

SOUTH AFRICA / JUDGMENT

Western Platinum Ltd v Swart (J2195/14) [2016] ZALCJHB 454 (25 May 2016)

[2016] ZALCJHB 454

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J2195/14

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case

no J

2195/14

In the matter between

WESTERN PLATINUM LTD

Applicant

and

EMD SWART

Application heard: 17 March 2016
Judgment
delivered 25 May 2016
Respondent

JUDGMENT

VAN NIEKERK J

- [1] This is an application to set aside a settlement agreement concluded under the auspices of the CCMA on 31 October 2013.
- [2] The applicant dismissed the respondent on 30 September 2013. The respondent referred a dispute to the CCMA. At the conciliation

hearing, the parties concluded a settlement agreement. In terms of the agreement, the applicant agreed to pay the respondent the sum of R 830 000 in settlement of the respondent's claim of unfair dismissal.

- [3] Prior to the conclusion of the agreement, on 3 October 2014, the respondent had returned a laptop computer, being the property of the applicant. The deponent to the founding affidavit avers that after the laptop computer was returned, the applicant's systems administrator attempted to retrieve an environmental program, a program which the respondent had compiled while in the employ of the applicant. Other unspecified information had also been deleted from the laptop computer. The applicant avers further that the cost of compiling a new environmental programme is significant, far exceeding the sum that formed the basis of the settlement agreement. The only inference to be drawn, so the applicant contends, is that the respondent fraudulently induced the applicant to enter into the settlement agreement in circumstances where had the applicant been aware of the true facts, it would not have concluded the agreement.
- [4] I deal first with the issue of jurisdiction. I requested the parties' representatives to file supplementary heads of argument on this court's jurisdiction, if any, to set aside a settlement agreement concluded under the auspices of the CCMA. I did so in the absence of an express provision in s 158 of the LRA empowering this court to do so. I am grateful to both parties for the supplementary heads – they agree that this court has the necessary jurisdiction. I was referred to a recent decision by the Labour Appeal Court in *Gbenga-Oluwatoye v Reckitt Benckiser South Africa* (JA 95/2014) in which the court considered an application to set aside a mutual separation agreement in circumstances where indirectly, the court's jurisdiction was assumed. I was also referred to the decisions of this court in *Eckhard v Filpro Industrial Filters (Pty) Ltd & others* [1999] 8 BLLR 804 (LC) and *Ulster v Standard Bank of South Africa* (2013) 34 ILJ 2343 (LC), where a residual power to set aside settlement agreements was similarly but more expressly assumed. I will accept therefore, for present purposes at least, that given the court's jurisdiction to make settlement agreements orders of this court, it has jurisdiction to deal with incidental matters, including a setting aside of the agreement on any recognised ground.
- [5] The case made in the founding affidavit, as I have indicated, is that the applicant entered into the settlement agreement on the bona fide assumption that the respondent would return all of its intellectual property, and that it would not have entered into the agreement had it known that the applicant had deleted the program. The applicant accordingly submits that the respondent fraudulently induced it to conclude the settlement agreement.
- [6] The respondent denies that she compiled any environmental program, and avers that that copies of approved environmental programs were in any event electronically saved on a central server. The respondent expressly denies that she deleted the program as alleged.

- [7] In reply, the applicant makes out a rather different case. It avers that an information technology expert examined the lap top and reported that on 1 October 2013, a new operating system (Windows 7) was installed on the computer, which had the effect of erasing all of the information, including the applicant's confidential information, previously stored on Windows Enterprise. The averment now made is that the respondent 'deliberately or negligently' corrupted and destroyed the information concerned, and that the agreement ought to be set aside on this basis.
- [8] Save in exceptional circumstances, the applicant in motion proceedings must necessarily make out a case in the notice of motion

and founding affidavit. It is not permissible to adduce additional evidence in support of a case, even less to make out a case, by way of reply (see *Betlane v Shelly* Court CC 2011 (3) BCLR (CC); *John Roderick's Motors Ltd v Viljoen* 1958 (3) SA 575 (O)). The applicant's case must stand or fall by the founding affidavit and the facts alleged in it. Motion proceedings are not designed to resolve factual disputes. To the extent that the applicant seeks a final order and there is a material dispute of fact disclosed by the papers, the well-known rule established by *Plascon Evans v Van Riebeeck Paints* [1984] ZASCA 51; 1984 (3) SA 623 (A) applies. The court may grant an order if and only if those facts averred by the applicant that have been admitted by the respondent, together with the facts averred by the respondent, justify the order sought. Given the nature and extent of the respondent's denials of the averments that she developed an environmental program during the course of her employment with the applicant and that she deleted the program from her compute after her dismissal but before the conclusion of the settlement agreement, the respondent's version must be accepted.

- [9] In any event, the founding affidavit does not establish that the respondent fraudulently induced the applicant to conclude the

settlement agreement. There is no evidence that the respondent made any representation, let alone a representation that was false and which served actually to mislead the applicant. In these circumstances, I fail to appreciate how it can be said that the respondent fraudulently induced the applicant to enter into the settlement agreement.

- [10] It follows that the application stands to be dismissed.

- [11] In relation to costs, this court has a broad discretion to make orders for costs according to the requirements of the law and

fairness. In the present instance, although the respondent has succeeded in opposing the application, I cannot ignore the fact that the answering affidavit comprises material (including most of the annexures) that is irrelevant to the application. The papers in this matter have been unnecessarily burdened as a consequence and for this reason, I intend to limit the respondent's costs to 50% of those that would ordinarily be recoverable.

I make the following order:

1. The application is dismissed
2. The respondent is entitled to 50% of her taxed costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv M van As, instructed by CDH Attorneys

For the respondent: Adv H Gerber, instructed by Welman Attorneys

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