IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D131/2022

Not Reportable

In the matter between:

MARLENE GOTTLIEB	First Applicant
LUCILLE NAICKER	Second Applicant
BEVERLEY HORSLEY	Third Applicant
CAYLEE REYNEKE	Fourth Applicant
TYRON ELS	Fifth Applicant
and	
PROCURE GENII (PTY) LTD	Respondent

Heard: 13 and 14 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 10h00 on 1 July 2025

JUDGMENT: POINT IN LIMINE

ALLEN-YAMAN J

Introduction

[1] Having been dismissed by the respondent, the applicants instituted action in which they claimed the following relief,

> *'6.1 Reinstatement with full retrospective effect in the event that the applicants' dismissals are found to be substantively unfair, alternatively compensation equal to 12 months pay each;*
> *6.2 In the event that the applicants' dismissals are found to be procedurally unfair only, compensation that is fair and equitable;*
> *6.3 Statutory monies as referred to in schedule "B";*
> *6.4 Further and / or alternative relief;*
> *6.5 Costs on a party and party scale.'*

[2] In opposing the applicants' claim the respondent raised a point *in limine* in addition to having addressed the merits thereof. The respondent pleaded that the parties had entered into a settlement agreement, the effect of which was that the dispute between the parties had been finalised, and that the applicants' claim was accordingly *'lis pendens / res judicata'*.

[3] In view of the fact that the issue raised by the respondent could potentially have disposed of the applicants' claim, and the trial of the matter had been enrolled for two days only, the parties were directed to limit their evidence to this issue only.

Background

[4] The parties' pleadings reflected their opposing views concerning the events which led to the termination of the applicants' employment by the respondent, but it was nonetheless common cause that their services were terminated on 16 August 2021.

[5] This led the applicants to referring a dispute to the Commission for Conciliation, Mediation and Arbitration ('the CCMA') three days later, which referral was allocated case number KNDB 7750-21. A certificate of outcome was issued on 1 December 2021, in which the dispute was reflected as having been unresolved and the presiding commissioner recorded that the dispute was to be referred to arbitration. By way of the completion and submission of a form 7.13 the following day, the applicants requested the CCMA to arbitrate their dispute.

[6] Having submitted their request for arbitration, the applicants referred a second dispute to the CCMA on 8 December 2021, such second dispute also having related to the termination of their employment with the respondent. In view of the fact that such dispute had not been referred to the CCMA within 30 days of the date on which their employment had been terminated, the applicants applied for condonation for the delay which was granted on 18 January 2022. On that date a certificate of outcome was also issued reflecting that the dispute then remained unresolved.

[7] On 13 April 2022 the applicants initiated action in this court. By 3 June 2022 the respondent had failed to enter any defence to the applicants' claim as a result of which the applicants applied for default judgment. In the meantime, on 19 May 2025, the parties had entered into a settlement agreement at the CCMA utilising the CCMA's standard form document, which evinced that the parties had settled the dispute under KNDB 9750-21.

[8] Service of the application for default judgment prompted the delivery of the respondent's Statement of Response, in which the respondent raised its special plea of *'res judicata / lis pendens'*.

<u>Analysis</u>

[9] *Res judicata* is a special plea raised in circumstances in which a court has granted a final and definitive judgment on the merits of the claim being pursued. Essential to such a plea is that reliance is placed on a judgment of a competent court. The special plea of *lis pendens*, whilst similar to that of *res judicata*, does not

require the existence of a final judgment, but only that of pending litigation between the same parties based on the same cause of action in respect of the same subject matter as that of the claim being pursued. Neither such special pleas can be upheld in the present matter: there has been no final judgment of any court in respect of any of the issues in dispute between the parties, and nor is there any pending litigation between the parties in any other forum.

[10] In consideration of the issue actually raised by the respondent, it is event that it miscategorised the nature of its special plea. It was the respondent's case that the applicants' claim is the self-same claim as had previously been settled between them at the CCMA. The respondent pleaded that,

> *'A settlement agreement was concluded on 18 May 2022, after the service of the Statement of Claim, in terms of which the Respondent agreed to pay the applicant an amount of severance pay in settlement of their claims.*
>
> *It is accordingly submitted that the matter is res judicata, having been finalised at the CCMA, and that this claim falls to be dismissed, with costs.'*

The allegation by the respondent that the parties concluded a contract which had as its object the termination of the litigation between them was, in effect, a plea of compromise.

