

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

2023/05/08

DATE



SIGNATURE

CASE NO: 22/16204

In the matter between:

AVIMA (PTY) LTD

APPLICANT

and

DAVID MONTAGU GREATHEAD

FIRST RESPONDENT

AGRI FRONTEIRA LDA

SECOND RESPONDENT

Neutral citation: *AVIMA (PTY) LTD v DAVID MONTAGU GREATHEAD AND
ANOTHER* (Case No: 2021/16204) [2023] ZAPGPJHC 466 (8 May 2023)

JUDGMENT

MARAIS AJ:

- [1] In this application, the applicant applied by way of notice of motion for an order against the first respondent in terms of which a settlement agreement incorporated in an arbitration award be made an order of court and, consequentially, for an order for payment of the amount of R3 674 624.00, with costs.
- [2] The application purports to be one in terms of Rule 41(4) of the Rules of Court, but on a proper analysis the application is an application to make an arbitration award an order of court in terms of section 31 of the Arbitration Act, Act 42 of 1965, alternatively for an agreement concluded between the parties to be made an order of court by agreement. Nothing turns on this in this matter and the issue can be resolved by an appropriately worded order.
- [3] The background of the matter is a dispute between the parties relating to the sale on credit of certain goods by the applicant to the second respondent, in respect of which the first respondent has bound himself as surety. The second respondent failed or refused to pay the purchase price of the goods due to the applicant.
- [4] This dispute resulted in an arbitration agreement between the parties dated 10 September 2018 (see annexure A3.1 to the founding affidavit). The arbitration agreement recorded that the dispute emanated from the failure by the respondents to make payment of the amounts due in respect of the supply of goods by the applicant to the second respondent.

- [5] The arbitration agreement also contained the usual clause providing that the arbitration award would be binding and could be made an order of court.
- [6] The arbitration proceedings resulted in the conclusion of a settlement agreement on 2 March 2020, in Sandton, Johannesburg, between the Applicant and the Respondents (see Annexure A2 to the founding affidavit).
- [7] The settlement agreement recorded a full and final settlement of all disputes between the parties in the arbitration proceedings, in particular the disputes relating to the supply of the goods by the applicant to the second respondent, and the Respondents agreed to pay to the Applicant, jointly and severally, the amounts of R3 074 624.00 and R600 000.00, as well as 50% of the arbitrator's fees. Payment in instalments, coupled with an acceleration clause, was agreed upon, which is not relevant herein, as the time for payment has passed.
- [8] It was agreed between the parties that the settlement agreement would be incorporated in an arbitration award, and that the arbitration award and the agreement may be made an order of court. The agreement provided that this would be done in Mozambique regarding the second respondent and in South Africa regarding the first respondent.

- [9] The arbitrator, Advocate A Bester SC, made an arbitration award incorporating the settlement agreement also on 2 March 2020 (see annexure A3.2 to the founding affidavit).
- [10] Evidently, the respondents did not comply with the arbitration award, which resulted in the present application.
- [11] The application has not been served on the second respondent, who is technically not before court. No relief is sought against the second respondent and in law the joinder of joint and several debtors are not necessary (see *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W)). The legal interests of the second respondent cannot be affected by the order sought in the present matter. It would have been different if the liability undertaken was jointly, as opposed to jointly and severally.
- [12] The first respondent delivered an answering affidavit, in which the facts set out above were not disputed.
- [13] The first respondent, however, raised the issue that the applicant had allegedly infringed the trademark of another Mozambiquan company, allegedly in labeling the goods that were supplied by the applicant to the second respondent in contravention with the trademark, and that there were allegedly criminal proceedings pending against the applicant in Mozambique for fraud and trademark infringement.

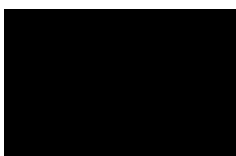
- [14] The first respondent attached documents purportedly emanating from the Mozambiquan authorities dated 12 August 2018, purportedly confirming the pending investigation into the aforesaid matters. The aforesaid document had been translated into English, and the translator's certificate is dated 15 August 2018 (the annexures are unmarked).
- [15] As the parties have agreed that the settlement agreement was a full and final settlement relating to all the disputes regarding the goods supplied by the applicant to the second respondent, and furthermore agreed to an arbitration which would result in a binding award which could be made an order of court, the possible defences that may be raised by the respondents were limited.
- [16] The full and final settlement was clearly a compromise or a *transactio*, which created a new relationship between the parties with consequential rights and obligations, with the result that the parties could no longer enforce the original rights and obligations (see *Ratlou v Man Financial Services SA* (Pty) Ltd 2019 (5) SA 117 (SCA) par 13). At the same time, such compromise in express terms prevented any preceding dispute covered by the compromise from being validly raised.
- [17] No defence was raised that may question the existence or validity of the settlement agreement.

- [18] Section 28 of the Arbitration Act provides that *“unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms”*.
- [19] Whilst certain limited defences may be available in terms of the Arbitration Act in respect of an award (which need not be elaborated upon herein), no such defence was raised.
- [20] The first respondent’s defence was limited to relying on an issue that existed prior to the arbitration process, settlement agreement and arbitration award. Furthermore, even if the first respondent was entitled to raise this pre-existing issue, he failed to demonstrate how it constitutes a defence.
- [21] In the premises, the application must succeed, subject to certain amendments to the order. As already indicated, the provisions of rule 41 do not find application. Furthermore, the order should reflect that the first respondent’s liability is joint and several with the second respondent.
- [22] The court hereby grants the following order, which will be contained in an order which will be signed and marked “DM”:

“1 The content of the settlement agreement between the parties on 2

March 2020 attached to the founding affidavit as Annexure A2 is hereby made an order of court.

- 2 *The first respondent is ordered to pay the amount of R3 674 624.00 to the Applicant.*
- 3 *It is recorded that the first respondent's liability set out in paragraph 2 above is joint and several with the second respondent, the one paying the other to be absolved.*
- 4 *The first respondent is ordered to pay the costs of the application."*



D MARAIS

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

8 MAY 2023

Appearances:

Appearance for Applicant:	Adv. H van Zyl
Instructed by:	Zaltzman Attorneys
Appearance for First Respondent:	In person
Instructed by:	N/A
Date of hearing:	8 May 2023
Date of Judgment:	8 May 2023