

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION: DURBAN**

CASE NO: D11532/2022

In the matter between:

KILKEN PLATINUM (PTY) LIMITED

APPLICANT

and

**FREDERICK WILHELM AUGUST LUTZKIE
RESPONDENT**

FIRST

EUGENE BOTHA

SECOND RESPONDENT

NEW SALT ROCK CITY (PTY) LIMITED

THIRD RESPONDENT

ORDER

The following order is granted: -

- 1. The application is dismissed with costs.**

JUDGMENT

OLSEN J

[1] These are contempt proceedings. The applicant is Kilken Platinum Proprietary Limited. It seeks an order imprisoning the first and second respondents, Messrs Lutzkie and Botha for 90 days, and the imposition of a fine of R250 000 on the third respondent, New Rock City (Pty) Limited. The applicant's case is that on 7 May 2021 this court granted it an interim interdict under case number D4047/2021 against the third respondent, prohibiting the third respondent from launching winding-up proceedings against the applicant pending the decision in those proceedings. The applicant alleges that Mr Lutzkie, the first respondent, is a former director of the third respondent and an "indirect shareholder" in it, and that he and the second respondent, Mr Botha, who is a director of the third respondent, exert total control and influence over it. It is alleged that the respondents "have been confederate with each other", and that they acted in concert in contempt of the interim order, in the manner described below.

[2] On 5 May 2021 the applicant launched an urgent application against the third respondent for the issue of a *rule nisi* accompanied by interim relief. This was done under case number D4047/2021. The essential elements of its case were relatively simple and may be summarised as follows.

- (a) The third respondent was a shareholder in the applicant. There was a shareholders' agreement to which the third respondent was a party, in terms of which, if a dispute should arise *inter alia* between the company and a shareholder, the dispute would be submitted to private arbitration for resolution.
- (b) The third respondent sent a letter to the applicant demanding the payment of monies claimed to be owing to the third respondent. The letter was framed in terms of s 345 of the Companies Act, 1973, warning that winding-up proceedings would be commenced if the debt was not paid.
- (c) The debt is in fact disputed. It had to be submitted to private arbitration for resolution. It was therefore not open to the third respondent to institute the threatened winding-up proceedings.

- (d) If the third respondent were to proceed as it threatened to do, it would take out a bond of security and launch an application, both of which events would cause severe harm to the applicant.

[3] The relief sought in the Notice of Motion in case number D4047/2021 was for an interim interdict as follows.

'2.1 The first respondent is hereby restrained and interdicted from issuing an Application and/or Counter-Application to this Application, for the Compulsory Winding-Up of the Applicant founded upon the First Respondent's claims as demanded under section 345 of the Companies Act, 1973 in its letter dated 19 April, 2021 that appears as annexure "A" hereto.

2.2. The First Respondent is hereby restrained and interdicted from applying to [The Master] for the issue of a Security Bond in terms of section 346(3) of the Companies Act, 1973 for the Winding-Up of the Applicant.'

[4] On 6 May 2021 the attorneys representing the third respondent wrote a letter to the attorneys representing the applicant, stating that the former were instructed "that between Mr Lutzkie [the first respondent in these proceedings] on behalf of the first respondent [the third respondent in these proceedings] and Mr Zunaid Moti on behalf of the applicant, a draft order had been agreed, to the following effect: ..."

[5] The material part of the draft order set out in that letter read as follows.

'2.2 That *pendente lite* this Application the First Respondent [the third respondent in the present proceedings] undertakes:

2.2.1 not to issue an Application for the Winding-Up of the Applicant under section 345 of the Companies Act, 61 of 1973 or the Companies Act 2008;

2.2.2 not to apply for the issue of a Security Bond in terms of section 346(3) of the Companies Act 1973 and for the Winding-Up of the Applicant.'

That is the order which was granted by this court on the morning of 7 May 2021.

