



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, BHISHO)**

CASE NO: 223/2025

In the matter between:

KHAYALETHU TUNGATA

Applicant

and

MEMBER OF EXECUTIVE COUNCIL

DEPARTMENT OF HEALTH, EC PROVINCE

First Respondent

SUPERINTENDENT GENERAL FOR THE

DEPARTMENT OF HEALTH: EC PROVINCE

Second Respondent

PREMIER OF THE EASTERN CAPE PROVINCE

Third Respondent

JUDGMENT

MAKAULA J:

1. Introduction

[1] The applicant issued an application seeking the following order.

‘1. Directing the respondent to comply with the settlement agreement concluded between the parties on 18 November 2022 and 17 May 2024, in terms of which the applicant was to be placed in the position of Senior Manager: Fleet Management for the contract of one year with the option to renew.

2. Declaring that the applicant is an employee of the Department of Health, Eastern Cape.

3. Directing the respondents within 15 days of granting this order, to:

3.1 conclude a written contract of employment with the applicant, which accurately reflects the terms and conditions of the applicant’s return to the position of Senior Manager: Fleet Management, with effect from 2nd June 2024.

3.2 permit the applicant to commence and fully perform the duties associated with the position of Senior Manager: Fleet Management, in accordance with the terms agreed upon, without any further hindrance or obstruction; and

3.3 remunerate the applicant by paying the salary and benefits to which the applicant would have been entitled had the applicant returned to work on 2nd June 2024 up to and including the date of actual compliance with the terms of the agreement by the respondents. (sic)

4. The respondents shall pay interest on the outstanding income payable to the applicant at the legal rate.

5. The respondents to pay the costs of the application; and

6. Granting such further and/or alternative relief as deemed necessary.”

2. The Facts.

The applicant’s case.

[2] The applicant had been employed by the first respondent since 2007 as Finance Manager, responsible for overseeing Fleet Management. His employment

was governed by a fixed-term contract subject to renewal. The contract was renewed several times until its termination in March 2022.

[3] Upon termination, the applicant brought an urgent application to the Bisho High Court, contending that in March 2021 his fixed-term employment contract was converted to permanent employment. The respondents opposed the application, and Bloem J dismissed it with costs. The applicant filed a Notice for Leave to Appeal (LTA), which he later withdrew. The parties disagree on the reason for the withdrawal. The applicant contends that the withdrawal resulted from Mr Modupi, the respondents' legal representative, approaching the applicant's legal representatives and proposing an out-of-court settlement. The applicant further contends that the parties negotiated and reached an oral agreement.

[4] On 18 November 2022, the applicant's attorney wrote to the respondents' attorney, confirming and accepting the terms of the orally agreed contract. The applicant withdrew the LTA on the basis that he had accepted the offer to renew the contract.

[5] The relevant part of the letter dated 18 November 2022 reads as follows:

"During our telephone discussions you indicated that the Department of Health is offering our client a new contract of 12 months and our client is requested to withdraw the leave to appeal. We have discussed the issue with our client and we hold instructions to inform you that the offer of a new contract of 12 months by the Department of Health is accepted. Our client is available to sign a new contract on a date and time which will be suitable to the Department of Health.' (sic)

[6] The applicant's attorney sent another email on 22 November 2022, referencing numerous telephone conversations, particularly on 18 November 2022, and reiterating that their client accepted the respondents' offer of settlement. The applicant undertook to file the notice withdrawing the LTA the next day.

[7] On 23 November 2022, Mr. Modupi sent an email to the applicant's attorney stating the following:

"I have received your email, and I do confirm our discussion in the above case and I have spoken with our clients particular, Mr. Nabe, and he says that he will come back to you for arranging the signed of contract." (sic)

[8] The applicant accepted the offer, leading to a new employment agreement (the 2022 agreement). The applicant argues that the respondents authorised and directed Mr. Modupi to enter into an agreement with him. As a result, he filed the LTA on 7 December 2022.

[9] Upon realizing that the respondents were supine, the applicant wrote the letter dated 9 December 2022. In it, the applicant reiterated the background stated above and set forth the agreed terms of the new agreement as follows:

“3.1 (the applicant) should withdraw his leave to appeal against the judgment of Mr. Justice Bloem.

3.2 The contract of employment which is perceived to have come to an end on 31st March 2022 will be renewed.

3.3 Will be offered a new contract of employment for a period of 12 months immediately, whilst the department will be embarking in a process of regularizing his employment permanent employment.

