IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, PORT ELIZABETH)

CASE NO: 1541/2012

Date delivered: 17 October 2013

NOT REPORTABLE

In the matter between:

DIANE ELEANOR LAWRIE	Applicant
and	
NURSING RESPONSE CC	1st Respondent
LIFE HEALTHCARE GROUP (PTY) LTD	2nd Respondent
JULIA CAMERON COMMISSION FOR CONCILLIATION	3rd Respondent
MEDIATION AND ARBITRATION	4th Respondent

JUDGEMENT

DUKADA J:

[1] This is an application to set aside or have an agreement declared void *ab origine*, which was concluded between the applicant, the first respondent and the second respondent, with the assistance of the third respondent under the auspices of the fourth respondent.

[2] The facts in this matter are largely common cause. The applicant was employed by the first respondent as a nursing sister. However, at the time of the happening of the incident in this matter she was working at the hospital of the second respondent, namely Hunters Craig in terms of a labour brokerage arrangement between first respondent and second respondent for sourcing qualified labour for specific projects and fixed periods from the first respondent. The services of the applicant were terminated on the 26th November 2010 by the first respondent after convening a disciplinary enquiry into an alleged misconduct of sleeping on duty. Applicant was found guilty and dismissed. The applicant felt that she had been unfairly dismissed and she accordingly referred the dispute to fourth respondent on the 29 November 2010, seeking reinstatement. During the course of the CCMA proceedings the second respondent was joined. The matter was then set down for arbitration before the third respondent on the 27th September 2011. The applicant was legally represented by an attorney. On that date of the hearing a mediation process took place between the applicant and first respondent under the chairmanship of the third respondent, an arbitrator in the employ or under appointment by the fourth respondent to arbitrate disputes that are referred to the fourth respondent. The mediation culminated in the conclusion of the agreement which is under attack in this matter. The document containing this agreement was annexed to the papers.

[3] The document has a heading reading "*SETTLEMENT AGREEMENT"* with an emblem and letters in bold "***CCMA***" written on the top left corner.

It then has a sub-heading reading. "*IN THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION*

In the dispute between:

Diane Lawrie *Applicant*

And

(1) Nursing Response CC

(2) Life Health Care Groups (Pty) Ltd *Respondents"*

It then goes on with the pre-amble reading:-

"*The undersigned parties record the settlement of their dispute in the following terms. By signing this agreement, the parties acknowledge that the agreement was read to them and interpreted (where necessary) and that they understand the content hereof. This agreement is in full and final settlement of all disputes arising out of the employment relationship as well as in full settlement of all statutory payments due to the applicant unless specifically excluded in paragraph 4 of this agreement."*

The terms of that agreement which are relevant for the purposes of this matter are:-

"(4) The contract of the 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 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 applicant maintains that the Settlement Agreement contains the following falsehoods.:-

(a) It records that the applicant was not suspended in circumstances where she had been suspended;

(b) It records that the applicant's employment was terminated as a result of the expiry of a fixed term contract, when in fact her employment was terminated as a result of a Disciplinary Enquiry in terms of which she was found guilty for allegedly sleeping on duty and dismissed.

[5] This application is being vigorously opposed by the first and second respondents and they have raised the following points in *limine*:-

(i) Lack of jurisdiction

(ii) The fact that the contract was made an arbitration award in terms of section 142 A of the Labour Relations Act, 66 of 19956 *("the LRA"*).

I will now deal with these points in *limine.*

<u>LACK OF JURISDICTION</u>

[6] Adv. LAH Shene, Counsel for the first respondent, has submitted that this Court lacks jurisdiction in that this settlement agreement is governed by section 158 (1)(a)(iii) of the LRA. He further submitted that when section 157(1) is read with section 158(1)(a)(iii) of the LRA, it is clear that the Labour Court has exclusive jurisdiction to hear this application. Elaborating on his argument he stated that the applicant

makes no allegations in her founding affidavit which would suggest that this Court has the requisite jurisdiction to entertain this application and she only relies on an allegation that the settlement agreement refers to a contractual matter in the replying affidavit.

