IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D10/2022

Not Reportable

In the matter between:

MEC FOR HEALTH, KWAZULU-NATAL	Applicant
and	
HOSPERSA obo ZAKIA HOOSEN	First Respondent
PUBLIC HEATH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL	Second Respondent
JAMES NGOAKA MATSHEKA NO	Third Respondent

Heard: 2 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 15h00 on 19 June 2025

JUDGMENT

ALLEN-YAMAN J

<u>Introduction</u>

[1] The applicant applied to this court for orders in the following terms:

> *'1. That the late filing of the applicant's review application be and is hereby condoned.*
>
> *2. Setting aside the settlement agreement entered into purportedly by the applicant and the first respondent.*
>
> *3. Reviewing and setting aside or correcting, in terms of the provisions of section 158 of the Labour Relations Act, 66 of 1995, the arbitration award handed down by the third respondent under case number PSHS 480-19/20 dated 10 July 2020.*
>
> *4. Substituting the arbitration award with an order of the above honourable court dismissing the applicant's referral of her dispute relating to the application of Collective Agreement, Resolution 3 of 2009.*
>
> *5. That the first respondent pays the costs of the application in the event that the application is opposed by her.'*

[2] The applicant was opposed by the first respondent, referred to herein as 'HOSPERSA' and 'Ms Hoosen' where it is necessary to distinguish them.

<u>Background</u>

[3] Having referred a dispute in terms of s24(2) and (5) of the LRA to the second respondent on 17 July 2019, it remained unresolved at the stage of conciliation convened on 12 August 2019. The first respondent duly requested that it be scheduled for arbitration, in which request the issue in dispute was categorised as having been, *'OSD Translation – Interpretation and / or application of a collective agreement, Resolution 3/2009.'* The outcome required by the first respondent was stated to have been, *'Employee be translated to Pharmacy Supervisor with backpay to 2009.'*

[4] Ms Hoosen's claim for translation was premised on her belief that the applicant had erroneously translated her from the position of Principal Pharmacist to Pharmacist Grade 1 in terms of Resolution 3/2009, rather than to the position of Principal Supervisor, in circumstances in which she met the requirements for translation. The requirements were stipulated in such resolution to have been,

> *'2.3.4 Translation tables to facilitate the translation to the post of Pharmacy Supervisor with effect from 1 April 2010 are provided for serving employees –*
> *2.3.4.1 who occupied a post of Pharmacist on salary level 8 or higher pre-OSD as at 30 June 2009; and*
> *2.3.4.2 where it was required of the incumbent and contained in the formal job description / performance agreement to directly supervise more than one post of Pharmacist (including a Pharmacist: Community Service) that was converted / aligned to Pharmacist Grade 1, 2 or 3 on 1 July 2009 in accordance with the provisions of PHSDSBC Resolution 3 of 2009 (regardless of whether such posts were filled or vacant).*
> *2.3.4.3 Employees who meet the requirements in paragraphs 2.3.4.1 and 2.3.4.2 shall translate to the post/job level of Pharmacy Supervisor in accordance with the translation tables contained in Annexure B2 of this Agreement.*
> *2.3.4.4 Employees who are translated in accordance with the provisions of paragraph 2.3.4 above shall been 1 July 2009 as their date of entry into the OSD post/job level of Pharmacy Supervisor.'*

[5] On 8 November 2019 the settlement agreement which forms the subject matter of the present application was concluded. Utilising the second respondent's standard *pro forma* settlement agreement, the first respondent's dispute was recorded as having been settled, its terms having reflected that the applicant would translate Ms Hoosen to the position of Pharmacy Supervisor from 1 April 2010 to date (presumably intended to mean that the translation was to have been retrospective and for an indefinite period of time) and would pay her the amount of R795 392.26. The agreement was signed by Ms Hoosen herself, and one Mr Msane on behalf of the applicant.

[6] On its own version, the applicant became aware of the settlement agreement in November 2019 but did not then implement its terms. Unnecessary for the purpose of the present application, but nonetheless canvassed in some detail, were the steps taken by the applicant to interrogate whether Ms Hoosen's translation to the post of Pharmacy Supervisor had been justifiable in accordance with the provisions of collective agreement 3/2009.

[7] In consequence of the applicant's failure to have acted in accordance with the terms of the settlement agreement, the first respondent applied to the second respondent to make the settlement agreement an arbitration award in terms of s142A of the LRA. Albeit that the applicant referred to the award as having been certified, nothing before this court suggests that pursuant to the settlement agreement having been made an arbitration award in terms of s142A on 10 July 2020 the first respondent proceeded to have the award certified in terms of s143. On its own further version, the applicant became aware of the arbitration award when it was served on it on 14 September 2020.

[8] More than a year later, on 11 January 2022, the applicant initiated the present application.

