

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 146/17

In the matter between:

MARTIN CORY

Applicant

and

THE CITY MANAGER:

CITY OF TSHWANE MUNICIPALITY

First Respondent

THE STRATEGIC EXECUTIVE DIRECTOR:

CORPORATE AND SHARED SERVICES

Second Respondent

Heard: 22 August 2019

Delivered: 05 September 2019

Summary: Application to make a settlement agreement an order of Court. Counter application to set aside the agreement. *Parole evidence* rule apply to the settlement agreement. Held: (1) Application to set aside and or rectify the agreement dismissed. (2) Settlement agreement is made an order of Court. (3) The respondents to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] The applicant believed that he was discriminated against in relation to pay parity. As a result, he referred a dispute alleging discrimination. On 7 August 2017, the applicant and the respondents entered into a settlement agreement. Having failed to comply with the terms of the settlement agreement, the applicant launched an application seeking to make the settlement agreement an order of this Court. In opposing the application, the respondents sought to have the settlement agreement set aside. Both applications came before me for a decision¹. After hearing all the submissions, a judgment of this Court was reserved. Both Counsel approached me in chambers and asked that the judgment be delayed by a week as they possibly might resolve the matter. A week came and passed without any resolution. Any attempts by my Associate to get the parties to advise me of any resolution drew blank. Accordingly, there was no longer a valid reason to delay the issuance of this judgment.

Background facts

- [2] Facts relevant to this judgment are brief. On or about 07 June 2017, the applicant served and filed a statement of case referring a dispute that remained unresolved on 05 December 2016. The respondents failed to file a statement of response. Subsequently, and on 07 August 2017, parties concluded a written settlement agreement. Owing to non-compliance with the terms of the settlement agreement, the applicant launched an application to make it an order of this Court. Despite a written undertaking not to oppose the section 158(1) (c) application, the respondents made a *volte-face* and opposed the application as well as launching a counter-application seeking to set aside the settlement agreement. Both applications were heard on the same day.

¹ Parties agreed that, in the papers, the correct respondent is the City of Tshwane Metropolitan Municipality (CoT). Where reference is made to respondents in this judgment, such shall refer to the CoT

Evaluation

- [3] In matters involving making a settlement agreement an order of this Court, this Court retains a discretion to be exercised judiciously. Of importance is whether the agreement is one that is valid and that the other party to it is refusing to comply. It is common cause in this matter that the respondents are refusing to comply. At this stage, the respondents are questioning the validity of the agreement.
- [4] I now turn to the question whether the agreement is valid or not. In other words, I now deal with the counter-application. In the notice of motion, the respondents prayed for the setting aside or rescinding of the settlement agreement and in the alternative a rectification of the agreement to reflect the parties' correct understanding. In seeking to set aside the agreement, the respondents plead mistake. It was alleged and disputed that the applicant drafted the agreement incorrectly and that there was an error that vitiated a consent.
- [5] In our law, only a material mistake can vitiate consent. The respondents allege that the mistake crept in only at the drafting stage. The agreement was allegedly crafted in a manner which altered the employment regime. This is an *error in qualitate*. This type of an error is generally not material.² The general rule is that the mere existence of an erroneous belief in the mind of one of the parties to a contract is not a sufficient ground for annulling it, the reason being otherwise the security of written engagements would be destroyed.³
- [6] The agreement is signed by the respondent's attorney with authority to do so. The question is, if the agreement was crafted in a manner altering the employment regime, why was it signed by the attorney? On application of the *caveat subscriptor*⁴ rule, the respondents cannot allege material mistake that seeks to vitiate its consent in the circumstances

² *Trollip v Jordaan* 1961(1) SA 238 (A).

³ *Stewart v Kennedy and Another* 15 A.C. 108.

⁴ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

where the recorded terms were assented to by their attorney with full authority to do so.

[7] During oral submissions, the respondents' counsel, Advocate Pillay made reference to some emails which were exchanged prior to the signing of the agreement. In that regard, when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by *parole evidence*. By application of this rule, the emails that seeks to contradict the written document are not admissible.

[8] In the alternative, the respondents seek to rely on a mistake common to both parties and thus sought rectification of the agreement. A party claiming rectification must establish that as a result of an error or mistake the document does not reflect the common intention of the parties. In this matter, the respondents allege that the regulatory regime was not factored in the agreement. This is not a mistake common to both parties. As pointed out in the respondents' affidavit, it was a *bona fide* mistake on the part of the respondents by overlooking the aspect of how the regulatory regime between the parties is governed. There is a serious dispute of fact between the parties on this aspect in particular. On application of the *Plascon-Evans*⁵ rule, the respondents, being the applicants must fail on the rectification claim.

[9] Accordingly, this Court concludes that the written agreement is valid and enforceable in law. Therefore, there is nothing that prevents this Court to make it an order of this Court.

Costs

⁵ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A).

[10] I turn to the issue of costs. The respondents had taken a view that the section 158(1) (c) application shall not be opposed. This view is understood when regard is had to the terms of the signed settlement agreement. One of the agreed terms was that the settlement agreement be made an order of court. The *volte-face* of the respondents is a conduct that invites an order as to costs. The respondents did not have any basis to oppose the application. In bringing a counter-application instead, the respondents acted frivolously and in a vexatious manner. Accordingly, an order of costs must, in law and fairness, be made against the respondents.

[11] For all the above reasons, the following order is made:

Order

1. The application to set aside or rectify the agreement is dismissed.
2. The application to make the settlement agreement an order of this Court is hereby granted.
3. The respondents are ordered to, jointly and severally, the one paying absolving the other, pay the costs of this application.

GN Moshoana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant : H Lee of Anton Baker Attorneys, Brooklyn.

For the Respondents : Advocate L Pillay

Instructed by : Noko Ramaboya Mason Attorneys, Pretoria