



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

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

18/10/2022

DATE

SIGNATURE

CASE NUMBER: 1454/2022

In the matter between:-

CAPITAL PROFOUND 3 (PTY) LTD

First Applicant

INYANGA TRADING 497 PTY LTD

Second Applicant

JACANA INVESTMENTS (PTY) LTD

Third Applicant

COFFEE BREAK INVESTMENT CC

Fourth Applicant

and

GUILT FOOD (PTY) LTD

t/a GUILT

First Respondent

JACQUELINE MICHELLE BURNS

Second Respondent

JUDGMENT

GREYLING-COETZER AJ

- [1] This application came before the court as an unopposed motion. The applicants seek this court to make the cancellation agreement, concluded between the applicants and the respondents, an order of court on the strength of clause 18 to the agreement, which provide that the parties agreed that the agreement will be incorporated into and made an order of court.
- [2] As will become evident from that set out herein below, the relief is sought in circumstances where no litigation is pending or has been commenced with between the parties. I therefore considerate necessary to determine whether it is competent for this court to make an agreement, as reached between the parties absent litigation, an order of court.
- [3] In the affidavit supporting this application (deposed to by the attorney of record on behalf of the applicants) it is alleged that the applicants and the first respondent concluded a one-year lease agreement, commencing on 1 April 2021 and expiring on 31 March 2022. Pursuant to the first respondent providing the applicants notice of its intention to vacate the leased premises before expiry of lease, the cancellation agreement was concluded on 26 October 2021.
- [4] In terms of the cancellation agreement, the parties agreed on *inter alia* f re-instatement of the lease premises, hand over the keys to the lease premises to the applicants, payment that the first respondent would be liable to make in respect of rental and other amounts due in terms of the lease agreement, totaling R159 716.13. It was agreed that the aforesaid amount would be payable in monthly instalments of R5 000.00 for the period 30 November 2021 to March 2022, and thereafter in installments of R10 000.00 per month as from 30 April 2022 until the full outstanding amount has been paid in full.
- [5] The second respondent further bound herself in terms of the cancellation agreement as surety and co-principal debtor for the due and punctual payment of all amounts and sums of money which may now or at any time thereafter, and from time to time be and become due, and for the due fulfillment of all obligations

which may now or at any time thereafter and from time to time be or become due by the first respondent unto and in favour of the applicants.

- [6] In the papers before court there is no suggestion that any litigation preceded the conclusion of this Cancellation Agreement and the consequential relief to make same an order of court.
- [7] Prior to the hearing of this matter, a directive was issued to the applicants, advising them that at the hearing they will be required to address the court in respect of the principles set out in **Eke v Parsons 2016 (3) SA 37 (CC)** and how it relates to the matter at hand.
- [8] At the hearing counsel for the applicants, as was done in the practice note, placed reliance on the unreported judgment of **Growthpoint Properties Ltd v Makhonya Technologies (Pty) Ltd and Others (67029/2011) [2013] ZAGPPHC 43 (12 February 2013)** submitting that it is competent for the court to make the cancellation agreement an order of court.
- [9] It was further submitted that the Constitutional Court in the **Eke** matter (*supra*) clearly drew a distinction between direct and indirect issues or *lis* between the parties. It was submitted that the matter before court relates indirectly to an issue or *lis* between the parties.
- [10] Not being persuaded by counsel for the applicants' submissions, judgment was reserved and the applicants were granted an opportunity to file written heads of argument. Counsel for the applicants duly complied, wherein helpful and insightful submissions were made. Per the submissions the court was urged to follow Van der Byl AJ in the **Growthpoint** matter (*supra*).
- [11] It was submitted that in the matter at hand specific provision was made in the Cancellation Agreement for the order to be made an order of court and in terms of Section 19 of the Superior Courts Act 10 of 2013, the High Court has the power and jurisdiction to hear any and all matters that have not been expressly excluded through means of legislation. I pause to point out that the

aforesaid reference might have been a typing error, as Section 19 of the Superior Courts Act 10 of 2013 does not provide as such. Section 19 relates to the power of the court on the hearing of appeals. Upon closer scrutiny, it appears that the applicants might have been referring to Section 19 of the repealed Supreme Courts Act of 1959.

