



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J633/2015

In the matter between:

**ORANGE RIET WATER USERS ASSOCIATION (PTY)
LTD**

Applicant

And

PAWUSA OBO DJ MOOLMAN

Respondent

Heard: 11 June 2015

Delivered: 25 February 2016

Summary: Applicant seeks a declarator that the respondent is not entitled to relief in terms of an arbitration award issued in his favour, as he signed a settlement agreement subsequent to the issue of the award, in which he compromised his claim.

JUDGMENT

RALEHOKO AJ

Introduction

- [1] The respondent, Mr Moolman is in possession of an arbitration award in his favour, in terms of which he was retrospectively re-instated after he successfully challenged his dismissal by the applicant. However, subsequent to the issue of the award, his representative approached the applicant and suggested a negotiated settlement to avoid a drawn out dispute which would have been occasioned by the filing of a review application. Those discussions resulted in a signed settlement agreement. Despite the settlement, Moolmaan sought to enforce the award and to that end, obtained a writ of execution against the applicant. The applicant successfully obtained an interim order setting aside the writ of execution. In these proceedings the applicant seeks a declarator in terms of section 158(1)(a)(iv) of the Labour Relations Act No 66 of 1995¹ that Moolman is not entitled to any relief in terms of the award but only in terms of the settlement agreement. The applicant also seeks a final order setting aside the writ of execution.
- [2] After the parties had filed affidavits, the matter was referred for oral evidence.

Background common cause facts

- [3] Moolman was dismissed by the applicant for alleged misconduct in October 2012. He successfully challenged his dismissal through the CCMA and obtained an award in his favour, which is dated 10 December 2012. He was retrospectively re-instated and the applicant was ordered to pay him R82 872.00 in back pay.
- [4] The applicant advised the union that it would take the award on review.

¹ Section 158(1)(a)(iv) provides as follows:

- (1) The Labour Court may-
- (a) make any appropriate order, including
- (iv) a declaratory order.

- [5] Notwithstanding the company's intentions, on 3 January 2013 Moolman brought an application to have the award certified.
- [6] On 4 January 2013, Mr PA Louw, a shop steward of PAWUSA at the applicant, approached Mr Du Toit of the applicant and proposed a negotiated settlement of the dispute. According to Louw, Moolman was terminally ill. It is not in dispute that Moolman had been diagnosed with prostate cancer and was hospitalised in October 2012 as a consequence.
- [7] On the same day, a memorandum of agreement was concluded and signed by Du Toit, Mr Nel of the applicant and by Louw.
- [8] Subsequently on 11 January 2013 the parties met and Louw explained the terms of the settlement agreement to Moolman. It is common cause that in that meeting, Moolman inquired as to what would happen if he is declared medically fit. Parties have differing versions on the response to that question, with Du Toit testifying that he clearly stated that the settlement agreement would still apply and that Moolman was unhappy with that response but nevertheless signed the agreement. Moolman's version was that he informed all present that the agreement would become null and void if he is declared medically fit.
- [9] The salient terms of the settlement agreement are:
- 9.1 Louw was duly authorised to represent Moolman and to conclude an agreement on behalf of Moolman and communicate the terms of the agreement to Moolman.
 - 9.2 The agreement was concluded to resolve the dispute and avoid the filing of a review application;
 - 9.3 Moolman was terminally ill and he would be accommodated as he was unable to resume his duties.
 - 9.4 The applicant would assist and pay for Moolman's visits to a specialist, provide free accommodation and pay Moolman R5000 monthly. These benefits were to apply for a period of 6 months from the date when the application to be declared medically unfit is received.

- 9.5 The applicant would assist Moolman to claim for permanent medical disability;
- 9.6 The R76 000 owed by Moolman in respect of the Mahindra Scpio vehicle which the applicant had financed to enable Moolman to perform his duties would be written off;
- 9.7 Moolman will accept his dismissal and would have no further claims against the applicant.

- [10] In line with the terms of the settlement agreement, applicant made the first payment of R5000 to Moolman at the end of January 2013. However Moolman returned this amount to the applicant.
- [11] On 2 February 2013, Moolman consulted with Dr Potgieter who refused to declare him medically unfit.
- [12] On 6 February 2013 Moolman obtained a writ of execution to enable him to recover the back pay of R82 872 in terms of the award. The applicant successfully obtained an interim order setting aside the writ of execution.
- [13] Further common cause facts are that Moolman did not return the vehicle he had to the applicant nor did he continue making payments on it. He had vacated the applicant's accommodation when he was hospitalised in October 2012 and he also did not report for duty after signing the settlement agreement.
- [14] During oral testimony, more information came to light as set out below.