[11] The applicants, on the other hand, argued that the settlement agreement had not been intended to settle all the applicants' claims, but only their claim for severance pay.

[12] Prior to considering the effect, if any, of the settlement agreement on the applicants' claim in this court, it is necessary to consider the applicability of the parole evidence rule.[1] Mr Caro, for the applicants, argued that,

[1] A document is conclusive as to the terms of the transaction which it is intended to embody.

'… the principle of the parole evidence rule generally prevents the use of extrinsic evidence to contradict the clearly stated terms of the agreement unless valid exceptions apply. None, it is submitted, exist.'

[13] The terms of the settlement agreement are embodied in a written document and the parole evidence rule must, accordingly, find application in relation to its terms. This does not, however, preclude the admission of evidence for the purpose of establishing the nature of the dispute that was intended to be settled by the agreement itself. This principle was expressed in Du Plessis v Nel 1952 (1) SA 513 (A),

'The correct inquiry is not whether a contradiction exists, but whether the writing was intended to cover a certain subject of negotiation. If not, the writing does not embody the transaction on the subject.'

[14] The settlement agreement recorded at the outset thereof,

'The undersigned parties record the settlement of their dispute in the following terms. By signing this agreement, the parties acknowledge that the agreement was read to them and interpreted (where necessary) and that they understand the content hereof. This agreement is in full and final settlement of the dispute referred to the CCMA as well as in full settlement of all statutory payments due to the applicant as reflected at paragraph 5 of this agreement (where no statutory payments are due and owing to the applicant it shall be specified at paragraph 6 of the agreement).'

[15] Given the stated purpose of the settlement agreement, it is necessary to determine (1) what dispute had been referred to the CCMA, and (2) what statutory payments, if any, were intended to be settled by the payment to be made by the respondent. In substantiation of each of the parties' respective cases, each introduced the evidence of two witnesses: Mr Stefan Bruwer and Ms Linda Harris testified on behalf of the respondent, whilst the first and third applicants, Ms Marlene Gottlieb and Ms Beverly Horsely testified on behalf of the applicants. Both relied upon a common bundle of documentary exhibits.

[16] The first form 7.11 submitted by the applicants to the CCMA on 19 August 2021 which was subsequently allocated case number KNDB 9750-21 categorised the nature of the applicants' dispute has having been 'Severance Pay'. Despite such categorisation, it is evident that the applicants' dispute concerned more than only severance pay. They also indicated that their dismissal had been for *'unknown reasons'* when asked to indicate the reason for their dismissals (in circumstances in which their dispute was an unfair dismissal dispute). The facts of their dispute were summarised to have been,

> *'Employer selectively dismissed staff under the pretence of a s189 without process of payment of any outstanding amounts.'*

> In relation to their dismissals, the applicants asserted that these had been both procedurally and substantively unfair. The result they required was recorded as having been, *'Payment of severance, & compensation.'*

[17] This dispute was enrolled for conciliation on 1 December 2021 but remained unresolved. Albeit that the categorisation of the dispute by the commissioner is not binding, the certificate of outcome indicated that the dispute concerned, *'S41 – Severance Pay'* and could be referred to arbitration. The applicants requested their dispute to be arbitrated by way of a form 7.13 which was completed the following day. In this request, the issues in dispute were listed as having been, *'Severance pay, unpaid salaries, unfair dismissal based on s189 process.'*

[18] Notwithstanding such request for arbitration having been made, the applicants referred a further dispute to the CCMA on 8 December 2021. In terms of this form 7.11, the nature of the dispute was categorised as relating to a dismissal for operational requirements. The facts were summarised as having been,

> *'Employer selectively dismissed staff under the false pretence of a s189, no formal process was followed, no severance pay was paid out, no UI 19 was issued.'*

[19] Again having asserted that their dismissals had been both procedurally and substantively unfair, the applicants indicated that the result required was, *'Payment of severance, notice, leave pay and compensation.'*

[20] Their second dispute was allocated case number KNDB 10774-21. On 18 January 2022 the applicants were granted condonation for the late referral of their second dispute[2] and a certificate of outcome indicating that their dispute concerning their dismissal for operational requirements could be referred to this court.