<u>Analysis</u>

[9] As relief in these proceedings the applicant sought independently both the reviewing and setting aside of the award as well as the setting aside of the settlement agreement which underpinned the award.

[10] The applicant's singular complaint concerning the award itself concerned what was said to have been the absence of notification of the s142A proceedings having been given to it by the first respondent,

> *'As stated earlier, these proceedings were unopposed, and the applicant has no record of a notice of set-down. According to the best of my knowledge, the applicant was not notified of these proceedings.'*

[11] The deponent to the applicant's founding affidavit, Mr Mnguni, the applicant's Director, Human Resource Management Services, conceded at the outset that not all the facts deposed to therein had been within his own personal knowledge, but constituted information conveyed to him by those who were familiar with the facts, or were derived from documents under the applicant's control. The statement made by him concerning the absence of any record of notice having been given of the first respondent's s142A application did not itself demonstrate that no notice of the application had been given to the applicant, it merely suggested that no such notice could be found in the applicant's own records. The further statement evincing the deponent's belief that no notice of the application had been given to the applicant likewise did not establish the correctness of such a proposition in circumstances in which no confirmatory affidavits by any functionaries who had personal knowledge of the facts were delivered. Moreover, notwithstanding such assertions, the applicant did not rely on this particular issue as a basis upon which it sought to review and set aside the award itself.

[12] In consideration of that which was stated in the applicant's founding affidavit, it is evident that the applicant failed to allege any reviewable irregularity on the part of the third respondent and, as was conceded by Ms Qono on behalf of the applicant, the application to review the award was wholly unsubstantiated. As the applicant's application for condonation related to the late delivery of its review application, which application has no possible prospects of success, condonation for the late delivery of its review application falls to be refused.

[13] The applicant's application that the settlement agreement fell to be set aside was premised upon its assertions that (1) its functionary who signed the settlement agreement on behalf of the applicant failed to exercise an appropriate standard of care when having done so, and (2) did not have the requisite authority to bind the applicant.

[14] Insofar as the first of the applicant's complaints was concerned the alleged *'lack of care'* exercised by Mr Msane when having concluded the settlement agreement was premised on its contentions that the Ms Hoosen had not been entitled to have been translated to the position of Pharmacy Supervisor, and, as

such, there had been no reason for the applicant to have capitulated to the first respondent's claim. It alleged that,

> *'The agreement to pay the respondent the amount recorded in the settlement agreement, and consequently, the award is illegal since there is no justifiable basis on which the agreement was concluded. The payment to the respondent in terms of the award and settlement agreement will amount to fruitless and wasteful expenditure in terms of the PFMA as Msane did not consider the terms of the agreement with reasonable care. Furthermore, payment to her would amount to irregular expenditure.'*

[15] In circumstances in which disputed or uncertain obligations are novated by way of compromise, any previous disagreements concerning the parties' original obligations are superseded by the obligations created under the settlement agreement. Accordingly, the validity of a compromise or settlement agreement is unaffected by any defence which may have been raised to the original claim,[1] and the applicant's assertions concerning the merits of the first respondent's dispute are accordingly irrelevant to the issue of the legality of the settlement agreement.

[16] The further issue regarding the settlement agreement concerns that of Mr Msane's authority. In seeking to establish that Mr Msane had not been authorised to enter into the settlement agreement Mr Mnguni alleged that:

- In terms of the applicant's Financial Management Delegations, only Senior Managers identified by the applicant's Head Office are authorised to approve expenditure on sundry payment vouchers of other expenditure (which includes expenditure in relation to settlement of disputes).
- Mr Msane, in his capacity as Assistant Director: Labour Relations did not have such authority, and nor had the relevant Senior Manager delegated such delegated authority to him.

This being the case, Mr Msane did not have the authority to enter into the settlement agreement, which was accordingly *ultra vires*.

[1] Christie, The Law of Contract in South Africa, Third Edition, page 505

[17] In opposition the first respondent asserted that in the event that this court found that Mr Msane did not have actual authority, the principles of ostensible authority found application, and further that the applicant was estopped from denying Mr Msane's authority. The first respondent accepted that the issue of Mr Msane's authority was dispositive of the validity of the settlement agreement,

> *'It is conceded that if it is established that Mr Msane did not have ostensible authority and that the Applicant is not estopped from denying his authority and that the settlement agreement is for that reason null and void, then the Award and its certification would also be liable to be set aside. On the merits therefore the only relevant question is whether the settlement agreement was void for lack of authority or not.'*

[18] By the time of the initiation of the present application, Mr Msane had passed away and the applicant's application was unsupported by an affidavit by him.

[19] Although the applicant asserted that Mr Msane had not been authorised to enter into the settlement agreement on behalf of the applicant, it nonetheless accepted that such authority could lawfully have been delegated to him by the relevant Senior Manager who him or herself had been delegated the authority to do so. The applicant omitted, however, to mention who such Senior Manager may have been. No affidavit in which the issue of the extent or limit of Mr Msane's authority was elaborated upon, and none confirmed the correctness of Mr Mnguni's assertions on the point.