He further argued that even though the applicant in her Heads of Argument stipulates that the possibility exists that the contract in its current format infringes the applicant's Constitutional rights in regard to employment and as such the contract is unenforceable, that was not specifically pleaded in the applicant's founding affidavit.

He contended that applicant's submissions in the founding affidavit and the true nature of the dispute show quite evidently that the application is one envisaged by section 158(1)(a)(iii) of the LRA.

He argued that the issue at hand is the validity of a settlement agreement concluded under the auspices of the fourth respondent in performing its dispute resolution function.

He submitted that it is the unfair dismissal dispute which was the subject of the deed of settlement. Even though the deed of settlement is in essence a contract, it is a contract which emanates from the dispute-resolution-mechanism as envisaged in the LRA. So his argument goes.

Mr Shene referred me to a number of cases in support of his argument.

Adv. Mullins, Counsel for the second respondent, has argued that the fact that the parties concluded a Settlement Agreement does not change the nature of the underlying dispute. It remains a labour dispute which was dealt with in terms of the LRA.

He submitted that the only Court that has the necessary jurisdiction to set aside the Settlement Agreement is the Court that made it.

He cited the following words from the preamble to the Settlement Agreement. "*the parties record the settlement of their dispute …….and in full and final settlement of all disputes arising out of the employment relationship".* He contended that can only be a reference to the CCMA case. He also contended that the fact that a dispute has arisen in relation to the terms of the Settlement Agreement does not alter the underlying nature of the dispute which is a labour related matter over which the Labour Courts hold exclusive jurisdiction.

He submitted that the applicant was obliged to approach the Labour Court with her dispute and her failure to do so is fatal to the application.

[7] Adv. B.C.Dyke, Counsel for the applicant, has argued that this Court does have jurisdiction on the grounds that the contract was entered into at Port Elizabeth between the applicant, the first respondent and the second respondent, and this is apparent from the contract itself.

He contended that the Settlement Agreement is no more than a contract, albeit an illegal and unenforceable one, which falls to be set aside by this Court.

[8] The term "*jurisdiction*" has been defined as the "*power or competence of a Court to hear and determine an issue between the parties*.[1]" Van der Westhuizen J remarked on this aspect as follows in Gcaba v Minister of Safety and Security:-[2]

"*In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has*

[1] Graaf –Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A) at 424.
[2] 2010 (1) SA 238 (CC) at 263 D-G

chosen to involve the Court's competence. While the pleading-including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits–must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the Court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another Court. If however, the pleadings properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction."[3]

[9] Turning to the case at hand, the applicant in her founding affidavit complains about the settlement agreement which she states that it contains false information and perpetuates a fraudulent situation. She states that it is contra *bonos mores* and she prays that it be declared void *ab initio* or set aside on the ground of fraud. She states that at the time when she entered into the Settlement Agreement she was overcome with emotion brought on by the immediacy of the situation at the Commission for Conciliation, Mediation and Arbitration (the fourth respondent) and the influence by the third respondent, and the pressure pertaining to the pending arbitration itself.

[10] Mr Dyke has submitted that an analysis of the pleadings in this matter elicits an interpretation that what is challenged is simply the lawfulness of a contract, a claim cognisable in this Court. He contended that the substantive nature of the dispute does not fall under the LRA. It is

[3] See also Chiriva v Transnet Ltd and Others 2008 (4) SA 367 (CC) at para 169; and Makhanya v University of Zululand 2010(1) SA 62 (SCA) at para 71 where Nugent JA remarked as follows:- "*When a claimant says that the claim arises from the infringement of the common law right to enforce a contract then that is the claim as a fact and the Court must deal (with it) accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the Court has before it. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.*"

merely the fraudulent nature of the contract. He therefore submitted that this Court does have jurisdiction to entertain this application.

