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

CASE NO.: 3384/2017

In the matter between:

P J CLOETE	Plaintiff
and	
H VAN ZYL	First Defendant
I J VAN ZYL	Second Defendant

JUDGMENT

MONAKALI AJ

Introduction

[1] Plaintiff instituted a claim for damages pursuant to a veld fire that originated on property of the first and second defendants, at the farm Boomplaas, in the district of Molteno, Eastern Cape. The veld fire spread to the property of the plaintiff, the farm Weltervrede, and the plaintiff suffered damages in the amount of R 1 398.132.00.

[2] On 18 March 2019, a day before the trial, the plaintiff contends that a settlement was reached which was reduced to writing in the form of a draft order. He seeks for the settlement agreement, concluded on 18 March 2019, to be made an order of court. Both defendants oppose the matter and allege that the Settlement Agreement does not bind them.

[3] Adv. Van Rensburg appeared for the plaintiff and Adv. De Sander represented both defendants. Mr. van Biljon testified on behalf of the plaintiff, Adv. De Sander presented the evidence of Mr. Buchner, the erstwhile attorney for the defendants and Mr. Van Zyl, the first defendant.

[4] On 19 of March 2019, the trial court was to proceed with the merits only. A day before the trial, the parties reached a settlement agreement which was later cancelled by the defendants.

[5] The facts leading to the damages constitute the following:

5.1 On or about 23rd and 24th of November 2015 there was a veld fire which originated from the defendant's farm, Boomplaas and it spread to the plaintiff's farm, Weltevrede. Consequently, the plaintiff suffered damage in the amount of R1 398 132.00 to his farm. The defendants were insured by Hollard.

5.2 On 18 March 2019, a day before the trial, the parties entered into a settlement agreement, which was later reduced to writing in the form of a draft order.

5.3 Both parties agreed that, on19 March 2019. the draft order was to be made an order of court.

5.4 At approximately 18h00 the defendants withdrew their settlement proposal.

5.5 When parties concluded the settlement agreement, Mr. Biljon represented the plaintiff, and the defendants were represented by Mr. Buchner.

Summary of Evidence

[6] At the hearing, Mr. van Biljon testified that on 18 March 2019, he was travelling from Bloemfontein to Makhanda to attend the trial, which was set down for 19 March 2019. While on his way, the defendant's attorney, Mr. Buchner, contacted him and made a settlement proposal. The settlement entailed that the defendants

would accept 80% liability of the damages and that the plaintiff would accept liability of the remaining 20%.

[7] Mr. van Biljon consulted with his client and received instructions to accept the settlement proposal. He then contacted Mr. Buchner and advised him that the offer was acceptable and that he must prepare a draft order to that effect. Subsequently, Mr. Buchner sent an email with a draft order. Exhibits A and B were handed in respectively by consent. Exhibit A is the cover letter addressed to Mr. van Biljon.

[8] The gist of the letter was for Mr. van Biljon to confirm if he was satisfied with the content of a draft order. Exhibit B is the draft order which reads as follows:

> "By agreement between the parties the following order is made:
> 1. The Defendants accept that they have contributed to 80% (EIGHTY PERCENT) of the damages resulting from a veld fire that originated on the 23 and 24 November 2015 on the farm of the First Defendant and subsequently spread to the plaintiff's farms.
> 2. The plaintiff's *locus standi* and quantum of the claim is postponed for further adjudication.
> 3. The Defendants are liable for payment of the plaintiff's taxed or agreed costs in respect of the merits up to and including 19 March 2019."

[9] Mr. van Biljon confirmed receipt of the email and was satisfied with the content of the draft order. He contacted Mr Buchner to confirm if he may return home to Bloemfontein and to inform the counsel, who was at that stage at the airport, to cancel his flight, since the matter was settled. It is his evidence that Mr. Buchner answered in the affirmative. He advised him that he did not doubt that the matter had become settled. He returned home as his attendance was no longer necessary and advised the counsel accordingly.

[10] On the same day, at about 18h00, in the evening, Mr. Buchner contacted him and informed him that there was no settlement anymore. Hollard had repudiated the claim and defendants would have to pay out of their pockets. Mr. van Biljon insisted that the matter has been settled, as per the draft order. On 19 March 2019, Mr. van

Biljon addressed an email to Mr. Buchner, that is, Exhibit C, confirming their telephonic conversation, and insisting the matter was settled and the defendants were bound by the settlement agreement.

[11] Under cross-examination, Mr. van Biljon maintained that the defendants are bound by the settlement agreement concluded on 18 March 2019.