Oral evidence

- [15] At the commencement of the hearing of evidence, Mr Malapela for Moolman handed up a bundle of documents, which included a document purporting to be the minutes of the meeting held on 11 January 2013. Mr Snyman for the applicant objected to the handing up of the minutes on the grounds that his client disputed the veracity of the document. He also submitted that the content of the document was at odds with pleaded common cause facts. I did not understand Mr Malapela's position to be insisting that the minutes must still be admitted into evidence even in the

face of Mr Snyman's objections. Accordingly I have not had regard to those minutes in determining this matter.

- [16] Du Toit, applicant's sole witness testified about how he was approached by Louw for a negotiated settlement and how the settlement agreement was signed. He further testified that at the meeting of 11 January Moolman posed the question what would happen if he is declared medically fit and the response was that the agreement would still apply. Moolman left the meeting looking unhappy.
- [17] Moolman testified on his own behalf. He referred to events subsequent to the issue of the award but prior to the signature of the agreement, which evidence I did not regard as relevant. On or about 6 or 8 January Louw approached him and showed him the memorandum of agreement, which they discussed but he saw it as a suggestion. He informed Louw that the agreement means nothing as he has an award in his favour. Louw informed him that the memorandum was conditional on him being declared medically unfit. Subsequently Louw telephoned him and informed him that Du Toit wanted to see them. They met on 11 January and he inquired from Du Toit why he wanted to get rid of him. Du Toit presented him with the memorandum for his signature and he signed but he also stated that the memorandum would only apply if he is declared medically unfit.
- [18] In cross examination, Moolman conceded that the agreement does not state that it would apply only if he is declared medically unfit. When questioned on why he signed a 'suggestion', he stated that Louw and Du Toit "put him in a corner". He also conceded that he signed the document out of his own free will although he also pointed out that this was debatable. Prior to signing, he read the document and understood what it meant. He added that at the time he had been without a salary for 3 months, had drawn all his pension funds and he thought that if he signed, he would at least get R5000 per month.
- [19] When it was put to him that the pleaded version that him and the union later rejected the agreement was at odds with his testimony, he stated that

he thought about the memorandum after he had signed it and realised that the applicant wanted to get rid of him.

[20] When questioned on a version in the pre-trial minute to the effect that Louw was not authorised to conclude and sign the agreement, a version which was not repeated during oral testimony, Moolman stated he did not instruct Louw to approach the applicant.

[21] Moolman also testified that he had been treated for cancer in October 2012 and that in December 2012 the treatment was successful. He was questioned on why Louw had approached Du Toit in January 2013 stating that Moolman was terminally ill and he responded that Louw made that conclusion on his own.

[22] On 12 January 2013 Du Toit informed him that he would be paid the first R5000 at the end of the month. He also testified that Du Toit made an appointment for him to see the doctor on 2 February 2013.

[23] He stopped making payments for the car because the company refused to re-instate him. He denied that he owed R76 000 but only R58 000 in respect of the car.

[24] Despite that in the pre-trial minute it was recorded that Louw would testify, he was not called. Mr Malamela informed the court that there was a fall out between Louw and the union and for that reason, he would have been a hostile witness. However Louw had deposed to an affidavit in which he stated as follows:

24.1 On 4 January 2013 he approached Du Toit and requested that Moolman be given an opportunity to be medically boarded as it had come to his attention that Moolman had prostate cancer.

24.2 He questioned Du Toit and Nel on what would happen if Dr Potgieter declares Moolman medically fit and Du Toit stated that the agreement would become null and void.

24.3 At the meeting of 11 January 2013, Du Toit produced a new agreement with different terms and Moolman refused to sign it, stating that prostate cancer can be treated and that he was not interested in a settlement.