Mr Dyke has referred this Court to *Tsika V Buffalo City Municipality*[4] in support of his argument that the High Court has concurrent jurisdiction with the Labour Court in respect of contractual employment issues. In fact this was confirmed by Van der Westhuizen J in Gcaba's case, supra when he remarked as follows at para 73:-

"*[73] Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157 (2) cannot be read to mean that it no longer lies there and should not be read to mean that it no longer lies there and should not be read as much. Where the judgment of Ngcobo J in Chirwa speaks of a Court for Labour and employment disputes, it refers to labour and employment related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other Courts, like the High Court and Equality Court, can no longer be adjudicated by those Courts."*

[11] Reverting to *Ntsika v Buffalo City Municipality* matter, in that matter, it seems to me, that the Court was seized with a claim in respect of a stand-alone contract of employment, which is one of the species of contracts. However, in my view, the Settlement Agreement in question in this matter cannot be equated with such a contract. The contract of employment is a product of negotiation between the employer and employee, whereas the Settlement Agreement in question here was a product of mediation process in the fourth respondent which was reached in order to settle a dispute which had been referred to the latter

[4] [2009] 3 BLLR 272 (E)

for resolution. I, therefore, fully agree with Mr Shene's contention that *Tsika's case* is distinguishable from the one at hand.

[12] It is clear from the applicant's papers that the Settlement Agreement which she seeks to have declared void *abo initio* or set aside on the ground of fraud was concluded in order to settle a dispute which had been referred to the fourth respondent for resolution. The agreement clearly stated that it is in full and final settlement of all disputes arising out of the employment relationship, etc. Furthermore the Settlement Agreement document reflects the agreement to have been concluded in the fourth respondent. It seems to me that the underlying dispute, which this Settlement Agreement is recorded to have settled, is inextricably bound to this agreement. Also the allegation pointing to the influence by the third respondent in the conclusion of the agreement, in my view, further bundles the latter into this web,

I find it, therefore, difficult to characterise the dispute relating to the Settlement Agreement without considering the nature of the underlying dispute whose resolution culminated in its conclusion. I am more inclined to agree with the submissions by Mr Shene and Mr Mullins in this regard.

[13] The other dimension in this matter is that when the applicant felt that she had been unfairly dismissed, she accordingly referred the dispute to the fourth respondent, seeking re-instatement. On date of the hearing a mediation process took place which culminated in the conclusion of this Settlement Agreement which she now wants to have impugned.

It is apposite at this juncture to quote the following remarks by Van der Westhuizen J in *Gcaba v Minister for Safety and Security, supra at para 57:-*

"………*forum–shopping by litigants is not desirable. Once a litigant has chosen a particular cause of action and system of remedies (for example, the structure provided for by the LRA) she or he should not be allowed to abandon that cause as soon as negative decision or event is encountered. One may especially not want litigants to 'relegate' the LRA dispensation because they do not 'trust' its structures to do justice as much as the High Court could be trusted. After all, the LRA structures were created for the very purpose of dealing with labour matters, as stated in the relevant parts of the two majority judgments, in Chirwa, referred to above".*[5]

[14] When the applicant at first referred her complaint about her unfair dismissal to the fourth respondent for resolution, she was pursuing her claim through purpose-built–process established by the LRA. The Settlement Agreement in question here was concluded through a mediation process of the fourth respondent.

Furthermore the applicant's attorneys wrote a letter to the fourth respondent dated 15th November 2011 conveying the same complaint about the Settlement Agreement as borne in this application.

Her attorneys were requesting that the document containing the Settlement Agreement be taken as *pro non scripto* and the arbitration

[5] In Chirwa, supra, at para 41 Skweyiya J emphasized this point as follows:-
"*the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims."*

matter be re-enrolled for hearing before a different arbitrator, failing which their instructions are to approach the Labour Court for appropriate relief.

In response to that letter the fourth respondent replied as follows:-

> *"This matter was settled and the CCMA is therefore functus officio. Your client must either enforce the settlement agreement or have it set aside at the Labour Court."*

[15] The LRA provides procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration for which the fourth respondent is established, and also establishes the Labour Court and the Labour Appeal Court as superior Courts with exclusive jurisdiction in terms of section 157(1) to decide matters arising from it. Unfair dismissals are dealt with in Chapter 8. Section 157(1) provides:-

> *"(1) Subject to the Constitution and s 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."*

In <u>*Gcaba's case, supra*</u>, at para 113 Ngcobo J (as he then was) remarked as follows on section 157 (1):-

"*The purpose of s 157 (1) was to give effect to the declared object of the LRA to establish specialist tribunals with exclusive jurisdiction to decide matters arising from [it].*

To this extent, it has given exclusive jurisdiction to the Labour Court and Labour Appeal Court to deal with matters arising from the LRA."

