



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

CASE NO J 3298/12

Not reportable

In the matter between:

NGAKA MODIRI MALEMA

DISTRICT MUNICIPALITY

APPLICANT

and

SHERIFF OF THE HIGH COURT

MMABATHO

TDH RAMPHELE

1ST RESPONDENT

2ND RESPONDENT

Application heard: 20 June 2014

Judgment delivered: 23 June 2014

JUDGMENT

VAN NIEKERK J

- [1] This is an application to set aside a writ of execution issued by the registrar of this court on 4 December 2012 under case number J 977/09. The writ was issued in favour of the second respondent, who opposes this application. The first respondent abides by the decision of this court.
- [2] The material facts relevant to the present proceedings have their roots in an order made by this court, per Bhoola J, on 28 April 2010. The second respondent was employed as the applicant's municipal manager from June 2007 until his dismissal in February 2009. In her judgment, Bhoola J held that the second respondent had been unfairly dismissed. She granted an order reinstating him with full benefits with effect from 2 February 2009, alternatively, she ordered that *'the first respondent compensate the applicant for the balance of his fixed term contract.'*
- [3] On 20 May 2010, the registrar issued a writ of execution pursuant to the judgment. The execution of the writ was suspended by order of this court, per Molahlehi J, on 3 June 2010, pending the outcome of an application for the rescission of the judgment granted by Bhoola J.
- [4] On 17 February 2011, a second writ of execution was issued by the registrar. On 11 March 2011, after an application to this court, that writ was set aside.
- [5] During August 2011, the applicant and the second respondent concluded two settlement agreements. In terms of the first, the applicant agreed to pay the second respondent an interim amount of R 200 000; in terms of the second, the applicant agreed to pay him an additional amount of R 3.25 million. Both agreements were signed on 10 August 2011. In terms of the second agreement, the agreed amount was to be paid to the second respondent within 10 working days of signature.
- [6] On 4 August 2011, a week prior to the conclusion of the settlement agreements, Bhoola J refused to condone the late filing of an application for leave to appeal against a judgment delivered on 28 April 2010.

- [7] On 4 December 2012, the registrar issued a writ of execution in favour of the second respondent in the amount of R 4 608 954.90. It would appear from the terms of the writ that the second respondent sought payment on the basis of the order issued by Bhoola J by deducting the amount that he received in terms of the settlement agreements from what he contends he would have earned from the date of reinstatement to the date of the expiry of his fixed term contract.
- [8] On 13 December 2012, this court stayed the execution of the writ issued on for December, pending the finalisation of the present application, which was postponed sine die. On 25 September 2013, some 10 months later, the second respondent filed an answering affidavit to oppose the application.
- [9] That issue in the present proceedings is whether the judgment debt created in terms of the order dated 28 April 2010 has been extinguished. The applicant contends that the settlement agreement said the effect of extinguishing the judgment debt. The second respondent contends that the settlement agreements constituted a variation of the court order and that in the absence of a formal abandonment of the judgment, the judgment stands and he is entitled to execute against it.
- [10] The agreement concluded between the parties on 10 August 2011 records that it is a 'full and final settlement agreement' entered into between the applicant and the second respondent. The preamble to the agreement reads as follows:

'PREAMBLE

WHEREAS the Ngaka Modiri Molema District Municipality (the municipality) has instituted an appeal against the whole judgment of the Labour Court, Johannesburg granted by Her Ladyship Justice Bhoola on 28 April 2010;

AND WHEREAS the parties are desirous to settle the matter out of court;

AND WHEREAS the parties have reached agreement, subject to the approval of the Council of the municipality, and have recorded their agreement on the terms and conditions as set out hereunder.

WHEREFORE IT IS AGREED AS FOLLOWS:...

- [11] In clause 1 of the agreement, the parties specifically acknowledge that the second respondent had been successful in obtaining judgment against the applicant in respect of the termination of his employment contract, that the court had ordered that he be reinstated and that the applicant had launched an appeal against that decision. Against that background, the parties record their agreement that *'the municipality shall proceed with its decision to terminate the employment relationship between it and Mr. TDH Ramphela as previously done.'*
- [12] In clause 2 of the agreement, the applicant undertook to compensate the second respondent in a net amount of R3.45 million, inclusive of an amount of R 200 000 already paid in terms of an interim agreement. Clause 4 of the agreement reads as follows:

'FULL AND FINAL SETTLEMENT OF DISPUTE

The parties hereby records (sic) that this agreement constitute the full and final settlement of the matter related to the employment contract entered into between them and any pending litigation shall be withdrawn forthwith.'

As I have indicated, is not disputed that the settlement amount was paid - on 10 August 2011, the second respondent was paid an amount of R 200 000 and on 7 September, he was paid an amount of R 3.25 million.