[20] The only particularity provided to this court which directly concerned the issue of Mr Msane's authority was its allegation that,

> *'In or about December 2019, the Chief Executive Officer, Ms B C Ndlovu wrote to the Head of Department, Dr Tshabalala informing him that the settlement agreement entered into on behalf of the applicant was not authorised by her. She further recorded that she did not receive a written mandate from "Head Office Labour Relations/Head of Health/ Chief Financial Officer to settle the matter neither commit to payment.'*

From the copy of the letter annexed to the founding affidavit it was evident that Ms Ndlovu was the CEO of the Port Shepstone Regional Hospital. She provided no confirmatory affidavit concerning that which had been attributed to her.

[21] On the applicant's own version, Mr Msane could have been authorised to conclude the settlement agreement by a Senior Manager with delegated authority. Absent from its version was that Ms Ndlovu had been such a manager, or indeed, the only manager capable of delegating him the requisite authority. This being so, the applicant's case is devoid of any evidence substantiating its assertion that Mr Msane had not been authorised to enter into the settlement agreement.

[22] Moreover, the applicant's functionaries became aware of the settlement agreement in the month in which it had been concluded; November 2019, yet failed then to raise the issue of Mr Msane's alleged lack of authority with the first respondent. The certified award was thereafter served on the applicant in September 2020, yet again Mr Msane's alleged lack of authority was not drawn to the first respondent's attention. The circumstances surrounding Ms Msane's signature to the settlement agreement, together with the events subsequent thereto, militate against the conclusion that he did not have actual authority to bind the applicant. For this court to conclude otherwise would require it to accept Mr Mnguni's unsubstantiated hearsay that such authority had never been delegated to Mr Msane in circumstances in which the latter had conducted himself in a manner consistent with the holder of authority, and the converse suggestion was raised for the first time only upon the initiation of the present application in 2022.

[23] However, regardless whether Mr Msane had actual authority, the circumstances in which the settlement agreement was entered into nonetheless established the existence of ostensible authority.

[24] The principles relevant to a claim premised on ostensible or apparent authority were summarised in Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC),

'In summary the position in regard to representations of authority founding a claim of ostensible authority is the following. The statements or conduct constituting the representation must be those of persons, individually or collectively, who have actual authority to bind the principal to the transaction in dispute. The conduct may include the appointment of an individual to a position ordinarily carrying with it a particular level of authority. If the appointment is made, but some of that authority is withheld or subjected to limitations, it is essential that this is made clear to persons dealing with that individual. Otherwise they will be entitled to hold the company to the representation of authority created by the appointment. A representation may also be made by permitting the putative agent to engage in a course of dealing on behalf of the principal. Representations by the agent alone without more are insufficient, whatever form they may take. But the conduct and statements relied upon may be those of the agent, provide the conduct or statements are themselves within the actual or ostensible authority of the agent. The statements and conduct must, when taken as a whole, be such as reasonably to convey to a person dealing with the agent the impression that they have authority to conclude the transaction in question, and thereby to induce the belief in that person that they have that authority.'[2]

[25] In consideration of these requirements the conclusion drawn by the first respondent that Mr Msane had been clothed with the necessary authority to conclude the settlement agreement was entirely reasonable. As the applicant's Assistant Director Labour Relations he attended the dispute resolution process at the PHSDSBC in his capacity as the applicant's representative. He duly engaged with the first respondent and, in such capacity, concluded a written settlement agreement to which his signature was affixed as the applicant's representative. There is accordingly no reason to doubt the veracity of the first respondent's unchallenged version that the circumstances in which the settlement agreement was entered into gave rise to the first respondent's not unreasonable belief that Mr Msane had the necessary authority to bind the applicant thereto. This being the case, if Mr Msane did not, in fact, have actual authority to bind the applicant, ostensible authority was nevertheless established, and the applicant is bound by the consequences thereof.

[2] At paragraph 165

[26] The application to set aside the settlement agreement accordingly falls to be dismissed.

Costs

[27] The first respondent asked that the application be dismissed with costs. In circumstances in which the first respondent has been obliged to incur costs opposing the present application in order to preserve Ms Hoosen's rights, this court can conceive of no reason why the applicant ought not to pay its costs.

Order

1. Condonation for the late delivery of the applicant's review application is refused.

2. The application to set aside the settlement agreement under case number PSHS 480-19/20 dated 8 November 2019 is dismissed.

3. The applicant is to pay the first respondent's costs.

K Allen-Yaman
Judge of the Labour Court of South Africa

Appearances

Applicant:
Ms Z Qono, instructed by the State Attorney, KwaZulu-Natal

First Respondent:
Mr B Purdon, Purdon and Munsamy Attorneys