



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 986/2009

In the matter between:

MADODA COLLEN SIMELANE

Applicant

And

FIDELITY SECURITY SERVICES (PTY) LTD

Respondent

Heard: 22 August 2013

Delivered: 13 May 2015

Summary: An order of court may not be set aside without valid reason.

JUDGMENT

LALLIE J

- [1] On 17 July 2012, the applicant approached this Court for an order mainly in the following terms:

'1. Declaring clause 2 of the Deed of Settlement entered into between the parties on 4 March 2009 to be legally unenforceable, null and void *ab initio*.

2. In the alternative to prayer 1 above, declaring the entire Deed of Settlement entered into between the parties on the 4 March 2009 to be of no legal force or effect, and accordingly avoid *ab initio*.

3. ORDERING AND DIRECTING that the matter be referred back to the CCMA for a determination only on the question of retrospectivity of the applicant's agreed reinstatement.

4. In the alternative to prayer 3 above, ORDERING AND DIRECTING that the matter be referred back to the CCMA for arbitration *de novo*'.

- [2] The application is opposed by the respondent which filed a notice of intention to oppose on 2 August 2012 and the answering affidavit on 13 November 2012. In the answering affidavit the respondent raised the following points in *limine*:

The deponent to the founding affidavit lacked capacity to depose to it, the present application was brought under the same case number relating to a matter between the parties which had been dismissed on 1 August 2011 and a number of allegations had to be struck out as being irrelevant vexatious and scandalous. On 16 January 2013, the applicant filed a conditional replying affidavit. On 22 January 2013, the applicant filed a notice of intention to amend his notice of motion. The respondent did not object to the amendment it, however, filed a supplementary affidavit in terms of Rule 7A (8) (a). On 15 August 2013, the respondent filed an application for condonation of the late filing of the answering affidavit.

- [3] The effect of the amendment was that prayers 1 and 2 of the notice of motion be deleted and substituted with the following:

'1.DECLARING the Deed of Settlement entered into between the parties on 4 March 2009 to be legally unenforceable, of no legal force or effect, and accordingly null and void *ab initio*.

2. SETTING ASIDE the court order granted by this Honourable Court on 27 October 2009 on the basis that the underlying agreement entered into between the parties on 4 March 2009 is legally unenforceable, of no legal force or effect, and accordingly null and void ab initio'

- [4] The applicant did not file any opposing papers to the respondent's condonation application. It was, however, argued on behalf of the applicant that the respondent failed to make out a case for condonation. The respondent submitted that it filed its answering affidavit out of time for a number of reasons. The first is that the applicant served his founding papers on its attorneys via email on 30 July 2012. As the attorneys had not been instructed to oppose the application they had to seek the necessary instructions. This factual averment was not opposed. Rule 4 provides for service of documents and excludes service via email. Further reasons proffered by the respondent for filing its answering affidavit on 16 November 2012, are that the applicant was dismissed in March 2004. A portion of the relevant files the respondent needed in order to oppose the current application had to be retrieved from the archives. As other applications in respect of this matter had been determined, it became necessary to consult the respondent's erstwhile attorneys who assisted it in earlier applications. The Respondent is a large organisation which employs over 33000 employees.
- [5] The respondent submitted further that the applicant suffered no prejudice as a result of the delay, alternatively, that it stood to suffer more prejudice than the applicant in the event of this application being refused because it will lose its opportunity to oppose the main application. The respondent added that the applicant had no prospects of success in the main application. It submitted that if the application for condonation was necessary, it had made out a case for its delay to be condoned. However, Rule 4 does not provide for service of documents via email and the applicant provided no legal basis for filing his founding papers in a manner which is not provided for by the Rule. Absent proof that the respondent filed its answering affidavit in breach of Rule 7 (4) (b), a conclusion cannot be reached that the answering affidavit was filed late.

