**IN THE HIGH COURT OF SOUTH AFRICA**
**FREE STATE DIVISION, BLOEMFONTEIN**

Case no **4396/2022**
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
CIRCULATE TO MAGISTRATES: NO

In the matter between:

**BOKAMOSO PAINTING FIRM (PTY) LTD** Applicant
(Registration number: 2016[…])

and

**MASILONYANA LOCAL MUNICIPALITY** Respondent

**CORUM:** JP DAFFUE J

**HEARD ON:** 20 JULY 2023

**DELIVERED ON:** 10 AUGUST 2023
This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 10 August 2023.

**ORDER**

1. The application is dismissed.
2. Each party shall pay their own costs of the application.

**JUDGMENT**

*Introduction*

[1] Pending litigation between the parties, the one party has approach the court to make an alleged settlement agreement an order of court. Even if this could be done, it would not signal the end of the litigation between the parties.

*The Parties*

[2] The applicant is Bokamoso Painting Firm (Pty) Ltd (Bokamoso) who issued action procedure as plaintiff against the defendant under the same case number, to wit 4396/2022. Adv OK Chwaro appeared for the applicant in the application before me, he being instructed by Modiboa Attorneys Inc, c/o McIntyre and Van der Post, Bloemfontein.

[3] The respondent in the application and the defendant in the action is Masilonyana Local Municipality (the Municipality). Adv LA Roux appeared for the Municipality before me on instructions of Peyper Attorneys, Bloemfontein.

*Relief claimed*

[4] The following relief is claimed in the notice of motion:

> ‘1. That it be declared that both the Applicant and Respondent have reached or concluded a valid, binding, legal and enforceable settlement agreement in terms of Rule 34 as per the letters dated 09$^{th}$ February 2023, 10$^{th}$ February 2023, and 07 March 2023;
>
> 3. That the Respondent be ordered and or directed to make payment of R1 000 000.00 (One Million Rand) within 10 days from date of the order of this honourable court as per the settlement agreement between the parties;

4. That the Respondent be ordered and or directed to make payment of R1 189 200.00 (One Million, One Hundred Eighty Nine Thousand and Two Hundred Rand) on or before the 31st July 2023 as per the settlement agreement between the parties;

5. That the Respondent be ordered and or directed to pay the costs of this application on attorney and client scale;'

*History of the litigation*

[5] On 9 September 2022 Bokamoso issued summons against the Municipality, claiming payment in the amount of R3 849 600.00 plus interest and costs. The cause of action is services rendered in accordance with a tender awarded by the Municipality to Bokamoso. The summons was duly served on the Municipality.

[6] The Municipality failed to file a notice of appearance to defend and consequently, Bokamoso set down the matter for default judgment on 17 November 2022. On that day the matter was removed from the roll. It was again set down for default judgment on 1 December 2022. On this occasion it was again removed from the roll as a result of the Municipality's belated notice of intention to defend which was filed that same day. The Municipality was ordered to pay the wasted costs.

[7] Hereafter settlement negotiations were conducted between the parties as will be shown later herein. In a strange turn of events the applicant embarked upon application procedure under the same case number. A notice of motion using the long form in accordance with Form 2(a) of the First Schedule to the Rules was issued on 23 April 2023 in terms whereof Bokamoso sought relief as set out above. The Municipality filed an answering affidavit to which Bokamoso replied. It is this opposed application that needs to be adjudicated.

*The disputes*

[8] The application is opposed on two bases, first that insofar as Bokamoso seeks relief in accordance with rule 34 of the Uniform Rules of Court, it has not

complied with the requirements of the rule and second, no settlement agreement was entered into between the parties.

*The applicability of rule 34*

[9] Bokamoso elected to rely on rule 34 and consequently ss 34(1) and (6) need to be considered. Sub-rule 34(1) reads as follows:

> 'In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.' (my emphasis)

[10] In *Naylor and Another v Jansen*[1] the Supreme Court of Appeal dealt with the purpose of rule 34 and the fact that it was designed to enable a defendant to avoid further litigation and failing that, to avoid liability for the costs of such litigation. Obviously, having referred to the general rule, the trial court still remains with an unfettered discretion in awarding costs.