3.4 New 12 months contract of employment will be in respect of the same position and functions of finance management responsible for fleet management and in the same terms and benefits.” (sic)

[10] The letter did not elicit a response from the respondents. The applicant made numerous attempts to resume work. On 12 December 2022, he went to his place of employment and could not find the second respondent in the office. He was told the second respondent would contact him, but that never happened. The respondents’ officials did not honour subsequent appointments. He then exchanged WhatsApp messages with the Head of the Department, the second respondent, and the third respondent. In those messages, the third respondent urged the second respondent to resolve the applicant’s matter.

[11] On 16 January 2023, the applicant received a letter of assumption of duty from the Chief Financial Officer (CFO) of the second respondent stating *inter alia*:

‘This is to certify that Mr. Khayaletu Tungata – 5461 44031 has assumed the duties and responsibilities as Senior Manager: Fleet Management, with effect from Monday, 16 January 2023.’ (sic).

[12] The applicant states that despite the letter of assumption of duty, he encountered obstacles in performing his functions, including denial of access to his office, lack of necessary equipment, and absence of written particulars of his employment. The CFO advised him to remain at home while coordinating a meeting with the Acting Director of Fleet Management, Mr. Mtongana, and until Human Resources finalised the implementation of the negotiated settlement.

[13] Because the 2022 agreement led to no action, the applicant filed a case in the Labour Court on 7 May 2024. He sought an order enforcing the agreement and for specific performance, urging the respondents to draft and sign a written employment contract in accordance with their agreement. He also requested payments under section 32 of the Basic Conditions of Employment Act 75 of 1997, beginning in April 2022 and continuing until payment is made.

[14] Before the adjudication of that matter, another agreement (the 2023 agreement) was entered into between him and the respondents. The 2023 agreement was reached at the doorstep of the Labour Court. Adv. Siyo and Mr. Sakhela represented the applicant, while Adv. Maseti, Mr. Bastile (Senior Law Advisor of the first respondent), and Miss Weinand (of the State Attorney's office) represented the respondents. The parties sought to have the 2023 agreement made an order of court. The Labour Court refused to endorse the terms of the draft order sought on the ground that it lacked jurisdiction to hear the matter. The judgment captures the draft order as follows:

“1. The respondents are directed to draw and a written contract of employment of a fixed term for a period of one year which will be subject to renewal with the applicant in relation to his employment as Senior Manager: Fleet Management, Department of Health, Eastern Cape which incorporates the written particulars of his employment as contemplated in section 29 of the Basic Conditions of Employment Act 75 of 1997 within 5 days of receipt of this order.

2. The respondents are directed to advertise the applicant's position of Senior Manager, Fleet Management, Department of Health, Eastern Cape, for a permanent appointment provided that the post is existing, funded, and available.

3. The respondents pay the costs of this application, jointly and severally, the one paying the other to be absolved, and such costs are to include the costs of two counsel where so employed.” (sic)

[15] The Labour Court dismissed the application and refused to grant it, but it granted paragraph 3 of the draft order and ordered the respondents to pay the costs, with one paying the other to be absolved.

[16] After his appearance at the Labour Court, the applicant's attorneys forwarded a signed settlement agreement to the respondents' attorneys on 1 June 2024 for signature. The applicant asserts that both agreements were always oral, tacit, or acquiesced to by the respondents. The applicant further states that the 2023 agreement remained valid, binding, and enforceable.

[17] On 4 June 2024, the applicant contacted the Acting Head of the Department to inform him of his intention to return to work the next day. The Acting Head told him that the Legal Department was working to resolve the situation and would contact him within 24 hours.

[18] On June 28, 2024, the Acting Head informed the applicant that the position he was to be appointed to was no longer listed in the organogram. The Acting Head advised the applicant to approach the Bargaining Chamber to obtain the necessary legal instruments to legitimise the matter. The applicant contends that the two agreements are undisputed and remain valid, binding, and enforceable. The applicant further contends that the first and second respondents entered into and executed the settlement agreement with full knowledge of their organisational structures and operational capacities.

[19] The applicant submits that he complied with his obligations under the agreements by making his services available when called upon to resume duty. He declares that the respondents have been obstructive by failing to provide him with the written employment contract required by the settlement agreements and by hindering the performance of his duties and responsibilities, thereby breaching the agreements. The applicant argues that the respondents' failure to comply with the terms of the agreements is emotionally, physically, and financially prejudicial to him. The applicant avers that the flimsy excuse that the position is no longer available undermines the essence of the agreement and that the respondents acted in bad faith.

The defendants' case.