24.4 The agreement is voidable as it was dependent on Moolman being declared medically unfit.

The parties respective submissions

- [25] On the one hand the Applicant submits that Moolman is no longer entitled to any relief in terms of the award as he compromised his claim in the settlement agreement concluded on 4 January 2013 which he signed on 11 January 2013. The submission is therefore that the cause of action (in terms of the award) has novated.
- [26] The applicant also submits that the respondent cannot accept the benefits of the settlement by, *inter alia*, retaining the vehicle and also seek to enforce the award. The respondent cannot approbate and reprobate, so the applicant submits.
- [27] On the other hand the respondent contends that the applicant cannot unilaterally circumvent the award by relying on a settlement agreement which was concluded in the absence of Moolman, and which Moolman together with the union rejected when they became aware of the terms of the agreement. The respondent also contends that the settlement agreement was concluded based on an error by Louw that Moolman had a permanent disability. Finally the respondent submits that the condition that Moolman be declared medically unfit was not fulfilled and this renders the agreement null and void.

Legal principles and analysis

- [28] A settlement agreement has the effect that it disposes of a matter if it resolves all aspects of the dispute. Where such an agreement is concluded, it has the effect of compromising a claim² and precludes the other side from taking further legal action in respect of an issue resolved in the settlement agreement.

² *NUM & Others v Crown Mines Limited* [2001] 7 BLLR 716 (LAC) at para 26.

[29] Dealing with the issue of compromises, the court in *FAWU v Cape Hospitality Services*³ and with reference to case authority stated as follows:

9. *It is so that an offer of compromise "in full and final settlement" of a debt constitutes a compromise and precludes the creditor from claiming the balance of the amount owing, if that offer is accepted. But, as Malan AJA remarked in Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd.*^[4]

'The essential issue is whether an agreement of compromise was concluded: one is concerned simply with the principles of offer and acceptance.... In other words, 'the proposal, objectively construed, must be intended to create binding legal relations and must have so appeared to the offeree.'

[30] In *Wilson Bayly Homes (Pty) Ltd v Maeyane and Others*⁴ the court stated as follows regarding compromises,

The contract in the present case was one of compromise. The nature of such a contract is that it is concluded because the rights of the parties are uncertain, and they choose not to resolve that uncertainty.

[31] To resolve disputes of facts in trial matters, the approach set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others*⁵ must be followed. This is that the court must make findings on the credibility of the witnesses, their reliability and the probabilities.

[32] On the facts I find that there is no substance to any of the respondent's contentions for the simple reason that his own version is contradictory. He states that he rejected the agreement but at the same time seeks to rely on some unwritten clause that the settlement agreement was subject to some condition. Either there is no settlement agreement or the agreement was conditional. It cannot be both.

³ (2014) 35 ILJ 3394 (LC).

⁴ 1995 (4) SA 340 (T) at 345E.

⁵ 2003 (1) SA 11 (SCA).

- [33] Moolman agreed to accept his dismissal from the applicant in exchange for a number of benefits.
- [34] The applicant did not unilaterally seek to circumvent the award by imposing a settlement agreement on Moolman as submitted. It was Louw, Moolman's representative, who initiated the settlement negotiations because Moolman was terminally ill and he would not be able to resume his duties. Moolman himself signed the agreement, whose terms he conceded he understood.
- [35] On whether Louw had the mandate to approach the applicant and propose a negotiated settlement, the more probable version is that he did. The union represented Moolman during the arbitration proceedings. Louw was one of the two shop stewards at the applicant and he was aware that applicant intended to take the award on review. He was also aware of Moolman's condition. I reject Moolman's version that Louw assumed that he was terminally ill.
- [36] There is yet another reason why I find that on the probabilities, Louw was mandated by Moolman to approach the applicant and negotiate a settlement. Moolman met with Louw on 6 or 8 January 2013. He did not challenge Louw on why he had initiated settlement discussions without his mandate. Instead they discussed the document.
- [37] Thereafter and at the meeting of 11 January 2013 the agreement was again explained to Moolman who signed it. He admitted that he read and understood the terms of the agreement and that he signed out of his own free will. There is therefore no merit to the respondent's contention that the agreement was concluded and signed in Moolman's absence. The initial negotiations might have taken place in his absence after he mandated Louw to initiate those discussions but subsequently he signed the agreement.
- [38] Having listened to Moolman's testimony, it is very clear that he had a change of heart after signing the agreement. His version that he signed the agreement because he had been without a salary for 3 months, had drawn all his pension funds and he thought that if he signed, he would at least get R5000 per month, says it all. Subsequently and perhaps in

consultation with a different union representative, Moolman sought to renege on an agreement reached. He could not unilaterally resile from a settlement agreement which he had freely signed.