[12] Mr. Buchner testified that he was instructed by Hollard to act as the attorney for the defendants. On 18 March 2019, while he was waiting for Hollard to confirm the issue of liability, he contacted the first defendant, who apparently was in a mall, in a noisy area and explained to him that Hollard had not yet confirmed liability. He enquired if he could proceed with the settlement proposal. The first defendant instructed him to do what he deemed was best. He then contacted the plaintiff's attorney, Mr. van Biljon and enquired if he was amenable to a settlement. He explained to him that, in his view, the merits may be settled on an 80/20 basis, the defendants accepting liability for 80% of the damages of the plaintiff and the plaintiff accepting liability for 20% of the damages, but the issue of *locus standi* was to stand over for later determination. The plaintiff accepted the proposal. He formulated a draft order which was to be made an order of court.

[13] During cross-examination, he conceded that he first consulted with the first defendant and thereafter made a settlement proposal. He further confirmed he had the authority to enter into a settlement agreement on behalf of the first defendant and had no instructions on behalf of the second defendant. Later in the early evening, he received instructions from the first defendant not to settle the matter. It was after the defendants realized that they might have to foot the damages, as Hollard did not accept their claim.

[14] Mr. van Zyl supported the version of Mr. Buchner that he was in Queenstown, in a mall when Mr. Buchner called him. He testified that he explained to him about the proposed settlement that they would be liable for 80% of the plaintiff's damages and the plaintiff would be liable for 20%. He instructed Mr. Buchner to do what was best as he struggled to hear him and did not understand him.

[15] Later in the early evening, when he discussed with his wife, the second defendant, what Mr. Buchner had explained to him about the settlement agreement. Both defendants understood at that stage that they would be personally liable for 80% of the damages. He contacted his attorney and instructed him not to proceed with the settlement.

[16] Under cross-examination, he conceded that they cancelled the settlement agreement after Hollard had repudiated their claim and had realized that they would be personally liable for 80 % of the damages. He averred that when Mr. Buchner contacted him earlier during the day, he was not acting on behalf of the second defendant. the second defendant was not called.

[17] Due to time constraints, both parties agreed to submit Heads of Arguments on or before 15 January 2024.

Submissions by the Parties

[18] The plaintiff submits that the settlement agreement reached on 18 March 2019 is binding to both parties. The defendant's attorney acted on the mandate of the defendant. Mr. Bucher made an offer, and the plaintiff accepted the proposed settlement. The terms of the draft orders are in line with the settlement agreement. He referred the court to the case of *Makate v Vodacom Pty Ltd 2016 JDR 0072 CC and* argued that if the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. Once actual authority has been proven, as set out in the evidence of Mr. van Biljon, which was corroborated by the evidence of Mr. Buchner and Mr. van Zyl, therefore the defendants, as principal, cannot deny the existence of the settlement agreement.

[19] The defendants argued that Hollard appointed Mr. Buchner in terms of the principle of subrogation and such evidence remains uncontested. The court should accept the evidence that, on 18 March 2019, Hollard informed the first defendant through Mr. Buchner that his cover in terms of the policy had not been confirmed. This left the defendants on their own. Mr. Buchner had no authority to settle the matter for the second defendant. When Mr. Buchner telephoned the first defendant

he could not hear properly and as a result advised him to do as he deemed fit in the circumstances. It is patently clear that the first defendant did not intend to conclude the settlement as alleged and had no intentions to accept liability where the insurer rejected its liability. Therefore, there was no valid and binding agreement. There is no agreement capable of being enforced. The court must dismiss the plaintiff's claim with costs.

[20] The issue for determination is whether the defendants are bound by the Settlement Agreement concluded on 18 March 2019.

Applicable Law

[21] It is trite that the settlement agreement is legally binding between the parties to a dispute. Whilst it is not a legal requirement that the agreement be reduced to writing, this does assist the parties to not only have certainty but to prove the terms of the agreement in the event of a dispute. A court can only make an order that is competent, proper and in accordance with the Constitution and law. A settlement agreement ought to be made an order of court if the agreement can be enforced as an order of court. Its wording must be clear, and unambiguous, and the enforcement thereof. It must provide closure. [1] Making a settlement order of court changes the nature of the agreement in that it provides the partners with a method to execute thereon. Settlement agreements are binding in nature. Parties are advised to be cautious and to ensure that they fully understand the terms of the agreement they are signing, see *Ulster v Standard Bank of SA Ltd* [2].

[22] In *J.A.N v N.C. N*[3] the court stated that,

"the question is whether the settlement agreement was concluded with proper understanding. Court must be satisfied that the parties to the agreement have freely and voluntarily concluded the agreement and that they are ad idem as to the terms."