[21] In the dispute subsequently made to this court on 13 April 2022 the applicants sought reinstatement, alternatively compensation in respect of their claim that they had been unfairly dismissed; notice pay; and leave pay. In addition, the first and second applicants sought payment of a *pro rata* portion of their salaries for the month of August 2021.

[22] The settlement agreement itself evinced that the obligations created in relation to the respondent in favour of the applicants were intended to finally settle the dispute referred to the CCMA; and the statutory payments due to the applicants, as detailed therein.

[23] To determine what dispute was being settled thereby, the starting point must be the applicants' initiating document: their form 7.11 dated 19 August 2021. Although the applicants indicated that the nature of their dispute had been that of severance pay, the remainder of the document reflected that they then also challenged the fairness of their dismissals. It cannot, however, be found that they persisted in that portion of their claim which related to the fairness of their dismissals under KNDB 9750-21 post fact conciliation of the dispute on 1 December 2021.

[24] Ms Horsley's evidence was that the applicants had been advised by the conciliating commissioner in the course of the first conciliation process that the CCMA would be unable to deal with any portion of their dispute other than the severance payment aspect thereof. Given the jurisdictional provisions of s191(12) of the LRA in relation to dismissals as a result of an employer's operational

[2] The application for condonation was not placed before this court.

requirements, and the subsequent categorisation in the certificate of outcome of the applicants' dispute as being one relating to severance payment, this court has no reason to doubt the correctness of her recollection.

[25] The form 7.13 in relation to KNDB 9750-21 which was submitted to the CCMA by the applicants' erstwhile representative prior to their submission of a second 7.11 form, whilst incompatible with their version that they did not intend to persist in anything other than the severance pay portion of their dispute under that case number, is nonetheless not dispositive of the respondent's suggestion that their intention remained to prosecute all their claims under the first of their disputes.

[26] The 7.13 included a claim for unpaid salary, which had not only never been conciliated, but in respect of which the first and second applicants (being the only applicants with claims of this nature) were precluded from claiming in the CCMA in light of the fact that their salaries exceeded the threshold then prescribed by the Minister.[3] [4]

[27] In addition, the applicants' claim in relation to the fairness of their dismissals was restated in the dispute subsequently referred by them to the CCMA and thereafter to this court, which fortified their version that they had not intended to prosecute that portion of their claim any further under KNDB 9750-21.

[28] The applicants' version that the only aspect of their dispute under KNDB 9750-21 remained extant at the time when that dispute was settled was unchallenged in cross-examination. Notwithstanding that both the respondent's witnesses testified that they had believed the settlement agreement had been intended to settle all the applicant's claims, those beliefs, if held, were both unsubstantiated and unreasonable.

[29] Mr Bruwer testified that the only documentation to which he had been privy prior to entering into the settlement agreement had been the 'postponement document' and an attendance register. At no point in the course of his evidence did

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[3] The threshold in 2021 was R211 586.30

[4] S73A of the BCEA excludes from its provisions employees who earn in excess of the threshold established by the Minister.

he explain how he came to form the conclusion that the settlement agreement had been intended to settle 'all the disputes' between the parties in circumstances in which, on his own version, he had been wholly unaware of the particularity of the actual dispute under KNDB 9750-21 before the CCMA and oblivious to the existence of the applicants' claim in this court.

[30] Ms Harris, on the other hand, conceded that she had been well aware of the applicants' claim in this court but could not explain how, in the absence of any term in the agreement having expressly referred to such claim, she had formed a belief that the applicants' claim in this court was intended to be settled together with the applicants' claim under KNDB 9750-21.

