

**IN THE HIGH COURT OF SOUTH AFRICA,
(East London Circuit Local Division)**

**Case no: EL 322/2003
ECD 720/2003**

In the matter between:

Marilyn Elizabeth White

Applicant

and

The Minister of Safety & Security

First Respondent

Inspector Nokhwali

Second Respondent

Inspector Qamra

Third Respondent

Inspector Ndzalo

Fourth Respondent

JUDGMENT

D. VAN ZYL J:

1] This is an interlocutory application wherein the applicant seeks an order directing the first respondent (“the respondent”) to give due consideration to an offer of settlement made by the respondent’s legal representatives to the applicant, and to advise the applicant of his decision.

2] The undisputed background to the application is as follows: The applicant instituted an action in 2003

against the respondent and three others in this court claiming payment of an amount of money as damages. The applicant and the respondent are cited therein as the plaintiff and first defendant respectively. The merits of the claim (the issues relating to the first respondent's liability to compensate the applicant) were finalised at an earlier stage and the only issue remaining is, what is referred to in the application as the *quantum* of the claim. I assume it is intended to refer to those issues that relate to damage and the *quantum* thereof.

3] The action was set down for trial on 15 August 2011.

The applicant was ready to proceed with the trial and all her witnesses were subpoenaed and available to testify. The applicant's legal representatives were informed by those representing the respondent that they had a mandate from the respondent to attempt to negotiate a settlement of the claim. The parties as a consequence entered into settlement negotiations.

4] These negotiations culminated in the respondent's

representatives proposing a settlement of all aspects of the applicant's claims. The terms of the proposed settlement found favour with the applicant. The parties were however not able to conclude a compromise (*transactio*) as the mandate of the respondent's representatives did not extend to them agreeing to any settlement proposal. They first had to obtain authorisation from the respondent. According to the applicant the respondent's legal representatives indicated that obtaining the necessary authorisation should not present a problem. A memorandum was to be prepared and submitted to the respondent for approval. From the respondent's answering affidavit filed in the present proceedings it would appear that that was done.

5] As a result of the negotiations the trial did not proceed on 15 August and stood down until the following day. The next day the matter was postponed by agreement between the parties to 22 August 2011. The purpose of the postponement was to enable the respondent's attorney to obtain the

necessary approval for the proposed settlement. The indication was that authorisation would be received by that date. Between 16 and 22 August the applicant's attorney directed a number of enquiries to the respondent's attorney asking about progress.

6] At the resumed hearing on 22 August the respondent's attorney indicated that he had not as yet received authorisation and that the process was taking longer than anticipated. He however gave an assurance that authorisation was imminent and that it will be obtained. The respondent's representatives informed the presiding judge that a further three weeks were required for that purpose. The matter was consequently postponed to 12 September. Between 22 August and 12 September several written enquiries were once again addressed to the respondent's attorney. As before, most remained unanswered.

7] At the hearing on 12 September counsel for the respondent informed the applicant's attorney that

they still did not have authority to settle the matter on the proposed terms. As the presiding judge was no longer prepared to keep the matter on the trial roll, it was directed that a new trial date be obtained. The matter was as a result postponed *sine die*. The registrar subsequently allocated 11 June 2012 as a trial date. Despite fresh assurances that the issue relating to authorisation would be finalised by the end of October 2011, nothing transpired.

8] In an attempt to ensure progress in the matter further correspondence were directed to the respondent's attorneys. This did not yield any results and the position at present, according to the applicant is that there is no explanation for the delay in the respondent either granting or refusing approval for the settlement proposal. The difficulty in which the plaintiff finds herself is not knowing whether to prepare for trial on 11 June and to incur further costs in once again securing the attendance of her witnesses and instructing counsel. As stated earlier, the action was commenced in 2003 and the applicant

finds the delay in having the matter brought to finality to be traumatising.

