



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 3328/2021

In the matter between:

MATJHABENG LOCAL MUNICIPALITY

Applicant

and

LEQUBU SPECIALISED SERVICES (PTY) LTD

Respondent

IN RE:

LEQUBU SPECIALISED SERVICES (PTY) LTD

Applicant

and

MATJHABENG LOCAL MUNICIPALITY

Respondent

CORAM: HEFER AJ

HEARD ON: 8 APRIL 2024

DELIVERED ON: 4 JULY 2024

[1] This is an application in which the Applicant (Respondent in the main application) seeks leave to appeal against an order in terms of which a Deed of

Settlement, concluded between the parties, was made an order of Court in terms of Rule 41(4) of the Uniform Rules of Court.

- [2] For ease of reference and to avoid confusion, the Applicant herein will be referred to as **“the Municipality”** whilst the Respondent will be referred to as **“Lequbu”**.

Relevant background facts:

- [3] The Municipality appointed Lequbu during October 2020 to provide certain services in particular to conduct an emergency investigation at the Municipality’s problematic sewer lines, provide a report and to supervise any necessary construction work to resolve any issues that required immediate attention.
- [4] For these services rendered, Lequbu submitted seven Fee Claims of substantial amounts, of which five claims, totalling an amount of R15,842,055.00 (Fifteen Million Eight Hundred and Forty-Two Rand and Fifty-Five Cents) remained unpaid.
- [5] The Municipality terminated Lequbu’s appointment on 1 April 2021.
- [6] Lequbu then brought an application against the Municipality for payment of the abovementioned amount in respect of the five unpaid Fee Claims for services rendered by Lequbu.
- [7] The Municipality initially opposed the application but later capitulated to the extent that it acknowledged Lequbu’s appointment and the services that it rendered. The application was opposed by the Municipality, the true dispute being that the fees charged were not correct and payable in accordance with the agreement entered into between the parties, in short, the quantum of the amount due to Lequbu.

- [8] When the matter served before Naidoo J during November 2021, the parties agreed that the dispute regarding the quantum be referred to mediation to determine the amount which was actually due and payable to Lequbu.
- [9] The agreement reached between the parties pertaining to the determination of the quantum payable by means of mediation formed part of the order of Naidoo J (“**the mediation order**”).
- [10] The mediation order provided for, *inter alia*:
- (i) That the Municipality will, upon request by the mediator, provide whatever supplementation and/or explanation required regarding its itemised Fee Claims;
 - (ii) The mediator will certify the amount owing and the amount so certified shall be the amount owing by the Respondent to Applicant in respect of the Fee Claims;
 - (iii) In the event of any of the parties being dissatisfied with the outcome of the certification, either party may proceed with litigation limited to the issue of quantification only.
- [11] During July 2022, the appointed mediator made its final determination that the value of the services rendered by Lequbu was R413,176.00.
- [12] Being dissatisfied with the certification by the mediator, during October 2022 Lequbu notified the Municipality’s erstwhile attorneys of record that it would proceed to recover the full amount claimed by Lequbu, which Lequbu maintained was due and owing.
- [13] Approximately two months later, during December 2022, the Municipality represented by then Acting Municipal Manager, Dr V Adonis, entered into a written settlement agreement in terms whereof the Municipality agreed to pay Lequbu the amount of R4,000,000.00 in full and final settlement of the dispute.

It is this settlement agreement which formed the basis for the order in respect of which the Municipality now seeks leave to appeal.

Grounds of application for leave to appeal:

[14] The grounds upon which the Municipality seeks leave to appeal are:

- (i) That the Court misdirected itself in not finding that the annexures of the Applicant were not incorporated into the founding affidavit of Lequbu and therefore could not have regard to such annexures at all; and
- (ii) Based on the documents and affidavits before Court, the Court misdirected himself in not finding that there is a material *bona fide* dispute of fact that could not have been resolved on the papers in motion proceedings and which could therefore not have reasonably allowed for the order to have been granted based on the settlement agreement entered into.

[15] I will now proceed to deal with these grounds relied upon by the Municipality separately.

Lequbu failed to incorporate annexures into founding affidavit:

[16] Mr *Harms*, now appearing on behalf of the Municipality, submitted in this regard that it is not open to an applicant to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed.