- [6] I have considered the respondent's point in *limine* that Mr Voyi ("Voyi"), the applicant's attorney lacked the capacity to bring this application as well as personal knowledge of the facts he deposed to. The applicant attached to his conditional replying affidavit, a confirmatory affidavit in which he confirmed its contents as well as having instructed and authorised Voyi to proceed with the current application and depose to any necessary affidavits on his behalf. The confirmatory affidavit therefore cured the defect and a proper construction of the founding affidavit reflects that Voyi had personal knowledge of all the facts relevant to the current application. He was present at the CCMA when the settlement agreement was entered into. This point in *limine* must therefore be dismissed.
- [7] A further point in *limine* raised by the respondent is that the present application stands to be dismissed as it has been brought under a case number relating to a matter between the parties which was dismissed on 1 August 2011. The respondent submitted that the defect was fatal and warranted a dismissal of this application. I have considered the applicant's opposing views on this point. The factual averment that the case number was given to the applicant by the registrar was not made in his replying affidavit. It could therefore not be relied on in argument as it is not foreshadowed in the papers. I am of the view that there is a duty on this Court to deal with the actual dispute referred and not deny a litigant the right to be heard based on the form rather than substance of any part of a case. I am not convinced that this point in *limine* can be used as a basis to non-suit the applicant, it must therefore be dismissed.
- [8] The respondent moved an application to strike out some allegations in the founding affidavit as being irrelevant, vexatious and scandalous. The respondent submitted that in paragraphs 9, 49 and 50 of the founding affidavit, Voyi deals with the dismissal of the applicant. In paragraph 9 Voyi contends that the applicant was unfairly dismissed by the respondent on 25 March 2004. In paragraph 49 he makes the averment that the applicant's dismissal amounted to a gross violation of his right not to be unfairly dismissed as entrenched in section 185 (a) of the LRA. And in paragraph 50

he stated that when agreeing to reinstate the applicant, the respondent effectively acceded to the claim that the applicant's dismissal was unfair. All the allegations have been denied by the respondent which also raised the defences of estoppel and waiver because the applicant was at all relevant times represented by an attorney. He must have been aware of his right to have the settlement agreement and court order declared null and void.

- [9] Waiver is not presumed easily. The respondent needs to prove that the applicant took the decision to abandon his right with full knowledge of the right and conveyed the decision to the respondent. See *Feinstein v Niggli and Another*¹. The respondent proved the requirements of neither waiver nor estoppel.
- [10] The court in *Bezuidenhout v Patensie Sitrus Beherend Bpk*² held that an order of a court of law stands until set aside on appeal in terms of Rule 42 of the Uniform Rules of Court or common law grounds. The applicant sought to rely on a number of judgements which advocate the view that an agreement which has been made an order of court can be set aside on recognised grounds including that the underlying agreement had been induced by fraud, duress, *iustus* error, misrepresentation or some other ground for rescission, was void for any other reason including vagueness, or being impossible to perform.
- [11] When the settlement agreement was made a court order it ceased to exist. The value of the agreement at this stage is that it is the underlying agreement on which the order of 27 October 2009 is based. An order of court may not be set aside without valid reason. Each case is decided on its merits. After the settlement agreement had been breached, the applicant launched an application in terms of section 158 (1) (c) of the Labour Relations Act 66 of 1995 ("the LRA") for the agreement to be made an order of court. Opposing the application the respondent submitted that Mr Mkhonto ("Mkhonto") indicated that he could not agree to the date of reinstatement and the amount to be paid to the applicant and insisted that performance of the underlying agreement was impossible but the applicant denied. After the agreement had

¹ 1981 (2) SA 684 (A)

² 2001 (2) SA 224 at 229 A-E

been entered into, the applicant, particularly because he was legally represented, should have known that it was impossible to perform. A further opportunity for the applicant to acknowledge that it was impossible to perform the agreement presented itself on 14 July 2010 when the application in terms of section 158 (1) (c) was opposed. The applicant did not seize it. He instead insisted that the order be granted with costs. He was successful. The applicant made his choice which is binding on him. He could not, on 17 July 2012, without valid reason, take the liberty to seek an order nullifying the order, making that the settlement agreement an order of court. Fairness requires that litigation should start, continue and be brought to finality within reasonable time. The applicant acknowledged that clause 2 of the underlying agreement was unenforceable. The clause existed before the application in terms of section 158 (1) (c) was launched. He cannot be allowed to deliberately, without valid reason, stand in the way of having this matter finalised. Because of the binding nature of court orders, the applicant needed valid reason for abandoning the judgement making the settlement agreement an order of court with the view to resuscitate the dispute the parties had settled and have it arbitrated. The real reason for seeking the order making the settlement agreement an order of court set aside or for abandoning it is that the applicant's attorney made an error. He erred in not recognising that the settlement agreement reached when he represent the applicant was unenforceable at the time it was entered into and when he had it made an order of Court. He should have reasonably foreseen that it was unenforceable. The error does not constitute valid grounds to have the order of court or the underlying agreement declared null and void *ab initio*.

- [12] Having considered the authority the parties sought to rely on, I have noted that even the cases the applicant sought to rely on require valid reason for setting aside an order of court. The applicant provided none. His application cannot succeed.

[13] In the premises the application is dismissed.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant:	Advocate Kela
Instructed by:	Ndumiso Voyi Incorporated
For the Respondent:	Advocate Westhuizen
Instructed by:	Crafford Attorneys

LABOUR COURT