- 9] The respondent is opposing the relief claimed, placing reliance on an affidavit deposed to by his attorney of record. The basis for the opposition to the relief claimed is that the settlement negotiations simply resulted in a proposal and that until such time as it has been authorised by the respondent, the applicant has no grounds to approach this court for any relief. Failing authorisation, it is contended that the matter must proceed to trial. In so far as the delay in obtaining authorisation is concerned, it is stated that it is the respondent's prerogative to be allowed sufficient time to investigate the issues and come to the correct decision. There is further a vague reference to a change in senior staff in the respondent's department. How this may have affected the granting of authorisation over the last six months is not stated. There is no affidavit from the respondent or any other relevant official explaining why it is taking so long to give consideration to the settlement proposal.

10] At the hearing of the matter argument centered around the question whether the applicant has met the requirements for a final interdict. The submission advanced on behalf of the respondent was to the effect that as the relief claimed is in the form of a final interdict, it is consequently incumbent that the applicant establishes a clear right. (For the requirements for the grant of a final interdict see Erasmus **Superior Court Practice** at E8-6C to E8-6D.) Counsel for the applicant submitted that the applicant has on the papers established such a right. The nature and content of this right is that due and expeditious consideration will be given to the settlement proposal and that such consideration would be communicated to the applicant expeditiously. This right, so it was argued, arises from the fact that the settlement proposal emanated from the respondent's legal representatives, that the applicant's attorney was informed that the authorisation of the settlement offer would be 'a **formality**' upon the consideration by the respondent

of the memorandum prepared by his legal representatives, and that the matter was postponed in order for such authorisation to be obtained.

11]The respondent's submission in turn is that in the absence of the proposed settlement having been approved by the respondent, there is no agreement in existence and nothing that could be enforced. The undertaking given by the respondent's legal representatives to recommend the settlement proposal to pursue the matter, and to report back to the applicant does not constitute an agreement and cannot establish a clear right for a final interdict.

12] Counsel for the respondent is in my view correct that in the absence of an agreement, whether it be an agreement to consider a settlement proposal within a fixed or reasonable time, or an agreement amounting to a compromise, the applicant has failed to establish a clear right (or put differently, a right clearly

established. See Erasmus *op cit* at E8-6D.) Whether the applicant has a right that would entitle her to a final interdict is a matter of substantive law. Substantive law defines legal rights, duties and remedies. Procedural or adjectival law on the other hand deals with the proof and enforcement of rights, duties and remedies. (Herbstein & Van Winsen **Civil Practice of the High Courts of South Africa** 5th ed vol. 1 at page 3.) In *Universal City Studios Inc. v Network Video* 1986 (2) SA 734 (A) at 754 J Corbett JA quoted the following passage in Salmond **Jurisprudence** 11th ed at page 503-504 in this regard: ‘Substantive law is concerned with the ends which the administration of justice seeks; procedural law with the means and instruments by which those ends are to be attained.’ A legal right may in turn be defined as ‘an interest conferred by, and protected by the law, entitling one person to claim that another person or persons either give him something, or do an act for him, or refrain from doing an act.’ (Hutchinson, Van Heerden, Visser & van der Merwe **Wille’s Principles of South African Law** 8th ed at page 38.

See also Herbstein & Van Winsen *op cit.*)

13]The applicant does not allege the existence of an agreement in her papers. It is correct as stated by counsel for the respondent that the application is in essence founded on an undertaking that the settlement proposal would be considered by the respondent and that there has been an undue delay in complying therewith. An undertaking quite clearly falls short of the necessary consensus required for a binding agreement creating rights and obligations that are enforceable. This is no doubt the reason why counsel for the applicant rather chose to place reliance on the conduct of the respondent as establishing a clear right. It is not clear on what basis the conduct relied upon in this regard can in law give rise to a legal right, and none was advanced. I accordingly agree with counsel for the respondent that the remedy provided by interdict proceedings is on the facts of the present matter not available to the applicant.