[16] Reverting to the case at hand, the applicant has chosen to abandon the process she had followed in the CCMA and approached this Court. It seems to me that she was not well-advised in abandoning the process that she started in the CCMA. In my view, this is the route she should have followed to its very end rather than getting involved in what seems to me to be forum-shopping. More-so that the Labour Court has an-exclusive jurisdiction to rectify or cancel a settlement agreement.[6]

[17] For the above reasons I have come to the conclusion that this Court has no jurisdiction to entertain this application and it, therefore, falls to be dismissed on that point alone.

[18] In the event I am wrong in my afore-said conclusion, I proceed to deal with the merits.

[19] The applicant states that she concluded the Settlement Agreement on the urging or influence of the third respondent; was overcome with emotion brought on by the immediacy of the situation and the pressure pertaining to the pending arbitration itself.

The applicant was represented by an attorney in the fourth respondent when a decision was made to proceed with mediation. She states that the attorney recommended to her to take the deal as it stood despite the inaccuracy thereof in order to settle the matter. She raises no complaints against that attorney in the manner she legally assisted her. The applicant also does not give full information as to how she was urged or influenced by the third respondent to conclude the Settlement Agreement and also as to how that happened on the face of her legal

[6] See Eckhard v Filpro Industrial Filters (Pty) Ltd (1994) 20 ILJ 2043 (LC)

representative. Section 138(3) of the LRA allows the Commissioner, if all the parties consent, to suspend the arbitration proceedings and attempt to solve the dispute through conciliation. It seems to me that this is what the Commissioner did in this matter.

The Settlement Agreement provided for some moneys to be paid to the applicant; they were paid and she accepted them. Furthermore the applicant has not shown the nature and extent of the influence by the third respondent or how it was undue. She had to show that third respondent exerted improper pressure on her in such a manner that she was incapable of exercising independent will.[7] It is a question of fact in each case whether undue influence exist. In my view, the applicant has not furnished sufficient information to successfully assail the Settlement Agreement on the ground of undue influence.

[20] The applicant further attacks the Settlement Agreement on the ground that it perpetuates a fraud on prospective employers and that it is *contra bonus mores* and should be declared void *ab initio* or set aside. The aspects in the Settlement Agreement which the applicant cites to perpetuate fraud and to be *contra bonos mores* are:-

(i) To record that she was not suspended in the circumstances where she had been suspended;

(ii) To record that the reason for the termination of her employment was the expiry of a fixed term contract, when in fact it was for her sleeping on alleged duty.

[21] Regarding aspect (i) above, the first respondent's response is that it is not false as the Settlement Agreement correctly states that the applicant was never placed on suspension in terms of the first respondent's

[7] Preller v Jordan 1956 (1) SA 483 (A); Patel v Grobbelaar 1974 (1)SA 532 (A) at 533-534

internal procedures and policies. Furthermore the applicant stated in her affidavit in support of her application for the joinder of the second respondent, that she was suspended by the second respondent.

I fully agree with these contentions.

Consequently, in my view, the applicant's reliance on this aspect to attack the Settlement Agreement has no merit.

[22] Regarding the afore-mentioned second aspect, the first respondent responded as follows in her answering affidavit:-

"*I am advised that there is nothing prohibiting parties to a pending arbitration in considering various factors inter alia* the merits of their *respective case; the risks; the costs; and the inconvenience involved in running the arbitration, agreeing to settle the matter and in recording in such Settlement Agreement a different reason for the termination of the employment relationship. This is precisely that which an arbitration award, which did not order reinstatement, would achieve. I am advised that disputes at the fourth respondent are frequently settled on this basis*."

This response dealt with the gravamen of the applicant's complaint which she alleges perpetuates fraud and is *contra bonos mores* and in my view one would expect that she would respond to it adequately in her replying affidavit but she failed to do so. In fact she did not respond at all to these averments. The primary purpose of the replying affidavit is to put up evidence which serves to refute the case made out by the respondent in his answering affidavit.[8]

In the absence of such refutal from the applicant, the factual averments of the respondent stand and I find no reason not to proceed on the basis of the correctness thereof.

