IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C340/07

In the matter between:

THE DEPARTMENT OF HEALTH **Plaintiff**

and

DR L JONES **1ST Respondent**

PUBLIC HEALTH AND WELFARE

SECTORAL BARGAINING COUNCIL **2ND Respondent**

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant seeks an order to have the settlement agreement, concluded between it and the first respondent, under the auspices of the second respondent set aside. The agreement was concluded prior to the conclusion of the arbitration hearing which was scheduled for a hearing by the second respondent under case number PSHS 283-06-07.

Facts which gave rise to the application

[2] The first respondent, Dr Jones, who was employed as a doctor by the plaintiff, was charged for making disparaging remarks about other doctors to Dr Rowe, Head of Orthopaedics at the Victoria Hospital. She is alleged to have told Dr Rowe that doctors falling under his management who were also her colleagues were incompetent. She is alleged to have said that these doctors were *"decreasing competence and [a] slack attitude "towards their Surgical responsibilities."* These allegations were also copied to other doctors at the Groote Schuur Hospital.

[3] The outcome of the disciplinary hearing was that the first respondent was found guilty and issued with a suspension of 3 (three) months which was later reduced on appeal to 2 (two) months without pay. The first respondent was unhappy with the out come of the disciplinary hearing and accordingly declared an unfair labour practice dispute with the second respondent.

[4] The arbitration proceedings which were subsequently convened by the second respondent were adjourned after the first respondent presented her evidence in chief to afford the parties the opportunity to discuss a possible settlement. Because of the agreement the hearing did not proceed any further. In terms of the agreement the parties agreed as follows:

> "*1. The findings of the disciplinary hearing of 18 September 2006 that Dr Jones is guilty of misconduct and that a sanction of two months' suspension without pay coupled with a final written warning should be imposed is hereby set aside in its entirety;*
>
> *2. The employer will compensate Dr Jones in an amount equivalent to two-and-a half month's of her remuneration, being R87 500 00 less allowable deductions for income tax, such amount payable before 12 April 2007 into her bank account;*
>
> *3. The parties agree not take any further action in pursuing this matter.*
>
> *4. Dr Jones agrees to have no further contact with the medical officers concerned except in so far as her professional responsibilities may require;*

5. Dr Jones agrees to write [to] each of the medical officers concerned, namely Drs Garret, Paton and McIntyre a letter in the form set out in Annexure "A".

6. This agreement ids made in full and of this final settlement of this dispute."

[5] The complaint that gave rise to the present action arose on the 15 March 2007, when the first respondent attended at Victoria hospital to prepare for her final departure from the hospital and as part of her farewell she was invited to tea and cake.

[6] The plaintiff's complaint is that the first respondent in breach of the agreement made certain defamatory remarks during the "farewell tea" against certain doctors who are based at the Victoria hospital. In terms of the founding affidavit the first respondent is alleged to have said that:

"*23.1 She (the First Respondent) had a pile of patient's files with examples of how they had been mismanaged by the Hospital;*

23.1 The Medical Superintendent (i.e. the deponent) had ignored evidence of medical mismanagement.

23.3 The deponent is an "f…," and "idiot."

[7] In addition to the above the first respondent is accused of having said that the effect of the agreement between her and the plaintiff was that the outcome of the disciplinary hearing was overturned and that the plaintiff was ordered to compensate her.

[8] The other complaint of the plaintiff is that the first respondent's sister, who was present at the arbitration hearing and the conclusion of the agreement, sent an e-mail to a certain Yvonne Everett setting out what was supposed to have happened at the arbitration hearing and its outcome. The e-mail was also copied to the first respondent and her husband. The first respondent then copied the same e-mail to a number of other persons including institutions.

[9] The deponent of the founding affidavit, Dr Stokes and head of the Victoria hospital, became aware of the contents of the e-mail after it was emailed to her by Dr Martini. After reading the contents of the e-mail, Dr Stokes came to the conclusion that the first respondent *"had exceeded all reasonable boundaries placed on the settlement reached in good faith earlier on 14 March 2007."* Dr Stokes further concluded that :

"The fact of the matter was that the First Respondent had committed the same misconduct which had originally resulted in her being disciplined and that in the circumstances it could not be said that the First respondent was acting in good faith and in accordance with the terms of the settlement reached."

[10]It was on the basis of the above that Dr Stokes, acting in her capacity as head of the plaintiff, refused to implement the terms of the agreement and sought to have the agreement set aside.

Evaluation

[11]The case of the plaintiff is in my view unsustainable on two grounds.

[12]In the first instance the first respondent in her answering affidavit state that the agreement had been made an award in terms of s142A of the Labour Relations Act 66 of 1995 (the Act). This has not been disputed by the plaintiff.

[13] In terms of s142A of the Act, the commissioners of the CCMA or panellists of bargaining councils have the power to make any

settlement agreement in respect of any dispute that has been referred to the CCMA or the bargaining council an arbitration award.

[14]In my view, once an agreement is made an arbitration award, as is the case in present instance, it acquires the status of an arbitration award and can be enforced in terms of s143 of the Act or made an order of the Court in terms of s158 of the Act. In other words an agreement that has been made an arbitration award attracts the same effect as those wards envisaged in s143 of the Act, in that such an award is final and binding and can be enforced in terms of the same section or s158 of the Act.

