

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: CA229/2021

In the matter between:

MEC FOR EDUCATION, EASTERN CAPE PROVINCE

Appellant

and

THABO HERMAN MALAO

Respondent

JUDGMENT

Bloem J

1. This appeal has its origin in the failure of the Eastern Cape Department of Education (the department), represented herein by the member of the executive council responsible for education in the Eastern Cape (the MEC), to make payment to the respondent, Thabo Herman Malao, for services rendered by him as an educator. By notice of motion dated 5 December 2016 Mr Malao issued an application, as a matter of urgency, for hearing on 24 January 2017 for an order *inter alia*:
 - “2. directing [the MEC] to pay [the respondent’s] salary forthwith and continue to pay it at the end of each month.

3. *directing [the MEC] to pay the costs of this application on a scale as between attorney and own client”.*
2. On 24 January 2017 the application was struck off the roll for, *inter alia*, lack of urgency. Mr Malao was ordered to pay the costs of the hearing of that day. On 7 February 2017 the MEC delivered a notice of intention to oppose the application.
3. By notice of motion dated 27 February 2017, accompanied by his supporting affidavit, Mr Malao purported to launch another urgent application against the MEC, under the same case number (the second application), wherein he sought exactly the same relief set out in the notice of motion of the first application, which had been struck off the roll. In his affidavit in support of the second application, Mr Malao said that the affidavit was filed in support of the reinstatement of the earlier application. The notice of opposition remained in full force and applied to the second application.
4. Before the delivery of the MEC’s answering affidavits, the parties entered into settlement negotiations and on 5 May 2017 they concluded a settlement in terms whereof Mr Malao was paid R1 353 023.89 for salary owed to him from November 2010 to 31 October 2016. The department undertook to also pay his salary from November 2016 to April 2017 *“pending the release of the arrear salary code from the Department of Treasury”*.
5. However, by notice of motion dated 13 September 2017, Mr Malao delivered yet another notice of motion (the third application), again supported by his supporting affidavit, under the same case number. In that notice of motion he gave notice of his intention to seek an order that the MEC should pay interest on his arrear salary, calculated from 20 November 2010 to date of payment, and costs of the application on an attorney and client scale. In his affidavit in support of the third application, Mr Malao said that on 5 May 2017 the MEC had *“agreed to pay the arrear salary but refused to pay interest thereon and costs”*.

6. The MEC opposed the third application. That application was heard by Mfenyana AJ, who declared that Mr Malao was “*entitled to interest from the date when the payment fell due to date of the final payment*” and ordered the MEC to pay Mr Malao’s costs of the application. It is against these findings that the MEC appeals, with the leave of the Supreme Court of Appeal.
7. The primary issue is whether or not the MEC was liable to pay interest to Mr Malao in respect of the late payment of his salary. The MEC contended that Mr Malao was not entitled to interest as he had failed to collect his salary, and that he had, in any event, failed to make out a case for the payment of interest to him. However, the thrust of the MEC’s case was that the issues of interest and costs had formed part of the settlement negotiations and he contended that “*the matter had effectively settled in accordance with our settlement agreement*”. The failure to provide in the settlement agreement for the payment of interest and costs was in accordance with the department’s denial of such liability, it was contended.
8. The question which arises is what the effect of the settlement agreement is. A settlement agreement is a compromise. A compromise is a contract between two or more persons which has as its object the prevention, avoidance or termination of litigation.¹ A compromise brings about a final settlement of the dispute and ends the uncertainty that accompanies litigation. It is usually a sign that the hostilities between the litigants or prospective litigants have ended.² A compromise is a full defence to any action based on the original claim, because a settlement agreement operates as *res judicata*.
9. It is undisputed that before the delivery of the answering affidavit filed on behalf of the MEC, the parties entered into, what the deponent of that answering affidavit described as, “*rigorous settlement negotiations*” for purposes of “*the settlement of the matter*”, which resulted in a settlement agreement.

¹ *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and others* 1978 (1) SA 914 (A) at 921A-D and *Lawrie v Nursing Response CC and others* [2016] 3 All SA 186 (ECG) at par 8.