[8] Standard Bank of South Africa Ltd v Sewpersadh 2005 (4) SA 148 (C) at 159 G-H

[23] The Constitutional Court made the following remarks in _*National Education Health and Allied Workers Union v University of Cape Town and Others (NEHAWU).*_[9]

"*The LAC is a specialized Court, which functions in a specialised area of law. The LAC and the Labour Court were established by Parliament specifically to administer the LRA. They are charged with the responsibility for overseeing the ongoing interpretation and application of the LRA and development of labour relations policy and precedent. Through their skills and experience, Judges of the LAC and the Labour Court accumulate the expertise which enables them to resolve the labour disputes".*[10]

In my view, these remarks apply equally well, *mutatis mutandis,* to the other structures created by the LRA, for example the fourth respondent. The fourth respondent would be in a better position to know the practice mentioned afore by the first respondent.

In the circumstances the applicant's complaint that the Settlement Agreement perpetuates fraud and is *contra bonos mores* cannot be sustained.

[24] In case I am also wrong in this conclusion I proceed to deal with the applicant's attack on the Settlement Agreement on the ground that it is *contra bonos mores* and contrary to public policy.

I will first sketch out briefly a legal background on this point and thereafter deal with the submission by Counsel.

[9] 2003 (3) SA 1 (CC) ((2003) ILJ 95; 2003 (2) BCLR 154)
[10] This dictum was quoted with approval by Skweyiya J in Chirwa's case, supra, at para 52.

[25] _Smallberger JA in Sasfin (Pty) Ltd v Beukes_[11] accepted that it serves no useful purpose to classify contracts into those contrary to the common law, those against public policy and those *contra bonos mores*, since the three expressions are interchangeable. He went further to confirm the authoritative statement of the Court's power to condemn a contract in the following words of Innes CJ in _Eastwood v Shepstone_.[12]

"*Now this Court has power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised, but once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look at is the tendency of the proposed transaction, not its actually proved result.*"

The Appellate Division had again to grapple with "*this often difficult problem (as called by Smalberger JA at 9 E) in Botha* _(now Griessel) v Financredit (Pty) Ltd._ .[13] In that matter Hoexter JA restated the principles from SASFIN as follows:-

"*I proceed to consider whether the provisions of clause 7 are, in the language of the majority judgment in the Sasfin case (at 8 C-D).*

'*……clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience……….and accordingly, unenforceable on the grounds of public policy. In such an investigation ………there must be borne in mind (a) that, while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man, and (b) that a Court's*

[11] 1989 (1) SDA (A) at 7I-9A
[12] 1902 TS 294 at 302
[13] 1989 (3) SA 773 (A) at 782 I-783C

power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest.

So approaching in the enquiry in the instant matter, I am not persuaded that the provisions of clause 7 of the suretyships are plainly improper and unconscionable. While at first blush the provisions of clause 7 may seem somewhat rigorous they cannot, I think, have regard to the particular circumstances of the present case, fittingly be described as unduly harsh or oppressive. The enquiry is directed to. '………the tendency of the proposed transaction, not its actually proved result' ".[14]

[26] Mr Dyke has submitted that a contract which records a benign reason for the termination of an employment contract (such as the expiry of a fixed–term contract) when in fact the true reason for termination of the employment contract was a dismissal for an alleged breach of disciplinary code (which renders the conduct of a serious nature) is contrary to public policy.

He contended that it is contrary to public policy in as much as persons wishing to employ the applicant are not appraised of the true reason for the termination of her employment and she is placed in an invidious position of having to explain to prospective employers if she wishes the truth to be told as to what actually happened. This, of course, places her at a disadvantage in the employment market, but ignoring that fact for the moment, if she were to remain silent, she perpetuates a clear fraud on prospective employers at large. So he argued.

He further submitted that that conduct offends the general sense of justice of the community as manifested in public opinion.

[14] See also Juglal v Shoprite Checkers (Pty) Ltd 2004 (5) SA 2008 (SCA) at 258.