[12] Consequentially, it was submitted that no legislation prohibits the High Court from granting applications for orders to make settlement agreements orders of court. But even so, the Constitutional Court in the **Eke** matter (*supra*) in passing made an *obiter* remark that for a court to be able to make a settlement agreement an order of court, it must in the first place relate directly or indirectly to an issue or a *lis* between the parties. It was submitted that in the present matter such an issue or *lis* exists, and that issue or *lis* is the sole reason for entering into the Cancellation Agreement.

[13] According to the applicant the position adopted by Budlender AJ in **Avnet South Africa (Pty) Ltd v Lesira Manufacturing (Pty) Ltd and Another 2019 (4) SA 541 (GJ)** wherein it was held that the intention of the Constitutional Court in the **Eke** matter (*supra*) clearly means that there had to be litigation between the parties before the court could make a settlement agreement an order of court, is not correct. In substantiation for this submission, it was argued that the Constitutional Court clearly made a distinction firstly between direct and indirect, and secondly between an issue and a *lis*. And so the argument went, should it be the case that the Constitutional Court simply stated that there had to be litigation, it would not have made the distinction, and specifically incorporated “*indirect issue*”, as a possible way to acquire jurisdiction to hear a matter and grant such an order. The Constitutional Court also did not state that it sought to limit the inherent power of the High Court. As such, it was submitted the correct position is that set out in the **Growthpoint** matter (*supra*).

[14] The **Growthpoint** matter (*supra*) similarly concerns an application wherein it was sought that an agreement be made an order of court in circumstances where no litigation was pending or preceded the application. Therein the

agreement was a settlement agreement. In the present matter the agreement is termed a 'Cancellation Agreement'. The content speaks to an agreement wherein the parties arrange and agree on manner of discharging the obligations the respondent had in terms of the lease agreement.

[15] It was argued in the **Growthpoint** matter (*supra*) that the court lacked the necessary jurisdiction to make the agreement an order of court as there was no prior litigation, and that there is no provisional rule in the Uniform Rules of Court for such an order to be granted. Relying on Section 19 of the Superior Courts Act 59 of 1959¹, the judge held that the applicant sought an order to determine an existing right.²

[16] As is argued on behalf of the applicants in the matter at hand, the court in **Growthpoint** (*supra*) was of the view that the applicant was entitled to have either launched an application based on the settlement agreement or instituted action, but to avoid litigation and cost to the parties, elected to reduce the agreement to writing and make same an order of court.³ The court proceeded to make the settlement agreement an order of court on the basis that if the court had no jurisdiction simply because of the reason that there was no pending proceedings, it would lead to an unnecessary duplication of legal proceedings.

"The term 'inherent' jurisdiction refers to the court's function of securing a just and respected process of arriving at a decision and is not a factor which determines what the order the court may make after due process has been achieved".⁴

[17] That found in **Growthpoint** needs to be accessed through the prism of that set out in the **Eke** matter (*supra*). The **Eke** matter (*supra*) did not concern a settlement agreement that had been concluded without litigation having

¹ This Act being repealed and replaced by the Superior Courts Act 10 of 2013, wherein Section 21 deals with jurisdiction of the High Court

² **Growthpoint** (*supra*) par [8]

³ **Growthpoint** (*supra*) par [12] and [13]

⁴ **Growthpoint** (*supra*) par [14]

preceded it, however, Madlanga J dealt with the nature and circumstances in which a consent order can be made. He held that:-

“For an order to be competent and proper, it must, in the first place ‘relate directly or indirectly to an issue or a lis between the parties.’⁵ Parties contracting outside the context of litigation may not approach a court and ask that their agreements be made an order of court. On this Hodd says: ‘[i]f two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to court to have that agreement made an order of court, merely on the ground that they prefer the agreement to be in the form of a judgment or order because in that form it provided more expeditious or effective remedies against possible breaches, it seems clear that the court would not grant the application’.⁶ This is so because the agreement would be unrelated to litigation.”