[11] As Erasmus[2] states, an unconditional offer is designed for the case where the defendant admits liability on the plaintiff's claim, in whole or in part, entitling the plaintiff to accept the offer and to sue for the balance of his claim at his peril. The procedure is created to either terminate or curtail litigation. A defendant making use of the procedure may avoid liability for the costs of the litigation. After judgment has been given and the offer or tender has been brought to the notice of the court, the question of costs may be considered afresh.[3] The usual practice is to order the defendant to pay the plaintiff's costs incurred up to the date of the offer or tender if the offer or tender exceeds the amount of the judgment and to order the plaintiff to pay the defendant's costs incurred thereafter.

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[1] (508/05) [2006] ZASCA 94; [2006] SCA 92 (RSA); 2007 (1) SA 16 (SCA) (31 August 2006) at paras 13 & 14.
[2] Superior Court Practice D1 – 446.
[3] See sub-rule 34(12).

[12] We have not come to the end of the litigation, ie the action instituted by Bokamoso. The Municipality has not even filed a plea and the pleadings have not been closed. Evidence is still to be led at the trial where after the trial judge will be required to deliver a judgment. Once that is done, he may be required to consider the costs award afresh. Bearing this in mind, rule 34 is inapplicable *in casu*. The whole purpose of Bokamoso's application is to make an end to the entire dispute between the parties and for the court to declare that a settlement agreement as alleged has been entered into in order to obtain finality. Therefore, Bokamoso apparently does not intend to await a judgment by the trial court after the leading of evidence. Rule 34 caters for a totally different scenario as mentioned and Mr Chwaro conceded this in the following words in his written heads of argument:

> 'The settlement agreement which was concluded between the parties does not have the hallmarks of a rule 34(1) settlement as there was no compliance with the requirements thereof, especially the written offer which was to be accepted within 15 days from the date of the offer, as envisaged in rule 34(6) of the Uniform Rules of Court.'

It is correct that Bokamoso did not accept the offer within 15 days as provided for in rule 34(6), but this is irrelevant for the reasons stated.

[13] Although not dealt with by the parties during argument, I also considered the possibility of adjudicating the application based on rule 41(4) of the Uniform Rules of Court which reads as follows:

> '(4) Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties.'

Although the sub-rule in its present form supersedes the judgment of Erasmus J in *Siebert and Honey v Van Tonder*[4] insofar as signature of the parties are

[4] 1981 (2) SA 146 (O) at 148 D.

now required, the judgment still remains relevant insofar as the court held that the settlement must be intended to bring an end to the suit as a whole. Applications for judgment in terms of rule 41(4) are not incidental or pending proceedings in the sense contemplated in rule 6(11). Such applications are brought in terms of rule 6(1) as Bokamoso tried to do, although the application was filed under the same case number and not a different number.[5] Consequently, this rule, although not relied upon by Bokamoso, does not find application in this case.

*The alleged settlement agreement*

[14] The second basis relied upon by the Municipality in its opposition of the application is the non-existence of a settlement agreement. Before I deal with the evidence pertaining to the alleged settlement agreement, it is apposite to refer to the following judgment of the Constitutional Court. *Eke v Parsons*[6] confirmed with approval the following principle:

> 'A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits.'[7]

It went on to state:

> '[31] The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, "a matter judged").'[8]

Bearing in mind that there may be certainty about some aspects of the offer and possible acceptance thereof, it is clear that the parties did not intend to

[5] Erasmus Superior Court Practice D1-552A.
[6] (CCT214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015).
[7] *Ibid* para 22.
[8] *Ibid* para 31.

and therefore did not settle the dispute in order to bring 'finality to the *lis* between the parties'. Having said this, it is also apposite to consider the legal principles pertaining to agreements in general hereunder.