[27] Borrowing from the words of *Nicholas AJA in Longman Distillers Ltd v Drop Inn Group.*[15]

"*public policy is an imprecise and elusive concept".* It is said to reflect the mores and fundamental assumptions of the community. It is the general sense of justice of the community, the *boni mores*, manifested in the public opinion."[16]

Nicholas AJA went further to say at 813 H-J:-

"*When a Court is asked to hold that something is against public policy, it does well to remind itself of the much-quoted passage in the judgment of Burrough J in Richardson v Mellish (1824) 2 Bing 294 (130 ER 2294 at 303):-*

'I, for one, protest......against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail'."

[28] Turning to this case, where there is an uncontroverted statement by the first respondent, quoted in paragraph 18 above, that the disputes at fourth respondent are frequently settled by stating in a settlement agreement a different reason for the termination of the employment relationship, I find it difficult to accept that such agreement runs counter the business ethics of that section of the community. To put it in other words, I find it difficult to accept that such Settlement Agreement is "*clearly inimical to the interests of the community*" or runs "*counter to social or economic expedience*". Bearing in mind that the power to

[15] 1990 (2) SA 906 (AD) at 913 G
[16] Per van Dilehorst J in Lorimar Productions and others v Dallas Restaurant 1981 (3) SA (t) AT 1152 H

declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases, in my view, the case at hand cannot be described as such.

[29] The other dimension to this issue arises from the argument by Mr Shene that even if the Settlement Agreement was illegal, the maxim *in pari delicto potior est conditio defendentis* triggers in.

Mr Mullins in support of this argument contended that the applicant was knowingly a party to an agreement that she claims contains incorrect information. He states that there has been performance in that the applicant has been paid three months salary which she accepted. He submitted that in the circumstances the applicant is prevented from having a Settlement Agreement set aside by virtue of the *par delictum* rule. Having been a party to what she believes to have been a fraudulent transaction, the applicant cannot now complain that she is unhappy with the outcome. So he argued. He cited in support of his argument *Jajbhay v Cassim.*[17]

Mr Mullins further stated that the applicant denies in her replying affidavit that the terms she now complains of were included at her instance. He submitted that those terms are solely for the applicant's benefit and on a preponderance of probabilities it is she, and not the first and second respondents, who would have insisted on them forming part of the Settlement Agreement. He further pointed out that the applicant has waited for more than a year to take any action. He contended that the applicant must have realised at the time, or very shortly thereafter that the terms of the Settlement Agreement may cause her difficulties in the future, yet she has waited an unreasonably long time before taking any action.

[17] 1939 AD 537

Stratford CJ in Jajbhay v Cassim supra, remarked at 544 as follows on the *par delictum* rule:-

"*the rule expressed in the maxim in pari delicto potior conditio defendentis is not one that can or ought to be applied in all cases, but*

it is subject to exceptions which in each case must be found to exist only by regard to the principle of public policy." He went further to say "*public policy should properly take into account the doing of simple justice between man and man*."

In the light of the contentions by Mr Mullins on the conduct of the applicant in relation to the Settlement Agreement, as mentioned above, with which I fully agree, I am not persuaded that the instant case is one to which an exception to the *par delictum rule* can be found to exist having regard to the principle of public policy. Simply put, I am of the view that simple justice between man and man does not demand such exception to be found to exist in this matter. Consequently this leg in the argument for the applicant has to fall.

[30] As far as the point in *limine* to the effect that the contract was made an arbitration award in terms of section 142 A the LRA the applicant abandoned it when it transpired that that was never done. I will consequently not deal with that point in this judgment.

[31] As far as the costs are concerned, I find no reason justifying a departure from the general rule that costs follow the event.

[32] In the circumstances this application is dismissed with costs.

D.Z.DUKADA

JUDGE OF THE HIGH COURT

Appearences:-

For the Applicant	:	Adv Dyke Instructed by Brown Braude & Vlok Inc **PORT ELIZABETH**
For the 1st respondent	:	Adv Adv Ah Shene Instructed by Chris Unwin Attorneys **PORT ELIZABETH**
For the 2nd respondent	:	Adv Mullins Instructed by Burman Katz Attorneys **PORT ELIZABETH**