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[1] A.V.W v S.V.W and Others (3118/2021) [2022] ZAWCHC 74.

[2] Ulster v Standard Bank of South Africa Ltd (647/2012) [2013] ZALCCT 3, [2013] 34 ILJ 2343 (LC) (15 February 2013).

[3] J.A.N v N.C.N (2283/2021) 2022 ZAECMKGC 14 (17 May 2022).

[23] This was also confirmed in *D.K and Others v C.F* [4] where J Adams stated as follows:

"[8] In my view, the real question to be asked is whether subjectively there was a meeting of minds in relation to this aspect of the agreement and whether the parties were ad idem about this particular term of the agreement. This question is asked at a fundamental level and relates to the basic general principle relating to contracts that there must be consensus ad idem between the contracting parties."

[24] The crux of the matter is whether Mr. Buchner was authorized to enter into the settlement agreement by the defendants. In *MEC for Economic Affairs, Environment & Tourism, Eastern Cape v Kruizenga GA*[5], where the court stated that:

"To summarize it would appear that our courts have dealt with questions relating to the actual authority of an attorney to transact on a client 's behalf in the following manner: Attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client. However, the instructions to an attorney to sue or defend a claim may include the implied authority to do so provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interests. The office of the State Attorney, by virtue of its statutory authority as a representative of the government, has a broader discretion to bind the government to an agreement than it ordinarily possessed by private practitioners, though it is clear just how broad the ambit of this authority is ". [6]

At para "[16] It is well established that to hold a principal liable on the basis of the agent's apparent authority the representation must be rooted in the words or conduct of the principal and not merely that of his agents." [7]

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[4] D.K and Others v C.F (2657/2021) [2023] ZAGPJHC 1331 (20 NOVEMBER 2023) at para 8.

[5] MEC for Economic Affairs, Environment & Tourism v Kruizenga (169/2009) [2010] ZASCA 58 (1 April 2010) at para 11.

[6] See Generally JR Midgley "the Nature and Extent of a Lawyer's Authority "(1994) 111 SALJ 415

[7] NBS Bank Ltd v Cape Produce Co (Pty) Ltd 2002 (1) SA 396 (SCA) 412 C – E , Glofinco v Absa Bank Ltd t/a United Bank 2002 (6) SA 470 (SCA) at para 13.

[25] Conduct may be expressed or inferred from the particular capacity in which an agent has been employed by the principal and from the usual and customary powers that are found to pertain to such an agent as belonging to a particular category of agents. [8] It may be inferred from the "aura of authority *"associated with a position which a person occupies, at the principal's instance, within an institution".*

Analysis

[26] When Mr. van Biljon was on his way to attend the trial Mr. Buchner, the erstwhile attorney for defendants, contacted him and made a settlement proposal. The cover letter confirms their telephone conversation and Mr. van Biljon confirmed that he was satisfied with the content of the draft order. The court accepts that, at that stage, Mr. van Biljon had no reasonable basis to question Mr. Buchner's authority. During cross-examination, Mr Buchner conceded that he made the settlement proposal after he had consulted with the first defendant. He had the consent of his client. Therefore, it can be inferred from his words and conduct that Mr. Buchner had actual authority to conclude the settlement agreement.

[27] Mr. van Biljon accepted the proposed settlement, as the terms of the draft order were unambiguous. The parties were ad idem as to the terms of the agreement.

[28] Hollard Insurance is not a party to the proceedings, therefore, whether it later denied liability or repudiated the defendant's claim is irrelevant.

[29] The defendants made an offer and the plaintiff accepted the offer, which resulted in the formulation of the draft order. The wording of the draft order binds both defendants, therefore the court accepts that when Mr. Buchner contacted Mr. van Biljon, he was acting on behalf of both defendants, and he had authority in respect of both parties. Subsequently, Mr. van Biljon returned to Bloemfontein as the

[8] Per Botha Jin Inter Continental Finance and Leasing Corporation (Pty)Ltd v Stands 56 and 57 Industria Ltd & another 1979 (3) SA 470 (W) at 748D.

merits had become settled and Mr. Buchner confirmed that his attendance was non-essential.

[30] Consequently, the court finds that the first and second defendants are bound by a settlement agreement concluded on 18 March 2019.

[31] I accordingly make the following order:

1. The Settlement Agreement concluded on 18 March 2019 is binding and is made an order of the Court.
2. Costs in the cause

L F MONAKALI
ACTING JUDGE OF THE HIGH COURT EASTERN CAPE DIVISON

APPEARANCES:

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