[17] Mr *Harms* further submitted that in the absence of the primary fact, if the Court disregarded Lequbu's annexures, the alleged secondary fact, was merely a conclusion of law. It appears that in dealing with this point, Mr *Harms* referred to all the documents annexed to Lequbu's answering affidavit.

[18] These submissions by Mr *Harms* are indeed in accordance with what have been held by **Joffe J** in **Swissborough Diamond Mines v Government of the RSA**¹ and the authorities referred to therein.

[19] In the present matter, Lequbu's facts pertaining to the relief sought were set out in the founding affidavit "*simply, clearly and in chronological sequence and without argumentative matter*".² It is clear from these facts as alleged and contained in the founding affidavit with reference to the annexures to the founding affidavit, that Lequbu relied upon the contents of the settlement agreement between the parties as a whole. The relevant terms of the settlement agreement, attached to the founding affidavit, are also referred to in the founding affidavit of Lequbu. It is further common cause that the settlement agreement (and not the "*alleged*" settlement agreement as referred to by Mr *Harms* in his Heads of Argument), was indeed concluded between the parties.

[20] This point relied upon by the Municipality, can therefore not be upheld.

Dispute of fact:

[21] In **Road Accident Fund v Taylor and other matters**³, Van der Merwe JA said as follows:

"[31] Where the misappropriation of public funds is properly raised before a Court, it must of course, deal with it decisively and without fear, favour or prejudice. But a Court has no general duty or power to exercise oversight over the expenditure of public funds. This is so for three main reasons. The first is the constitutional principle of separation of powers. The second is that the exercise of such a duty of power would infringe the constitutional rights of ordinary citizens to equality and a fair public hearing. The third is the principle that the law constrains a Court to decide only the issues that the parties have raised for decision."

[22] Van der Merwe JA then continued as follows:

¹ 1999 (2) SA 279 (TPD)

² Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (WLD).

³ 2023 (5) SA 147 (SCA)

“[36] The essence of a compromise (*transactio*) is the final settlement of disputed or uncertain rights or obligations by agreement. Save to the extent that the compromise provides otherwise, it extinguishes the disputed rights or obligations. The purpose of a compromise is to prevent or put an end to litigation. Our Courts have for more than a century held that, irrespective of whether it is made an order of Court, a compromise has the effect of *res judicata* (a compromise is not itself *res judicata* (literally a matter judged) but has that effect)...

[40] When requested to do so, a Court has the power to make a compromise, or part thereof, an order of Court. This power must, of course be, exercised judicially that is, in terms of a fair procedure and with regard to relevant considerations. The considerations for the determination of whether it would be competent and proper to make a compromise an order of Court, are threefold. They are set out in *Eke v Parsons* 2015 ZACC 30; 2016 (3) SA 37 (CC), par. 25 – 26 (*Ake v Parsons*).

[41] The first consideration is whether the compromise relates directly or indirectly to the settled litigation. An agreement that is unrelated to litigation, should not be made an order of Court. The second consideration is whether the terms of the compromise are legally objectionable, that is, whether its terms are illegal or contrary to public policy or inconsistent with the Constitution. Such an agreement should obviously not be made an order of Court. The third consideration is whether it would hold some practical or legitimate advantage to give the compromise a status of an order of Court. If not, it would make no sense to do so.”

[23] Van der Merwe JA then also stated that:

“... the power to make a compromise an order of Court, is derived from a longstanding practice aimed at assisting the parties to give effect to their compromise. The clear import of *Eke v Parsons* therefore is that this power is not derived from the jurisdiction of the Court over the issues that have been raised before it, but were subsequently settled.”⁴

[24] Van der Merwe JA then summarised it as follows:

“To sum up, when the parties to litigation confirm that they have reached a compromise, a Court has no power or jurisdiction to embark upon an enquiry as to whether the compromise was justified on the merits of the matter or was validly concluded. When a Court is asked to make a settlement agreement an order of Court, it has the power to do so. The exercise of this power essentially requires a determination of whether it

⁴ Par. [42]

would be appropriate to incorporate the terms of the compromise into an order of Court.”

[25] According to Mr *Harms*, if one has regard to what was stated in the answering affidavit in that the alleged settlement agreement constituted fraud, alternatively misrepresentation on the part of Lequbu, the application could not have succeeded and the application should have been referred to trial given that:

- (i) there existed a dispute of fact on the papers, which dispute of fact could not have been resolved without referring the matter to oral evidence, alternatively trial; and
- (ii) if one applies the **Plascon Evans**-test, and considers the facts as stated by the Respondent together with the admitted facts in the Applicant’s affidavit, then Lequbu could not have succeeded with its application.