² *Moraitis Investments (Pty) Ltd and others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at 511C.

10. The agreement reached between the parties is headed "*Settlement Agreement*". It records that the parties had agreed that "*the matter must be resolved amicably out of Court*". The "matter" was Mr Malao's claim for unpaid salary, interest thereon and costs under the case number of the initial and second applications.
11. Mr Notshe, counsel for Mr Malao, submitted that the settlement agreement did not extinguish Mr Malao's claim for interest on the unpaid salary. That is so, the submission continued, because the settlement agreement did not reflect that it was in full and final settlement of all Mr Malao's claims. Where, in a case like the present, an employer and employee negotiate about unpaid salary and interest thereon, the entire cause of action, including the claim for interest, would be extinguished if they conclude a settlement agreement, or compromise. This is so even when the compromise agreement provides for the unpaid salary only, unless the employer and employee specifically reserve the employee's right to proceed thereafter with a claim for interest or costs. It is not necessary for the settlement agreement to state that the agreement is in full and final settlement of the employee's claims because, by its very nature, it represents a settlement of their dispute. Thus, it was said in *Georgias and another v Standard Chartered Finance Zimbabwe Ltd*:³

"The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as res judicata on a judgment given by consent. It extinguishes ipso jure any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved."

12. On Mr Malao's own admission, despite the capital amount, interest thereon and costs having been discussed during the course of the settlement negotiations, "[t]here was no agreement in respect of interest and costs". He

³ *Georgias and another v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZSC) at 139A-C.

said that, although the MEC “*agreed to pay the arrear salary, [he] refused to pay interest thereon and costs*”. The inescapable conclusion is that during the course of those negotiations, the representatives of the MEC adopted the stance that: “*The MEC will pay all your arrear salary, but will not pay interest thereon or costs*”. That was the deal. This is information of which the parties had knowledge at the time of the conclusion of the settlement agreement.⁴

13. Once the settlement agreement was concluded on the basis that the MEC was unwilling to pay interest or costs, it was not open to Mr Malao to then institute a new application to claim a head of damages, which had been compromised. That compromise constituted the settlement, by agreement, of the MEC’s disputed obligations to pay the arrear salary, interest thereon and costs.⁵ The court *a quo* was accordingly wrong when it found that Mr Malao was entitled to the payment of interest on the unpaid salary.
14. In the circumstances, the appeal must be upheld. Costs must follow the result. Mr Quinn, counsel for the MEC who appeared with Mr Malunga, submitted that it was a reasonable precaution for the MEC to employ two counsel and that the costs of the appeal should therefore include the costs of two counsel. Counsel submitted that the issue at stake, namely whether or not, in all the circumstances, interest on the unpaid salary should be paid by the MEC to Mr Malao, was important to the parties, particularly to the MEC, and accordingly justifies the making of such an order. In my view, although the matter was indeed important to the parties, that is, in all the circumstances, an insufficient reason for allowing the costs of two counsel. The matter was not complex. It involved the application of trite law to a set of straightforward facts. Under the circumstances, it would be unreasonable and unfair to burden Mr Malao with the payment of the costs of two counsel.
15. In the result, it is ordered that:

⁴ *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 604A-B.

⁵ *Absa Bank Ltd v van de Vyver NO* 2002 (4) SA 397 (SCA) at 402G-H.

1. The appeal be and is hereby upheld with costs, such costs to include the applications for leave to appeal to the court *a quo* and the Supreme Court of Appeal.
2. The order of the court *a quo* is hereby set aside and replaced with the following:

“1. The application is dismissed.”

GH BLOEM

Judge of the High Court

I agree.

JW EKSTEEN

Judge of the High Court

I agree.

A GOVINDJEE

Judge of the High Court

For the appellant:

Mr RP Quinn SC with Mr Y Malunga, instructed by the State Attorney, East London and Mgangaatho Attorneys, Makhanda.

For the respondent:

Mr VS Notshe SC, instructed by Dyushu Majebe Attorneys NN Dullabh and Co, Makhanda.

Date of hearing:

6 March 2023.

Date of delivery of the judgment:

14 March 2023.