14] However, the basis for the relief claimed by the applicant lies in my view elsewhere. Both parties proceeded from the premise that it is only available by way of interdict proceedings. This remedy and its requirements are matters of substantive law. (Herbstein & Van Winsen *loc cit.*) Although the dividing line between substantive and adjectival law is at times not an easy one to draw, the issue raised in the present proceedings is in my view a matter of procedure rather than substantive law. It is procedural because the relief sought in its effect seeks to facilitate the finalisation of the applicant's action as opposed to enforcing a right, which is a matter of substantive law. What the parties in the present matter has been doing since August 2011 was to attempt to bring their disputes to finality by way of a settlement as opposed to litigation. To this extent they requested, and was granted permission by the court in August and September 2011 to keep the matter on the trial roll. The postponement of the trial on each occasion was sanctioned by the court no doubt so as to facilitate a settlement of the matter

rather than for the matter to go to trial. This is in accordance with the position in our law relating to compromise. **‘There is no law preventing the parties to legal proceedings from coming to a voluntary compromise and settlement in regard to their various claims in a law suit. The law, in fact, rather favours a compromise (*transactio*), or other agreement of this kind; for *interest reipublicae ut sit finis litium*.’** (Per Kotze JA in *Schierhout v Minister of Justice* 1925 AD 417 at 423. See also *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CKHC) at 284 C-D.)

15] To encourage and facilitate the settlement of proceedings without a trial is therefore one of the functions of the court in furthering the overriding objective of dealing with cases fairly and efficiently. In achieving this objective the court may, as in the instant matter, and as part of its inherent power to regulate its own procedure, postpone or stay the proceedings in an attempt at settlement where the parties request it. **‘There is no doubt that the Supreme**

Court possesses an inherent reservoir of power to regulate its procedures in the interests of justice.’ (Per Corbett JA in the *Universal Studios* case *supra* at 754 G. See also Herbstein & Van Winsen *op cit* at page 50.) It must follow that where a settlement process has been sanctioned by the court, it is in the interests of justice that it be brought to finality so as to ensure certainty and prevent the parties from incurring unnecessary costs. Further, in order to prevent an abuse of this process the court may come to the assistance of an aggrieved party. In this context assistance is not granted in terms of the rules of court but in the exercise by the court of its inherent power to regulate its own procedure.

16] Granting the intervention which the applicant seeks in this matter will ensure progress thereby promoting efficiency in the conduct of the litigation by reducing time and cost. This, I may add, is consistent with and would serve to promote the objective sought to be achieved by, what is referred to as ‘**caseflow management**’. Case management involves

the employment of measures or techniques by a court with the aim of controlling the progress of a case so as to ensure the efficient and prompt finalisation thereof (Steelman, Goerdt and McMillan **Caseflow Management, The Heart of Court Management in the New Millennium** at page xi *et seq.*) One aspect of this concept must necessarily be to ensure that a case is not unduly interrupted in its procedural progress. The idea of caseflow management is at present a matter that is receiving attention in this division with the view of introducing measures through rules of practice aimed at ensuring that the court play a more active role in the progress of cases in civil proceedings. Although this may prove to be a challenge, particularly by reason of the fact that the conduct of civil litigation in our law is adversarial in nature in that the litigants themselves are in control of the progress of a case the hope is expressed that this will come to fruition. I would however add this *caveat* though, as long as it does not lead to the creation of another opportunity for those who are always at the

ready to create more paperwork, thereby adding to costs in a system that is already conducive thereto.

17]In the absence of an acceptable explanation it must be concluded that the respondent had sufficient time since August to date (a period of more than six months) to give consideration to the settlement proposal which he instructed his legal representatives to negotiate with the applicant. In the circumstances I find the delay to be inordinately long so as to amount to an abuse of the process of this court which is prejudicial to the applicant in that she is unable to properly prepare for trial at the resumed hearing of the matter in June of this year.

18]For these reasons I propose to issue the following order:

- (a) The first respondent is ordered to consider the settlement proposal submitted to him by his legal representatives in case no. EL322/03 (ECD720/03), and to arrive at a decision to either accept or reject the offer within fifteen (15) days

from the date of this order.

- (b) That the first respondent advise the applicant in writing of the outcome of his decision.
- (c) That in the event of the first respondent failing to comply with paragraphs (a) and (b) of this order, the applicant is given leave to apply on these papers, duly amplified and upon notice to the first respondent's attorneys, for an order striking out the first respondent's defence to the applicant's claims.
- (d) That the first respondent pays the costs of this application.

D. VAN ZYL
JUDGE OF THE HIGH COURT

Matter heard on : **21 February 2012**

Judgment delivered on : **2 March 2012**

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