- [18] It was submitted that notwithstanding that held by the Constitutional Court, the remark was *obiter* and that a distinction was drawn between direct and indirect, the matter at hand, being such a matter as suggested by the Constitutional Court to be “*indirect*”.
- [19] Importantly, Madlanga J was, in stating that ‘*relate directly or indirectly to an issue or a lis between the parties*’ was quoting from the matter of **PL v YL 2013 (6) SA 28 (ECG)**. The relevant sentence at paragraph [15] of the **PL v YL** judgment contained a qualification. It reads: “... *must relate directly or indirectly to an issue or lis between the parties that is properly before the court*.” (own emphasis)
- [20] Madlanga J, also qualified his reasoning in re the direct and indirect issue or *lis* between the parties by holding that parties contracting outside of the context of litigation, may not approach a court and ask that their agreement be made an order.
- [21] The argument on behalf of the applicants that the matter at hand falls within

⁵ Quoting **PL v YL 2013 (6) SA 28 (ECG)** at par [15]

⁶ Quoting **Hodd v Hodd; D-Aubrey v D-Aubrey 1942 (NPD) 198 at 204**

the ‘*indirect issue*’ range, can therefore not succeed as this argument does not address the qualification set out above.

[22] I am of the view that on a proper construction of the **Eke** matter (*supra*), the Constitutional Court, without any doubt, held that where litigation had not yet commenced, a settlement agreement may not be made an order of court, on the strength of **PL v YL** (*supra*).

[23] Thus, there must be not only a dispute between the parties that led to the settlement agreement, but the issue or *lis* concerned must be properly before the court, and but-for the settlement agreement, the court would have entertained that dispute.

[24] Budlender AJ in **Avnet** (*supra*) dealt extensively with this issue and the effect of **Eke** (*supra*) on that found in **Growthpoint** (*supra*). It was *inter alia* held that:

“....The primary function of the courts is to determine disputes between parties.⁷ The basis upon which a court C makes a settlement agreement an order of court is therefore that there is a dispute between the parties which is already before the court and that, absent the settlement agreement, the court would have to adjudicate that dispute.⁸

[31] When the parties resolve the dispute that is before the court, the D court may then (after satisfying itself that the settlement agreement is a permissible one) make the settlement agreement an order of court. Such an order of court becomes an order of court 'like any other'⁹ — there is no difference between such an order and one granted by the court after dealing with the merits of the dispute.¹⁰ This is a coherent and consistent approach to the manner in which courts adjudicate and give orders in the disputes before them.

[32] It is quite a different matter to allow parties who are not engaged in any

⁷ **National Youth Development Agency v Dual Point Consulting (Pty) Ltd and Another** GJ 6982/2016

⁸ **PL v YL** (*supra*) par 15

⁹ **Eke** (*supra*) par 29

¹⁰ **Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd** 2017 (5) SA 508 (SCA) ([2017] 3 All SA 485) par 16.

litigation before the court at all to transform their agreement into a court order of this type..”

“[34].....It does not seem permissible or appropriate for parties to be free to clothe their agreement with these consequences, in circumstances where the agreement is not resolving a matter already before the court.”

“[35.4] In a case where a settlement agreement has been reached and H is sought to be made an order of court, there is inevitably no live dispute A between the parties, but it is also difficult to conceive what 'uncertain legal position' could be applicable. The very point of the application before me (and the application before Van der Byl AJ in Growthpoint Properties) is that the parties are not in dispute or a state of uncertainty about the existence of their agreement. It is on this basis that I am asked to enforce the B agreement via court order. It therefore seems to me that s 21 of the Superior Courts Act¹¹ does not provide me with the necessary jurisdiction to make the settlement agreement an order of court.”

“.....the settlement agreement between the parties before me is (absent some challenge to it) already a legally binding agreement. If the respondents adhere to their obligations under the agreement, there will be no need for legal proceedings or a court order at all. If they do not E adhere to their obligations, the applicant will then be entitled to institute proceedings based on the settlement agreement and seek a court order requiring compliance with the terms of the agreement.

[35.7] This in my view does not produce any 'unnecessary duplication F of legal proceedings'. Rather, it ensures that legal proceedings and the involvement of the court are confined to pronouncing on real disputes between parties or resolving legal uncertainty, but only if and when such disputes or uncertainty arise.”

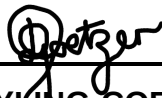
[25] Substantially for the reasons given by Budlender AJ in **Avnet** (supra) I consider that paragraph 25 in **Eke** (supra) correctly reflects the law and I

¹¹ The successor provision to s 19 of the Supreme Court Act.

should follow it.

[26] I accordingly make the following order:

1. The application is dismissed.



GREYLING-COETZER AJ

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