- [13] The writ issued by the registrar on 4 December 2012 directs the first respondent to attach and take into execution a sum being the balance of the second respondent's contract plus interest from 2 February 2009 *'as per court order less R 3 500 000.00 paid as per agreement between the parties ...And of same to cause to be realized the following sums being the balance of Applicant's*

employment contract plus interest at 15.5% from 02 February 2009: Total salary and benefits = R 4 608 954.90.'

- [14] The second respondent contends that the judgment by Bhoola J is final and cannot be altered by the parties, not even by way of compromise. Secondly, the second respondent contends that he has not abandoned the judgment or any part of it and that in the circumstances, the judgment stands, and he is entitled to execute against it. In this regard, the second respondent relies on rule 41 (2) of the rules of the High Court. Thirdly, the second respondent contends that a distinction ought properly to be drawn between the judgment on which he relies and the settlement agreement, which falls properly to be regulated by the law of contract. In this regard, he submits that this court has no jurisdiction in relation to contractual disputes. Finally, the second respondent contends that the judgment on which he relies affords him the right to claim salary and benefits for the unexpired period of these contract and that he is entitled to have the writ issued and enforced in respect of those amounts
- [15] The general principle that is applicable is clear – a writ of execution can be set aside if it is no longer supported by its *causa* (Van Dyk v Du Toit en 'n ander 1993 (3) SA 781 (OPA). A writ is no longer supported by its *causa* in circumstances where the judgment has been satisfied by payment, *compensatio*, *novation*, *delegatio* or cession (see *Le Roux v Yskor Landgoed (Edms) Bpk en andere* 1984 (4) SA 252 at 257E-F). An offer of compromise 'in full and final settlement' of a debt precludes the creditor from claiming any balance of the amount owing if that offer is accepted. The essential enquiry is whether an agreement of compromise was concluded – here, one is concerned with the rules of offer and acceptance (see *Be Bop a Lula Marketing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (A), where the court held that '*the proposal, objectively construed, must be intended to create binding legal relations and must have so appeared to the offeree*').
- [16] In the present instance, it is clear from the terms of the settlement agreement that it was intended, as reflected in the preamble, to 'settle the matter out of

court' in the face of the appeal lodged against the judgment of Bhoola J and that the terms of the settlement extended to the termination of the employment relationship between the applicant and the second respondent. The offer made and accepted was to in full and final settlement of the dispute between the parties relating to the second respondent's employment contract and its termination, and with full knowledge of the terms of the judgment.

- [17] In these circumstances, I fail to appreciate on what basis the second respondent contends that he is entitled to have issued a writ of execution in respect of an amount that would appear to be what he claims to be his remuneration and benefits for the balance of his contract, less the amount of the settlement. The terms of the settlement agreement clearly represent a compromise of the judgment debt. To the extent that the second respondent appears to base his contentions on the proposition that a judgment once granted is incapable of compromise, that is simply not correct, as the above authorities indicate. Nor does the second respondent's submission regarding the Rule 42 of the Uniform Rules have any merit. As I understood the submission, the second respondent contends that a judgment once granted cannot be novated or varied or otherwise compromised, and that in the absence of a formal abandonment in terms of Rule 42, he remains entitled to execute against the judgment by Bhoola J. Rule 42 is not peremptory – it simply entitles a judgment creditor to abandon a judgment granted in its favour and establishes the procedure for doing so. It does not prohibit or limit a judgment creditor from compromising a judgment granted in its favour. Similarly the second respondent's submission in regard to the validity of the settlement agreement is not supported by the papers before me. The second respondent contends that he was forced, on account of his dire financial circumstances, to sign the agreement. All of the evidence indicates the contrary. The second respondent, who is not an unintelligent man, entered into a contract in terms of which he accepted a significant sum of money in return for the certainty of the withdrawal of an appeal against the judgment in his favour and an expeditious resolution to the dispute between him and his employer. Similarly, the applicant bought certainty in the face of the judgment against it and the

uncertain outcome of any appeal. There is no reason, either in terms of the law or more broadly on grounds of public policy, why the parties should not be held to their agreement.

- [18] Finally, in relation to costs, the court has a broad discretion under s 162 to make costs orders according to the requirements of the law and fairness. The court has traditionally been reluctant to make orders for costs against individual employees who pursue their rights misguidedly, but in good faith. In the present instance, I have my doubts that this case falls into that category; having a writ issued in the present circumstances smacks of opportunism. I am prepared to give the second respondent the benefit of the doubt, and for that reason, I do not intend to make any order as to costs.

For these reasons, I make the following order:

1. The writ of execution issued by the registrar on 4 December 2012 under case no JR 977/09 is set aside.
2. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. E van Graan SC, with him Adv. X Matyolo, instructed by Kgomo Mokhetle & Tlou Attorneys

For the second respondent: In person

Labour Court