[31] The statutory payments claimed by the applicants in this court were not covered by the settlement agreement at all. The relevant clauses of the settlement agreement read as follows:

> *'… This agreement is in full and final settlement of the dispute referred to the CCMA as well as in full settlement of all statutory payments due to the applicant as reflected at paragraph 5 of this agreement (where no statutory payments are due and owing to the applicant it shall be specified at paragraph 6 of the agreement).*
>
> *3. MONETARY SETTLEMENT*
> *3.1 The respondent agrees to pay the applicant the amount of R75 000 – 00 by no later than ………… (date).*
> *3.2 The amount in paragraph 3.1 is inclusive of statutory payments due to the applicant unless specifically excluded in terms of paragraph 6 below.*
>
> *…*
>
> *5. BREAKDOWN OF THE AMOUNT REFLECTED AT PARAGRAPH 3.1*
> *The amount reflected at paragraph 3.1 above is inclusive of statutory payments as reflected below*
> ☐ ~~*Outstanding wages / salary*~~ *R X*

X Severance pay R75 000 – 00 To be distributed

□ Notice pay R X among 5 applicants

□ Leave pay R X pro rata by attorney

□ Overtime R X

□ Other R X

6. EXCLUSION OF STATUTORY PAYMENTS

□ The parties agree that there are no statutory payments due and owing to the applicant.

□ A dispute about statutory payments is already before the Department of Employment and Labour under the following reference number: …..

□ A Compliance Order has been issued by the Department of Employment and Labour under the following reference number: …..'

[32] No interpretation can be given to these clauses, read together, but to mean anything other than that the payment of R75 000,00 was intended to be made as payment for severance pay, and that the applicants remained at liberty to claim any other statutory payments which they believed were due to them.

[33] The first part of the settlement agreement states clearly that the payment is to be in full settlement of the statutory payments reflected at paragraph 5. Paragraph 5 clearly indicated that the payment was in respect of severance pay only. Had the exclusion of the remaining options been intended to indicate that no such further claims existed, this would have been indicated in paragraph 6.

[34] Moreover, save for the indication in the form 7.13 that the applicants claimed unpaid salary, no other statutory payments formed part of the dispute referred under KNDB 9750-21. As has already been mentioned, only the first and second applicants claimed unpaid salary in this forum, and by virtue of their rate of pay, their claims would not have been competent in the CCMA. Other than that form, the respondent presented no evidence to substantiate its claim that the settlement agreement was intended to have been dispositive of any other statutory payments to which the applicants claimed to have been entitled.

[35] It is accordingly the finding of this court that the settlement agreement entered into between the parties on 19 May 2022 under KNDB 9750-21 settled only the applicants' claim for severance pay, and that the applicants did not, by having entered into the settlement agreement, compromise their claim in this court.

[36] The respondent's *in limine* point will accordingly be dismissed.

Costs

[37] The applicants asked that that the dismissal of the respondent's point *in limine* be accompanied by an order as to costs, it having been the applicant's argument that the point was frivolously taken.

[38] Having considered the issues involved, the dearth of evidence in support of the respondent's position in and of itself suggests an absence of *bona fides* in having taken the point. Dispositive of the matter, however, was clause 7 of the settlement agreement,

> *'7. OTHER*
>
> *The monetary amount is subject to a tax directive. UI 19 form to be issued to the applicants no later than 23/05/2022. The UI 19 documents is solely for the purpose of the Applicants claiming UIF and parties agree that it will not be used in any other forum.*
>
> *…'*

[39] From this clause it is clear that at the time when the settlement agreement was entered into the respondent was well aware of the existence of the applicants' dispute in this court, and alive to the fact that the applicants intended to persist therewith. When Mr Caro put it to Ms Harris that the reason for the inclusion of the clause was as a result of the respondent's concern that the provision of UI 19 documents to the applicants might adversely affect its defence in this court, Ms Harris was unable to furnish any other possible explanation. This being the case, the point appears to have been opportunistically taken and, for that reason, this court is

of the opinion that fairness necessitates that the applicants not be required to be burdened with the costs associated therewith.

Order

1. The respondent's *in limine 'res judicata / lis pendens'* (compromise) point is dismissed.

2. The registrar is directed to enrol the matter for trial on the merits.

3. The respondent is ordered to pay the applicants' wasted costs incurred in opposing the respondent's *in limine* point.

K Allen-Yaman

Judge of the Labour Court of South Africa

<ins>Appearances</ins>

Applicants:
Mr D Caro, Dean Caro & Associates

Respondent:
Mr S Hansjee, Cox Yeats Attorneys