[6] The order was not granted without protest on behalf of the third respondent who was represented by junior counsel on the day. Counsel for the third respondent informed the court that shortly before the hearing commenced, he had received a telephone call from the third respondent's senior counsel who instructed him to ask that the words "or the Companies Act 2008" be deleted from the proposed consent order on the basis that it might be interpreted to be a prohibition against exercising other remedies such as those under s 163 of the Companies Act, 2008. (One would have thought that the complaint would be that the order would obstruct proceedings particularly under s 81 of the Companies Act, 2008.) After a short debate the learned Judge considered the letter just referred to and, as I understand his comments in the transcript of those proceedings, he decided that because the letter records that the order had been agreed upon between the parties, that was the order that had to be granted.

[7] The applicant's case in these proceedings is that, in contempt of the court order of 7 May 2021, on 8 August 2022 the third respondent (as one of three applicants) launched an application out of the Gauteng Division, Pretoria, in terms of s 81(1)(d)(iii) of the Companies Act, 2008 for an order placing the applicant in final liquidation on the basis that it was just and equitable to do so.

[8] The first respondent signed the opposing affidavit in the present proceedings on his own behalf, and on behalf of the second and third respondents. He says in effect that the reference to the Companies Act, 2008 was only inserted in the order because, having been repealed, the provisions of the 1973 Act relating to the winding-up of insolvent companies only continued to operate because of the transitional provisions made in Schedule 5 to the Companies Act, 2008. He argued that it was necessary to refer to both Acts in order to identify the scope of the interdict. Unfortunately for the first respondent the wording of paragraph 2.2.1 of the order that was granted does not support his interpretation. On his interpretation the

words “or the Companies Act, 2008” ought to read “read with the Companies Act 2008”. On the other hand, no affidavit by Mr Moti has been delivered to contradict the first respondent’s explanation for the reference to the Companies Act, 2008 in the order of 7 May 2021. I heard argument on the proper approach to the interpretation of the court order. The applicant argues that the order agreed upon and granted conveys that winding-up proceedings under the Companies Act, 2008 were also forbidden under the order. I do not propose to traverse the arguments on the subject of the interpretation of the order. I will proceed upon the assumption that the applicant’s interpretation is correct, without being convinced that it is. In my view the outcome of these proceedings turns on a different issue.

[9] In his answering affidavit the first respondent raised the fact that on 19 and 25 October 2021 the parties concluded an agreement of settlement and compromise. In terms of that agreement all then existing litigation between the parties was settled. That included the litigation under case number D4047/2021. The effect of the settlement of that case was that the interim order now relied upon by the applicant ceased to have any effect, it having been granted pending the determination of that litigation. That the settlement was concluded and had that effect at the time is not disputed by the applicant.

[10] The following facts are also undisputed.

- (a) The settlement agreement provided that the entire shareholding of the third respondent’s group in the applicant was bought by the other shareholder group for a substantial price, including the payment of R350 million.
- (b) Claiming that there had been non-performance of the settlement agreement justifying cancellation, the third respondent purported to cancel the settlement agreement on 16 June 2022.
- (c) The applicant regarded that as a repudiation of the settlement agreement which it eventually accepted on 13 September 2022.

[11] The argument for the applicant, based on the foregoing, is set out in its replying affidavit as follows.

‘But the cancellation of the Settlement Agreement has the effect of undoing the full and final settlement which in turn has the effect that the litigation previously fully and finally settled is no longer settled but resurrected’.

The argument goes further, it being the contention of the applicant that the “resurrection” of the litigation meant that the interim order which had been discharged as a result of the settlement also became “resurrected”. The argument for the respondents is that, whatever other consequences the cancellation of the settlement agreement may have had, it could not and did not revive the litigation which preceded it, and could not revive or bring into force the interim order which ceased to have any effect - which in effect expired – upon the settlement of the litigation.