[15] Before I return to the law, the facts must be considered. The alleged agreement is not contained in one document, but in a series of letters. The first letter, initiating the settlement negotiations, was written by the Acting Municipal Manager of the Municipality on 9 February 2023. This letter followed upon a meeting held between Modiboa Attorneys on behalf of Bokamoso and a delegation led by the Acting Municipal Manager. The following extracts from this letter, quoted *verbatim,* need reflection:

> '2. The Discussions.
>
> In December 2021 Bokamoso Painting Firm was paid an amount of R 1 000 000 from the invoice they had submitted amounting R 2,854,080.00 for the <u>completed phase 1 and 2 and 3</u>, thus R 1,854,080.00 is an outstanding balance for the work completed.
>
> The Municipality acknowledged its indebtedness to Bokamoso Painting Firm (Pty) Ltd with the amount of R 1,854,080.00 in respect of Phases 1, 2, and 3 of the project for which Bokamoso Painting was appointed.
>
> The Municipality acknowledges the debt of R 1 189 200,00 in respect phase [the phase number was not inserted, but it is clear from all the evidence that the reference should have been to phase 4], subject to <u>correction of the signatory</u> on the documents accompanying the invoice.
>
> The Municipality disputed the claim amounting to R 475 680,00 and R237 840.00 in respect of Phases 5 and 6 on the following grounds:
>
> a) …
>
> b) …

3. Resolution.

It was resolved that:

a) The Municipality is to make a Settlement proposal on the amount of R 1,854,080.00 and R 1 189 200,00

b) Bokamoso Painting Firm will attend to the queries raised by the Municipality in respect of phases 5-6 of the project then invoice the Municipality;

c) When the settlement agreement is reached all legal processes will be withdrawn by Bokamoso Painting Firm (Pty) Ltd;

d) Each party is to carry its own legal costs.'. (my emphasis.)

A payment proposal was annexed to the letter in terms whereof the Municipality proposed to pay R 1 854 080,00 on 31 March 2023 and R 1 189 200,00 on 31 July 2023.

[16] On 10 February 2023 Modiboa Attorneys responded on behalf of Bokamoso to the letter of the Municipality. I quote from paragraphs 3 and 4 of the letter:

'3. We must for the record, confirm that our client is in agreement with the move for the settlement of the matter herein to avoid unnecessary legal costs, <u>but would like to counter propose the following subject to your approval or for your consideration and or response thereto</u>;-

3.1 that the first payment of R1 854 080.00 should be made on or before the 28$^{th}$ February 2023 instead of the 31$^{st}$ March 2023, the reason being, ….;

3.2 that the second payment should also cover the fees for phase 5 and 6 …, meaning the amount payable on the 31st July 2023 should be R1 995 520.00 (as per second tax invoice) and that should form part of the settlement herein, instead of R1 189 200.00.

4. We would much appreciate it if you can revert back to us not later than Wednesday the 15th February 2023 with your response or reaction towards our counter proposal herein…' (my emphasis.)

[17] On 27 February 2023 Modiboa Attorneys wrote another letter to the Municipality. I quote from the letter:

'3. We also place it on record that we since had a meeting with you on the 26th January 2023 and fairly enough by now the settlement discussions should have been concluded whether positively or negatively, but because of your delayed response we are unable to finalise the settlement discussions and it now a month since we had a meeting with you which is not fair for our client because even one of the dates suggested in our counter proposal is tomorrow and you have failed to respond thereto.

4. We therefore based on the above give you until Wednesday 01 March 2023 to finally respond to our letters and the settlement discussions should be finalised by Friday 03rd March 2023, failing which we are proceeding with litigation processes and you will have to file your plea.' (my emphasis)

Two letters were written by Modiboa Attorneys to Peyper Attorneys (now on record on behalf of the Municipality during the settlement negotiations) the one on the 7th of March 2023 and the second on the 13th of March 2023. The following is quoted from the first letter:

'3. ….., please be advised or advise your client that our client is acceding to your client settlement proposal as contained in the letter dated 09th February 2023, meaning your client should or will pay our client the amount of R1 854 080.00 on or before 31st March 2023 and R1 189 200.00 on or before 31st July 2023.