- [39] Moolman's version that he made it clear that the agreement would be null and void if he is declared medically fit does not assist his case. He might have stated this in the meeting but there was no agreement on the issue. He could have insisted that the settlement agreement must specify this. He had representation. Both him and Louw were content to sign an agreement which presumed that Moolman would be declared medically unfit without making provision for the other possibility.
- [40] If the settlement agreement had been entered into based on an error on the part of Louw as Moolman contends, he could have applied to have the settlement agreement set aside on that basis. He did not do so.
- [41] In the heads of argument filed on behalf of Moolman, Mr Malapela relied on a decision of this court in *Tsotetsi v Stallion Security (Pty) Ltd*⁶ to argue that the settlement agreement cannot supersede the award.
- [42] In *Tsotetsi* the court granted leave to appeal against its decision to make a settlement agreement an order of court on the grounds that there was a reasonable prospect that the appeal court might come to a different conclusion. As I understand the court's reasoning, it is that sections 158(1)(c)⁷ read together with section 142A⁸ of the LRA deal with a situation where a settlement agreement is concluded in respect of a dispute which a party has a right to refer to arbitration or adjudication, either before the dispute is referred or after it has been referred.
- [43] On the facts before it, the court found that as the dispute had already been referred and an award issued, there was no dispute capable of settlement and therefore there was a reasonable prospect that the appeal court could find that the court erred in making the settlement agreement an order of court.

⁶ (2009) 30 ILJ 2802 (LC) at para 19.

⁷ The section deals with making settlement agreements orders of court.

⁸ The section deals with settlement agreements which can be made arbitration awards.

- [44] At the time of writing this judgment, despite a diligent search, it was unclear whether the appeal in the *Tsotetsi* matter was heard and what the outcome was.
- [45] Be that as it may, as I understand the court's reasoning in *Tsotetsi*, it is that once an award or a court order is issued and the parties subsequently conclude a settlement agreement, the court cannot make such a settlement agreement an order of court as there is no longer a dispute between the parties.
- [46] It seems to me that the limited issue decided in *Tsotetsi* was simply whether a settlement agreement concluded subsequent to the issue of an award should be made an order of court, given the provisions of section 158(1)(c) read together with section 142A of the LRA. The issue was not whether such a settlement agreement is binding and whether it supersedes the award or the court order.
- [47] In the present matter the issue is whether the settlement agreement must take precedence over the award, which in my view is a different issue altogether. I see no reason in law or fairness why parties cannot conclude a settlement agreement after an award or even a judgment has been handed down to finally resolve the matter and avoid further litigation. In fact this happens often in practice.
- [48] I have also considered the decision of the court in *Molaba v Emfuleni Local Municipality*⁹ which the respondent relied on in support of its contention. That judgment deals with the question whether a settlement agreement concluded prior to invoking the dispute resolution mechanisms set out in the Labour Relations Act can be made an order of court. The court found that it could not. In any event that decision was overturned by the Labour Appeal Court in *Greeff v Consol Glass*¹⁰ where the court stated that the approach in *Molaba* was erroneous. Clearly that case has little if any relevance to the issue in the present matter.
- [49] The applicant should succeed. The award was overtaken by the settlement agreement, which the applicant is willing to comply with, should

⁹ [2009] 7 BLLR 679 (LC).

¹⁰ (2013) 34 ILJ 2835 (LAC)

Moolman now be advised to accept benefits in terms of that settlement agreement.

Costs

[50] Taking into account the requirements of law and fairness as I am obliged to do, I do not believe that this is a case where costs must follow the result. Moolman's change of heart is understandable but not permitted. He cannot unilaterally renege on that agreement. I intend not to penalise him with a costs order for defending this matter.

Order

[51] I make the following order.

- 51.1 The late filing of the answering affidavit is condoned.
- 51.2 The respondent, Moolman is not entitled to relief in terms of the arbitration award dated 5 December 2012 issued under case number FS6511-12.
- 51.3 The writ of execution issued on 6 February 2013 in the matter is finally set aside.
- 51.4 There is no order as to costs.

Ralehoko AJ

Appearances

For the Applicant: Ms S Snyman

Instructed by: Snyman Attorneys

For the Respondent: Mr Malapela (Union Official)

Instructed by: PAWUSA

LABOUR COURT