[20] The respondents raised three points in limine, namely that this court lacked jurisdiction to hear the “so-named settlement agreements... which are of no force and effect”; that the third defendant is mis-joined because he lacks a direct and substantial interest in the matter; and that the issues are *res judicata* because they are substantially the same as those decided by Bloem J. However, when the matter was argued, the respondents advised that they no longer pursued the special pleas.

[21] The respondents deny the existence of both agreements. They contend that the applicant's reliance on the unsigned agreement is erroneous and misplaced. The respondents argue that the applicant's reliance on the letter dated 9 December 2022 is misplaced because it merely proposed settlement terms and is not a binding agreement. Further, the letters and correspondence exchanged between the applicant and the respondents are informal communications and not binding on them.

[22] Regarding the 2022 Agreement, the respondents state that no court order addresses it, as the applicant intimated. The only document that talks to settlement is the applicant's letter dated 9 December 2022, which refers to the out-of-court settlement negotiated on 18 November 2022. The respondents further rely on a WhatsApp message between the Premier and the Head of Department, in which the latter states that they shall prevail upon the applicant's attorney to ‘finalise the settlement agreement’. That message is not an agreement so argue, the respondents. In short, the respondents dispute the existence of the 2022 Agreement.

[23] The respondents submit that the 2023 Agreement was negotiated before the Labour Court's judgment. After the judgment was delivered, the parties did not engage in further negotiations. In short, the understanding is that the negotiations ended when the Labour Court ruled that it lacked jurisdiction to hear the application. The respondents argue that the failure to appeal the judgment ended the *lis* between the parties. Therefore, no settlement agreement was entered into because the Labour Court did not grant the draft order sought by agreement.

[24] The respondents argue that they were unaware of the settlement agreement negotiated by Mr. Modupi; therefore, they did not respond to the letter dated 18 November 2022. The argument goes further, stating that the applicant failed to file an affidavit explaining the terms of the negotiations and the authority under which Mr. Modupi was acting.

[25] The respondents stated that on 29 July 2024, the applicant referred a dispute with the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC), alleging that the respondents failed to sign the settlement agreement and to provide him with an employment contract. The applicant withdrew the hearing, though it was scheduled for 11 August 2025.

3. Analysis.

[26] Generally speaking, a contract is an agreement entered into by two or more people with the intention of creating legal obligations. A valid contract requires certain elements. First, the parties must agree on all material aspects of the agreement. Second, the parties must have the necessary capacity to contract. Thirdly, if the contract requires formalities, the parties must meet them. Fourth, the agreement must be lawful, that is, not prohibited by statute or common law. Fifth, the agreement must be capable of performance when entered into. Lastly, the agreement must have definite or determinable content, so that the obligations can be ascertained and enforced.ⁱ¹

[27] The applicant contends that the 2022 Agreement was made orally and later recorded in writing by email on or about 18 November 2022. The email reiterates the terms the parties agreed to, including that the applicant would withdraw the LTA, as arranged, in exchange for signing the contract. This was followed by the letter dated 9 December 2022, which set forth the contract terms and the 12-month term. Accordingly, the applicant withdrew the LTA.

[28] The respondents do not dispute the WhatsApp messages exchanged and merely note them in their answering affidavit. They also do not dispute the contents of the letter dated 16 January 2023, in which the CFO states that the

¹ 1. The Law of Contract in South Africa: Elizabeth De Stadler *et al* 4th Edition page 6. LAWSA; First Reissue, Vol. 5 Part 1, par 157, page 211.

applicant assumed duty. Furthermore, they do not deny the applicant's contention that he encountered numerous obstacles in attempting to resume duty, including being denied access to his office and not being provided with the necessary work tools. One issue is whether there was a meeting of the minds between the parties regarding the settlement of the dispute. The correspondence shows that both parties were eager to settle the applicant's employment dispute and, as such, engaged in concerted negotiations, culminating in at least three settlement agreements reached at the doors of various courts. The first led to the withdrawal of the LTA, and Mr. Modupi's letter of 9 December 2022, further supports their meeting of the minds by confirming arrangements to sign the contract. The letter states that the parties agreed to settle the employment dispute by entering into a contract, as the applicant intimated. There is no dispute about this issue. The respondents' argument that there was no agreement without a signature is incorrect. The respondents have never pleaded that the contract had to be signed first. Drawing up a contract and signing it were not requirements.²

[29] The respondents' contention that Mr. Modupi lacked authority to represent them is unpersuasive, given that the respondents are organs of state and therefore act only through their functionaries. This is further borne out by the various interactions and court appearances, during which the respondents were represented in court by their designated officials and by instructed legal representatives. They even sought to make the draft order an order of court, but for the views of Lalie J. It eludes me why the respondents argue that their legal teams were not required to bind them in dealing with the matter. This argument is opportunistic, as shown above.