4. ….. and our client is still of the view that fees for phase 5 and 6 should form part of last payment due in July 2023 whilst our client addressing any other issue that might be outstanding herein.' (my emphasise)

The following is quoted from Modiboa Attorneys' letter of 13 March 2023:

'2.2 the counter proposals were made by our client or our office, but to some extent those were never entertained by your client, and or rejected by your client;

2.3 the settlement proposal as contained in your client's letter of the 09th February 2023 remained open for acceptance by our client and same was never withdrawn by your client;

2.4 the settlement proposal was then accepted by our client as per our letter of the 07th March 2023, and as a result of the acceptance hereof, a settlement agreement was concluded between the parties as of the 07th March 2023.

[18] Interestingly, Mr Du Plooy of Peyper Attorneys addressed an email to Modiboa Attorneys on 27 March 2023. I quote:

'2. Our client was unable to make full payment of the R 1 854 080.00 due to receiving a lower equitable share than expected.

3. Our instructions are therefore *inter alia* the following:

3.1 Our client is willing to settle the dispute between the parties on an amicable basis, and has shown its bona fides by making an initial payment.

3.2 Our client will make payment towards settling the account with each Equitable share.

3.3 Our client will make payment of R1 000 000.00 with the equitable share received during July 2023.

3.4 Our client will make payment of R1 189 200.00 with the equitable share received during December 2023.

3.5 Our client still disputes the claims with regards to Phase 5 and 6.

4. Kindly confirm whether your clients are willing to accept the settlement proposals.' (my emphasis)

[19] Modiboa Attorneys responded to Peyper Attorneys in a letter on the same day and I quote:

'3. Our client attempted unsuccessfully to do the counter proposal and your client choose to ignore our letters and our client did not have any option under the circumstances but to accede to your client's initial settlement proposal and as a result hereof an agreement came into place between the parties and it is therefore binding and enforceable on the parties.

4. Our cannot agree to any further settlement proposal, because parties have reached an agreement already, and if on Friday 31st March 2023 our client does not receive payment of R1 000 000.00, our instructions are to file an application in the High Court in terms of an order will be sought to confirm the settlement agreement (*and the terms thereof*)…

5. Your client's settlement proposal was not subject (nor did the parties agree thereto) to your client receiving equitable share, and even in the letter dated 07th February 2023 no reference has been made thereto, …' (my emphasis)

*Legal principles pertaining to agreements in general*

[20] Now that the communication relied upon by Bokamoso has been dealt with, it is necessary to consider the authorities. It is apparent that Bokamoso is not relying on a settlement agreement contained in one document signed by the parties and/or their legal representatives on their behalf. A series of letters form the basis for the alleged settlement agreement as indicated above. The general principle is trite. Upon receipt of an offer by the offeror, the offeree's counter-offer incorporates a rejection destroying the original offer. This has been the case in this country for more than a century. The matter was first pronounced in *Watermeyer v Murray*[9] and more recently in *Legator McKenna Inc and Another v Shea and Others*[10] and *Robarts v Antoni N.O and Others*[11].

[21] Bradfield suggests in Christie's Law of Contract in South Africa[12] that it is conceivable that a counter-offer in a specific instance would not incorporate a rejection, relying on a *dictum* of Watermeyer CJ in *Collen v Rietfontein Engineering Works*[13] to the effect that this is a general rather than an absolute rule. The dictum reads as follows:

> 'It must also be remembered that a counter-offer is in general equivalent to a refusal of an offer and that thereafter the original offer is dead and cannot be accepted unless revived.'

