when, in fact, she was suspended by the first respondent. Secondly, it records that her services were terminated by the effluxion of a fixed term agreement when, in fact, she was dismissed for sleeping on duty. The appellant's case is that it would be *contra bonos mores* to allow the settlement agreement to stand and that she was loathe to perpetuate the fraudulent situation.
- [5] The first and second respondents opposed the application on two bases. They alleged that the court *a quo* did not have jurisdiction to entertain the application and secondly, that the parties' respective claims were compromised. Dukada J found that, because the appellant instituted the application in the High Court, she "has chosen to abandon the process she followed in the CCMA and approached this court". The learned Judge was of the view that, because she initially referred the dispute about the unfairness of her dismissal to the CCMA, the appellant should have made an application to the labour court for the relief sought herein.[1] He found that the labour court has exclusive jurisdiction to rectify or cancel a settlement agreement. For that finding reliance was placed on *Eckhard v Filpro Industrial Filters (Pty) Ltd.*[2] Landman J did not find in *Eckhard* that the labour court has exclusive jurisdiction to rectify or cancel a settlement agreement. The learned Judge made the assumption that it falls within the exclusive jurisdiction of the labour court to deal with incidental matters such as an application to rectify an agreement or declare that it has been validly cancelled.[3] That assumption was made because the labour court has jurisdiction to make a settlement agreement an order of court in terms of section 158 (1) (c) of the Labour Relations Act.[4] No authority was quoted in support of the above assumption.
- [6] With respect, I do not agree with the reasoning of the late Dukada J. It does not follow that, because a dispute between parties is referred to the CCMA, another dispute arising from but completely different to the original dispute must be referred to the labour court. Jurisdiction is determined on the basis of the pleadings and not the substantive merits of a claim.[5] The relief sought was for an order that the court *a quo* set aside the settlement agreement alternatively declare it void *ab initio*. The appellant formulated her claim in her founding affidavit on the basis that the two clauses in the settlement agreement were unenforceable because they were *contra bonos mores*. The appellant's claim has nothing to do with her claim which was referred to the CCMA, namely that she was allegedly unfairly dismissed. There is, in my view, no reason why the court *a quo* could not entertain the claim for the relief set out in the notice of motion. Whether that claim had merit is another matter altogether. In the circumstances, I do not agree with the finding of the court *a quo* that it did not have jurisdiction to entertain the appellant's case. To that extent the appeal must be upheld.

[7] The appellant's case is that the settlement agreement is invalid and unenforceable because the above quoted clauses are contrary to public policy. The second respondent submits that the settlement agreement is a compromise (*transactio*) and that it is not *contra bonos mores*. I shall firstly deal with whether or not the settlement agreement constitutes a compromise and, if so, whether the clauses in question are *contra bonos mores*.

[8] A compromise is a contract between two or more persons which has as its object the prevention, avoidance or termination of litigation.[6] The appellant did not deny the first respondent's allegation that the quoted clauses were included in the settlement agreement at her insistence because she "was desirous of having a clean disciplinary record for purposes of securing employment in the United Arab Emirates, which she conveyed

as her intention at the time".

[9] Prior to the conclusion of the settlement agreement the parties adopted the following positions. The appellant had been suspended and thereafter dismissed. She was of the view that she had been unfairly dismissed. She accordingly challenged her dismissal in the CCMA and sought her reinstatement. The first respondent, on the other hand, suspended and thereafter dismissed the appellant. It attended the arbitration to oppose the appellant's attempts to have her dismissal declared unfair as well as opposing her attempts at being reinstated. Had the parties proceeded with the arbitration, at the conclusion thereof there would have been a successful and an unsuccessful party. The third respondent would either have upheld or dismissed the appellant's claim. Had her claim been successful her position (that she was unfairly dismissed) would have been vindicated. Had her claim been dismissed, the first respondent's contention, that the appellant was fairly dismissed, would have been sustained. Self-evidently, it was risky for the parties to proceed with the arbitration proceedings. They could have ended up with a result that neither of them wanted.

[10] The alternative to an uncertain outcome was to settle the matter in dispute between them to secure a result palatable to both of them. For that to have happened, each of them had to recede from her or its previous position and conceding something, either by diminishing her or its claim or by increasing her or its liability. The parties, by mutual consent, would have had to agree to the settlement of their respective disputed or uncertain obligations.[7] That, with respect, is precisely what happened in this case. The first respondent must have realised that a finding that the appellant was fairly dismissed was not guaranteed. There was a possibility that the third respondent might have found at the conclusion of the arbitration hearing that she was unfairly dismissed. The appellant, on the other hand, must also have

realised that there was a possibility that the third respondent could have found that she was fairly dismissed. Instead of insisting on their respective positions, the first respondent increased its liability by agreeing to pay to the appellant a sum of approximately R20 000.00 and thereby conceding that there was a possibility that a finding could have been made by the third respondent that the appellant was unfairly dismissed. It accordingly agreed, in the light of that