[26] In the matter of **Global Environment Trust v Tendele Coal Mining (Pty) Ltd**⁵ the Supreme Court of Appeal referred to the judgment for leave to appeal in which the Court observed that the factual allegations relied upon by the Appellant, for the most part, were incorrect and unsubstantiated. For that reason the application was dismissed. The Supreme Court of Appeal then commented in this regard as follows:

“That, ought to have led to the dismissal of the application for leave to appeal. Surprisingly, it did not.”⁶

[27] I again scrutinised the opposing affidavit by the Municipality. I wish to quote the relevant portions of this affidavit:

“27. *It is indeed so that the agreement was signed some months after the mediator made a ruling that he could only find that an amount of R413,176.60 is due and owing to the Applicant. This is a far cry from the amount now claimed in terms of the agreement.*

⁵ 2021 (2) All SA 1 (SCA)

⁶ Par. [98]

28. *On 23 December 2022, when signing the agreement, the then Acting Municipal Manager, Dr Vuyo Adonis (Adonis), signed the agreement after being informed by the legal team of the Municipality. It bears mentioning that Adonis only acted as Municipal Manager for a month, which makes the timing of the signing of the Settlement Agreement extremely suspicious.*
29. *Acting on the strength of advice received by Mr Vanga Mtutuzeli and Mr Bertus Maritz, he signed the agreement, believing he is acting in the best interest of the Municipality.*
30. *Adonis signed the agreement in order to resolve 4 (four) other pending cases pertaining to then sewerage problem within the Municipality. These cases are inter alia the Oppenheimer Golf Club, Dr Op't Hof and 7 others, Oarabile (Pty) Ltd and the Sompena Trading (Pty) Ltd disputes.*
31. *The agreement was also signed to avoid any further delays in fixing the problems and to avoid further fruitless and wasteful expenditure.”*

[28] These portions of the Municipality's answering affidavit, nor any other part thereof, lends support to Mr *Harms*' contention that the alleged settlement agreement constituted fraud, alternatively misrepresentation on the part of Lequbu. The answering affidavit of the Municipality does not contain any factual allegations to this effect.

[29] Mr *Harms* further contends that if one take into consideration the preamble to the settlement agreement which refers to the involvement of Bloem Water as well as the National Treasury and National Department of Water and Sanitation, it is clear that Dr Adonis and the Court had been deceived and misled with regard to why or under what circumstances the disputed settlement agreement was entered into. Again, this was not alleged in the answering affidavit.

[30] Considering the context in which reference were made to these two entities, it cannot be concluded that there were any deceit or misleading with regard to why or under what circumstances the settlement agreement was entered into.

[31] The same applies in regards to the clause contained in the settlement agreement to the effect the Lequbu consented that the matter be removed from the court roll and that each party will be liable for its own legal costs. Technically, the wording of this clause appears not to be correct in that the matter was not enrolled at that stage. However, the application was still live and pending and it is quite significant also that the order of Naidoo J did not provide for the legal costs pertaining to such application.

[30] In **Eke v Parsons**⁷ the Constitutional Court held that:

“A Court must thus not be mechanical in its adoption of the terms of the settlement agreement. For an order to be competent and proper, it must, in the first place ‘relate directly or indirectly to an issue or *lis* between the parties’. Parties contracting outside of the context of litigation may not approach a Court and ask that the agreement be made an order of Court ...”

[31] It is clear from the wording of the settlement agreement that it was directly related to an issue between the Municipality and Lequbu.

[32] Taking into account the considerations to be applied with regards to the provisions of Section 17(1) of the Superior Courts Act 10 of 2013,⁸ I am not convinced that another Court will come to a different conclusion. Therefore, the application for leave to appeal must fail and the Municipality is to be held liable in respect of the costs thereof.

Therefore, I make the following order:

Order:

The application for leave to appeal is dismissed with costs.

HEFER AJ

⁷ *supra* at par. [25]

⁸ *Mont Chevaux Trust v Goosen* 2014 JDR 235 (LCC)

Appearances on behalf of the Applicant:

Instructed by:

Adv CLH Harms

BMH Attorneys

c/o Pieter Skein Attorneys

Bloemfontein

On behalf of Respondent:

Instructed by:

Adv WA van Aswegen

Peyper Attorneys

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