It is also clear that an offeror may repeat an offer after it has been destroyed as a result of a counter-offer or rejection and in doing so resuscitate the original offer[14]. Greenberg JA stated in *Boeren v Harris*[15] that the acceptance of an offer 'must leave no room for doubt.' Bradfield criticises the aforesaid phrase,[16] saying that 'it must be taken with a pinch of salt'. However, an acceptance of an offer by the offeree must be clear and unequivocal or

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[9] 1911 AD 61 at 70.
[10] (143/08) [2008] ZASCA 144; 2010 (1) SA 35 (SCA); [2009] 2 All SA 45 (SCA) (27 November 2008) para 17.
[11] [2014] 3 All SA 160 (SCA); [2014] JOL 31706 (SCA); [2014] ZASCA 64 (SCA).
[12] GB Bradfield, Christie's Law of Contract in South Africa 8th ed p 67.
[13] 1948 (1) SA 413 (A) at 420.
[14] *Robarts v Antoni N.O. and Others* para 21.
[15] 1949 (1) SA 793 (A) at 801.
[16] Christie's Law of Contract in South Africa 8th ed p 86.

unambiguous. The acceptance must correspond with the offer, either exactly or at least in all material respects.[17]

[22] The contents of the letters are not in dispute. However, the Municipality tried to put a different perspective thereon in the answering affidavit. All of a sudden, and in an about-turn, the allegation was made that Bokamoso had not fully complied with its contractual obligations pertaining to phase 4. I find this disturbing, bearing in mind that the Municipality's attorney made it quite clear in its email of 27 March 2023 that the only reason why it could not make the full payment of R 1 854 080,00 agreed upon by the 31st of March 2023 was due to receiving a lower equitable share than expected. Therefore, an amount of only R 854,080,00 was paid, leaving a balance which the Municipality's attorneys undertook to pay during July 2023. The same applies to the undertaking to pay R 1 189 200,00 during December 2023, whilst all of a sudden it was alleged in the answering affidavit that this amount was not due and payable.

[23] This being opposed motion proceedings, the *Plascon-Evans* principle should be applied. The question is therefore two-fold, to be considered on the evidence tendered by the Municipality which version cannot be rejected as farfetched. First, it must be considered whether an offer was made which was accepted. Second, whether Bokamoso's counter-offer amounted to a rejection of the initial offer, which was no longer open for acceptance as Bokamoso tried to suggest. Bearing in mind the correspondence and the evidence presented, I am satisfied that it is possible to find that there was an agreement pertaining to the amount payable in respect of phases 1, 2 and 3, the effect being that Bokamoso is entitled to payment of R 1 million. There is uncertainty pertaining to the amount of R 1 189 200,00 in respect of phase 4. I shall rather err on the side of caution and refuse to make any order for payment at this stage of the proceedings, allowing the Municipality to defend the action and for the parties to deal with the issues in dispute during a forthcoming trial.

[24] The action procedure should be allowed to continue to finality. That will mean that the Municipality shall file its plea immediately whereupon Bokamoso may file a

[17] *Ibid* at pp 87 & 88.

replication if so advised. Summary judgment procedure may be utilised thereafter and the court adjudicating that application may grant summary judgment for the amount due, owing and payable together with costs, ordering the parties to go on trial pertaining to the remainder of the disputes.

[25] I earnestly considered whether this court should not come to the assistance of Bokamoso, bearing in mind the unconditional offer in respect of which an amount of R1 million is clearly due and payable. I made it clear that neither rule 34, nor rule 41(4) is applicable. As pointed out in *Eke v Parsons supra* the settlement order must bring finality to the *lis* between the parties, save perhaps for litigation consequent upon the nature of the order. Unless as provided for in summary judgment applications, a court cannot deal with litigation on a piece-meal basis.

*Costs*

[26] Although I am not prepared to grant orders as sought by Bokamoso, it is apparent that the Municipality has unconditionally admitted liability for payment of R1 million. Although the Municipality has successfully opposed the application, this is a suitable case where I, in the exercise of my discretion, shall deviate from the general rule and not award costs in favour of the Municipality. Therefore, I regard it only fair that each party shall pay their own costs of the application.

*Order*

[27] The following order is issued:

1. The application is dismissed.

2. Each party shall pay their own costs of the application.

**JP DAFFUE J**

Counsel for the applicant in this application: Adv OK Chwaro
Modiboa Attorneys Inc

c/o McIntyre &Van der Post
BLOEMFONTEIN

Counsel for the respondent in this application: Adv LA Roux
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