[30] The respondents' argument that the agreement still had to be signed to form a contract is misleading. The parties' conduct makes it clear that they agreed to settle the matter by having the applicant return to work. The

² McWilliams First Consolidated Holdings (Pty) Ltd 1982 (1) SA 1 (A).

negotiations by their officials, the correspondence (including the referenced telephone calls) between the parties, and the withdrawal of the LTA demonstrate a meeting of the minds. The contract had been consummated, except for the reduction of the terms of the agreement. The legal basis of a contract is either consensus, that is, an actual meeting of the minds of the contracting parties, or the reasonable belief by one of the contracting parties that there is consensus.³

[31] The fact that the parties had concluded the 2022 Agreement is further supported by the CFO's letter dated 16 January 2023, which confirmed that the applicant had resumed his duties, as indeed he had. However, he stopped attending work due to the lack of support mentioned above.

[32] The second leg of the agreement is pursuant to the settlement agreement reached in the Labour Court. The draft order sets forth the terms of that agreement. Had Lalie J not raised the issue of jurisdiction, the court would have made the draft settlement an order, thereby binding the parties. Lalie J did not address the merits of the dispute, and whatever she said about them was certainly *obiter dicta* and not binding on the parties.

[33] The respondents argued, relying on *Eke v Parsons*⁴, and other Constitutional Court and High Court judgments, that an order of court is incompetent if it is contrary to the Constitution, against Public Policy, governed by legislation and unlawful, or unenforceable. This principle is trite. However, it is inapplicable here because I am not dealing with an order of court that is sought to be enforced. Furthermore, the respondents did not plead that the contract is unenforceable on those grounds. The respondents are bound by their pleadings, and the applicant was minded to address those pleadings. The *lis* between the parties turns on a contract of employment and its enforceability.

³ Contract: General Principles; Van Der Merwe *et al* 4th Edition page 17.

⁴ 2016 (3) SA 37 (CC).

[34] Having regard to the formalities of a binding contract I find that they have been met. The parties had the necessary capacity to contract. The respondents were represented by their officials and legal representatives on arriving at the agreement, as stated previously. The material aspects of the contract are not in dispute. The initial agreement was terminated by effluxion of time. Before me, the applicant seeks a fixed term contract of 12 months as agreed to by the parties. I find that the formalities necessary have been complied with. The legal requirement or formalities have been met in that the agreement between the parties is capable of performance. The obligations of the parties are clear, ascertainable and capable of enforcement.

4. Costs

[35] The respondents are liable for the costs incurred by the applicant. There is no reason to depart from the traditional rule that costs should follow the results. The issue is the scale. Both parties have agreed that the costs of senior and junior counsel should be scale C and that of the junior Counsel to be scale B. The conduct of the respondents towards the applicant is unacceptable. For the respondents to renege on an agreement each time for flimsy reasons needs to be condemned and this should be reflected in the scale of costs awarded. This is a case which reflects an abuse of the court processes at the expense of the applicant. The matter calls for costs to be awarded on scale C. I have no reason not to accede to that submission.

[36] Consequently I made the following order:

1. Directing the respondents to comply with the 2022 and 2024 settlement agreements, in terms of which the applicant is placed in the position of the Senior Manager: Fleet Management or any position equivalent thereto for a period of 12 months;
2. Directing the respondents within 30 days of the granting of this order, to:

- 2.1 conclude a written contract of employment with the applicant, which accurately reflects the terms and conditions of the applicant's return to the position of the Senior Manager: Fleet Management, or an equivalent position;
 - 2.2 permits the applicant to commence and fully perform duties associated with the position appointed to in accordance with the terms agreed upon without hindrance, obstruction or delay; and
 - 2.3 remunerate the applicant by paying the salary and benefits enjoyed by the Senior Manager: Fleet Management or by an incumbent in a position equivalent thereto;
3. The respondents are ordered to pay the costs of this application in accordance with scale C.

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances

For the Applicant	:	Adv Salukazana & Ms Mpofu
Instructed by	:	SAKHELA INC.
For the 1 st Respondent	:	Adv Pretorius
For the 2 nd Respondent	:	Adv A.M. Maseti

Instructed by: : **STATE ATTORNEYS**

Date heard : 4 December 2025

Judgment delivered : 27 August 2026