[12] If the fundamental rule concerning the consequences of a compromise or settlement of litigation was ever in doubt, matters were clarified by the Supreme Court of Appeal in *Road Accident Fund v Taylor and Other Matters* 2023 (5) SA 147 (SCA). The principle was stated, and the long history of judgments affirming that principle considered, at paragraphs 36 to 39 of the judgment of Van Der Merwe JA. A compromise is “the final settlement of disputed or uncertain rights or obligations by agreement”. Unless the agreement or compromise provides otherwise, “it extinguishes the disputed rights or obligations”. It puts an end to litigation. A compromise has the effect of *res iudicata*.

[13] The matter was put as follows in *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) at para 10.

‘A compromise (or *transactio*) arrived at between litigants is a well-established measure. Our courts encourage parties to deal with their disputes in this way and the rules decree that compromises must be sought. When concluded such a compromise disposes of the proceedings.’

[14] The effect of a compromise being to extinguish the rights and obligations which were the subject of the compromise, a party to a compromise cannot claim enforcement of those extinguished rights. A shortfall in the performance of obligations in terms of an agreement of compromise would only give rise to a claim for enforcement thereof. The third respondent's right when there was an alleged unlawful breach of the agreement of compromise was to enforce the obligation in question. It could not unilaterally cancel the agreement of compromise and revert to the position it claimed to occupy before the compromise was reached. However, when it purported to cancel the agreement it undoubtedly showed an unequivocal intention not to be bound by the agreement of compromise. It repudiated it. The repudiation was accepted by the applicant. The agreement of compromise was terminated. It was as if there was a consensual cancellation of the compromise which would ordinarily carry the implication that the parties agreed to revert to their claimed rights and obligations which existed before the compromise.

[15] However, it is another thing to say that the agreement of compromise automatically revived the legal proceedings which had been the subject of the compromise. They were terminated just as they would have been if the court had made its final order in those proceedings. That must be the effect of the law treating the issues in settled proceedings as *res judicata*. There was no agreement to revive the proceedings. One supposes that, having cancelled the compromise, the parties may agree that the papers delivered in the proceedings should be allowed to stand so that they could pick up from where they were before settling the case, perhaps in the interest of saving costs. But I doubt the soundness of the proposition that this happens automatically. The applicant cited no authority for its contention, and I have found none.

[16] However, in my view this case does not turn on the question as to whether the litigation under case number D4047/2021 was "resurrected" after it had died (adopting the terminology of the applicant). It turns on the question as to whether the interim order itself went through such a process.

[17] When the matter became settled the order expired in its own terms because the litigation gained the status of *res judicata*. The order ceased to have the quality

of being capable of enforcement. It was not merely suspended. It contained no provision or qualification that if it expired it would automatically revive in any circumstances.

[18] In my view the order could not be rendered enforceable by agreement, once its period of operation came to an end. A silly example illustrates the point. Two parties cannot by contract agree that as between them an order of court shall be deemed to exist obliging one to perform an obligation in favour of the other, and on the strength of that call upon the registrar of the court to issue a process in execution of the so-called deemed order. The enforcing party would be obliged to ask the court to make an order enforcing the obligation in question before any processes in execution could be employed. It is likewise with variations of court orders. The parties may agree upon the fact that an order already made should be varied to widen its ambit. It is trite that the court itself must vary the order to widen its ambit before it can be enforced in that form. It is not logical to suppose that despite the fact that an order like the one in issue cannot be rendered enforceable by agreement, that should be regarded as having happened automatically, ie without a further court order reviving the expired one.

[18] The applicant cited no authority for the proposition that the interim order automatically regained the enforceability which it had lost once the settlement agreement was terminated. I have been unable to find any such authority.

[19] I conclude that in launching its proceedings in Pretoria the third respondent (and consequently the first and second respondents) did not act in contempt or breach of any order enforceable against them.

I MAKE THE FOLLOWING ORDER.

The application is dismissed with costs, including the costs of two counsel where employed.

Date of Hearing: FRIDAY, 26 JANUARY 2024

Date of Judgment: Tuesday 4 June 2024

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