possibility, to record that the appellant's services were terminated. The parties agreed that, because the appellant's services were terminated on 25 November 2010, her term of employment was between 9 January 2009 and 25 November 2010. The settlement agreement reflects that her services were terminated as a result of the expiration of the term of employment which the parties fixed as between 9 January 2009 and 25 November 2010. The first respondent's compromised position was that the appellant was not dismissed. The appellant's compromised position was that she would not be reinstated despite the fact that the first respondent conceded the possibility that she might not have been fairly dismissed. In the circumstances of this case, I am satisfied that the settlement agreement is a contract of compromise. In view of my finding on the termination of the appellant's services, the issue concerning her suspension before the termination of her services is, in the circumstances of this matter, irrelevant.

- [11] I now deal with whether or not the compromise is invalid by reason of the fact that the two clauses in question are contended to be *contra bonos mores*. The issue to be addressed in this regard is whether it can be said that those clauses are clearly inimical to the interests of the community, contrary to the law or morality or run counter to social or economic expedience and, accordingly, unenforceable.[8] The following principles must be borne in mind when that issue is addressed. It should not be concluded that a contract is contrary to public policy merely because some of its terms offend one's individual sense of propriety and fairness.[9] Although public policy generally favours the utmost freedom of contract, it nevertheless takes into account the necessity of doing simple justice between person and person.[10] The court's power to declare contracts invalid which are against public policy is a power to be exercised sparingly and only in the clearest of cases.[11]
- [12] Mr Dyke, counsel for the appellant, submitted that the parties changed the factual situation in a dishonest way and that the appellant will commit a fraud if she present the settlement agreement in its present form to a prospective employer. I do not agree. Firstly, the clauses offend only the appellant's sense of propriety and fairness. Neither the first nor the second respondent is offended by those clauses. Prospective employers would also not be offended because, if they make enquiries as to the termination of the appellant's services by the first respondent, the settlement agreement speaks for itself. If needs be the appellant can explain to prospective employers that the first respondent dismissed her, that she challenged the dismissal because she believed it was unfair and that at the arbitration hearing the first respondent conceded the possibility that her dismissal might have been unfair and therefor agreed that her services were terminated on 25 November 2010 as a result of the expiration of the fixed period, agreed to between the appellant and the respondents at the arbitration hearing, as set out above.
- [13] Secondly, matters are settled on a daily basis in the high and labour courts with clauses containing similar wording. The two clauses in question mirror the reality of the situation in our courts. Those clauses do not run counter to social or economic expedience and are, in my view, not inimical to the interests of the (employer/employee) community. In my view the two clauses are not *contra bonos mores*. The settlement agreement is accordingly not

invalid. The appeal against the finding of the court a quo in that regard should therefore be dismissed.

[14] Regarding costs, although the appellant was successful regarding the issue relating to jurisdiction, the first respondent successfully opposed the merits of the appeal. The appellant would have been entitled to the costs of the appeal only if a finding was made that the settlement agreement was invalid because it contained clauses which are contra bonos mores. That was not the case. In the circumstances, I am of the view that it would only be fair for the appellant to pay the second respondent's costs.

[15] In the result, the appeal is dismissed with costs.

G H BLOEM

Judge of the High Court

HARTLE, J

I agree.

B HARTLE

Judge of the High Court

BACELA, AJ

X B BACELA

Acting Judge of the High Court

For the appellant: Adv B C Dyke, instructed by Brown Braude and Vlok Inc, Port Elizabeth and Neville Borman & Botha, Grahamstown.

For the second respondent: Adv N J Mullins SC, instructed by Chris Unwin Attorneys, Port Elizabeth and Nettletons Attorneys, Grahamstown.

Date heard: 9 May 2016

Date of delivery of the judgment: 19 May 2016

[1] Paragraphs 16 and 17 of the judgement of the court a quo.

[2] *Eckhard v Filpro Industrial Filters (Pty) Ltd* (1999) 20 ILJ 2043 (LC).

[3] *Eckhard v Filpro Industrial Filters (Pty) Ltd* at 2046B.

[4] Labour Relations Act, 1995 (Act No. 66 of 1995).

[5] *Gcaba v Minister of Safety and Security and Others* 2010

(1) SA 238 (CC) at 263D. *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008

(4) SA 367 (CC) at 418I

[6]Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others 1978

(1) 914 (AD) at 921A-D.

[7]Karson v Minister of Public Works 1996

(1) SA 887 (ECD) at 893F-H.

[8]Botha (now Griessel) and Another v Finansecrédit (Pty) Ltd 1989 (3) SA 773 (AD) at 782I-J.

[9]Eastwood v Shepstone 1902 TS 294 at 302.

[10]Jajbhay v Cassim 1939 AD 537 at 544.

[11]Sasfin (Pty) Ltd v Beukes 1989

(1) SA 1 (AD) at 9A-D and the authorities referred to therein.

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