[15]It would seem to me that there are at least two ways in which the original settlement agreement that has now been made an arbitration award can be set aside. To revert back to its status of being an agreement the plaintiff needed to either apply for the rescission of the award in terms of s144 or review it in terms of s145 of the Act. It therefore means that until such time that the arbitration award was either rescinded in terms of s144 or reviewed and set aside in terms of s145 of the Act, the Court does not have jurisdiction to set aside the settlement agreement that gave rise to the arbitration award. It is

therefore my view that the plaintiff's claim stands to be dismissed on this ground alone.

[16]The claim would still stand to be dismissed on its merits even if the issue of the status acquired by the agreement was to be disregarded. The essence of the case of the plaintiff is that the first respondent acted in bad faith in disclosing the contents of the agreement to other people.

[17]I agree with Mr Woolfrey, for the first respondent when he argued that the requirements of good faith entail both the conclusion of the agreement and the execution thereof. He further argued that good faith when applicable to the execution of the obligations under the contract; it has to do with the agreed terms.

[18]It has been held in those authorities relied upon by Mr Woolfrey that *good faith or bona fides* has deep roots in the South African mixed legal system. See ***Miller and Another NNO v Dannecker 2001 (1) 928 at 938 A-G*** and ***Eeste Nationale Bank van Suid Africa Bpk v Saayman NO 1997 (4) SA 302 (SCA) at 321-2.***

[19]In ***Eeste National Bank (supra)*** Olivier JA held that there was a close connection between the concepts of good faith, public policy and public interest in the process of concluding a contract or for that matter an agreement. Ntsebeza AJ in ***Miller (supra)*** held that the reason for this is because the function of good faith has always been to give an expression in the law of contract to the community's sense of what is fair, just and reasonable.

[20]In ***Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (at 625 D-G),*** Jansen JA is quoted by Ntsebeza AJ in ***Miller*** (***supra)*** with approval as having said:

> *"It should therefore be accepted that in our law an anticipatory breach is constituted by the violation of an obligation ex lege, flowing from the requirement of bona fide which underlies our law of contract.*

[21]The approach followed by Ntsebeza AJ in ***Miller (supra)*** is the same as that which was followed, in ***Standard Bank of SA LTD v Prinsloo (Prinsloo Intervening) 2000 (3) SA 576,*** where the Court held that a measure of fairness and reasonableness must be incorporated into the principles on which contractual liabilities are based. In that case in dealing with the issue of good faith in contracts, Davis J said:

"Not only should this principle of good faith apply when performance is made when rights under the contract are exercised, but it should infuse the entire process by which a contract is concluded."

[22]In the present instance the complaint about non compliance with the requirements of good faith by the first respondent is based on the publication of the agreement and projecting it as victory for herself. The second basis of the complaint is that the first respondent made adverse comments about Dr Stokes and other managers.

[23]In my view there is firstly no evidence showing that the first respondent entered into the agreement with the ulterior motive of ultimately disclosing the contents of the agreement or misrepresented to the plaintiff that he would not disclose to any one the contents of the agreement. There is also no evidence connecting the comments made by the first respondent to the terms of the agreement. There is further no evidence that the agreement expressly or by implication prohibited publication of its terms and conditions.

[24]The submission that it was an oversight not to include a term prohibiting the publication of the contents of the agreement does assist

the case of the plaintiff, particular if regard is had to the fact that both parties were legally represented during the drafting of the agreement. In any case if indeed this was the intention of the plaintiff, it never sought to amend the agreement to include a term prohibiting the publication thereof.

[25]In terms of the agreement it is evidently clear what duties were imposed on the first respondent by the agreement. The first was that she would not take further steps in pursuing her unfair labour practice dispute. She is secondly prohibited to have any contact with the three medical officers who were affected by the allegations she had made and which resulted in the disciplinary action taken against her. And finally the first respondent was required to write a letter in an agreed format to the three medical officers.

[26]It is not the case of the plaintiff that the first respondent has failed to comply with any of the above terms and conditions of the agreement. There is thus, no basis upon which this agreement could have been set aside even if its legal status had not changed to that of an arbitration award.

[27] In the circumstances of this case I see no reason in law or fairness why costs should not follow the results. I agree with the first respondent that not only was the application misconceived but that it also has strong elements of being frivolous and vexatious. The application was brought four months after the conclusion of the agreement and as stated earlier there is nothing that links the publication made by the first respondent to the terms and conditions of the agreement. There is also no evidence linking the statement publicising the agreement to the three medical officers referred to in the agreement. Had the first respondent sought punitive costs, I would have not hesitated to grant the same.

[28]The first respondent indicated in her answering affidavit that she intended filing an application to have the arbitration award made an order of Court to be heard at the same time with this application but such application was never filed.

[29]In the premises the application is dismissed with costs.

MOLAHLEHI J

DATE OF HEARING: 26 MARCH 2008

DATE OF JUDGMENT: 18 JUNE 2008

APPEARANCES

For the Plaintiff: Adv. Schyff

Instructed by: Colleen Bailey Attorney

For the Respondent: Adv. Caiger

Instructed by: David Woolfrey Attorneys.