REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

4 March 2019
DATE

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SIGNATURE

CASE NO: 18/38649

In the matter between -

AVNET SOUTH AFRICA (PTY) LIMITED Applicant

and

LESIRA MANUFACTURING (PTY) LIMITED First Respondent

EDWIN SIBIYA Second Respondent

Application to make settlement agreement an order of court – court has no power to do so where settlement agreement not preceded by litigation – application dismissed

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JUDGMENT

S BUDLENDER AJ:

[1] This is an unopposed application to make a settlement agreement an order of court.

[2] It raises an as yet unresolved issue: may a settlement agreement be made an order of court when the agreement was reached without litigation having commenced between the parties?

Background

[3] The founding affidavit in this matter is concise. It indicates that the applicant supplies and sells electronic components throughout South Africa; that the first respondent is involved in manufacturing smart metering units and goods; and that the second respondent is a director of the first respondent. In terms of an agreement between the parties, the applicant supplied the first respondent with goods to the value of R23.59 million.

[4] The affidavit sets out that, on 12 October 2018, the parties entered into a settlement agreement in terms of which:

[4.1] the first respondent would be indebted to the applicant in an amount of R23.59 million;

[4.2] the debt would be settled in a series of monthly instalments from October 2018 to January 2020;

[4.3] the second respondent agreed to enter into a suretyship agreement binding himself as co-principal debtor with the first respondent; and

[4.4] the parties agreed to have the settlement agreement made an order of court and the first and second respondents undertook not to oppose this.

[5] There is no suggestion in the founding affidavit that any litigation preceded the conclusion of the settlement agreement.

[6] The applicant thereafter launched the present application, which was not opposed. It came before me in the unopposed motion court. It was one of two

unrelated applications on my roll in which the parties sought to have a settlement agreement made an order of court, despite the fact that there had been no preceding litigation.

[7] When the matter was called, I enquired from counsel appearing for the applicant whether I could competently grant the order sought in view of the fact that there had been no prior litigation between the parties leading to the settlement agreement. I drew the attention of counsel to a dictum in the Constitutional Court decision in *Eke v Parsons*[1] which appeared to suggest that such an order was not competent.

[8] I stood the matter down for two days to allow counsel for the applicant a chance to address full argument to me on this score. She duly made helpful and thoughtful oral submissions on the point, including drawing my attention to three unreported judgments dealing with this issue. I deal with these judgments below. Counsel for the applicant also indicated that the applicant only persisted with the application insofar as it concerned the first respondent – the applicant did not persist in the application insofar as it concerned the second respondent.

[9] After I reserved judgment, the applicant filed a supplementary affidavit in which it explained the genesis of the dispute between the parties and how the settlement agreement came to be concluded. For present purposes it is not necessary to deal with the supplementary affidavit in detail. It suffices to say that the supplementary affidavit sets out the nature of the dispute between the parties which gave rise to the settlement agreement. It records that, but for the

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[1] *Eke v Parsons* 2016 (3) SA 37 (CC) at para 25

conclusion of the settlement agreement, the applicant would have issued summons to claim payment of the amount owing.

The divergent High Court judgments

[10] As I have indicated, the applicant's counsel helpfully drew my attention to three unreported judgments dealing with the question of whether a court may make a settlement agreement an order of court, despite there being no preceding litigation.

[11] The first is the judgment of Van der Byl AJ in the matter of *Growthpoint Properties.*[2]

[11.1] That matter concerned an application seeking to have a settlement agreement made an order of court in circumstances where there was no preceding litigation between the parties.

[11.2] It was argued by the respondents before Van der Byl AJ that he had no jurisdiction to make such an order because there was no prior litigation between the parties and because there was no provision in the rules for such an order to be granted.

[11.3] Van der Byl AJ accepted that there was no provision made in the rules for such an order but took the view that this was of no moment since the court's jurisdiction was not derived from the rule.[3] Instead he relied on

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[2] *Growthpoint Properties Ltd v Makhonya Technologies (Pty) Ltd and others* NGHC Case No. 67029/2011 (12 February 2013).

[3] *Growthpoint Properties* at para 6

the court's jurisdiction in terms of section 19 of the then Supreme Court Act.[4] He held that *"although there is on the papers no dispute relating to the terms of the settlement, the Applicant seeks an order determining an existing right the order will be binding on the respondents who do not dispute the existence and terms of the settlement agreement."*[5]

[11.4] Van der Byl AJ noted that there was at one stage a dispute between the parties, albeit before any litigation was commenced between them, relating to the amount payable in respect of arrears rental. That dispute was settled via a settlement agreement which the parties agreed could be made an order of court. He added that at the stage the dispute existed, the applicant was entitled to have launched an application or institute action but that to avoid litigation and costs the parties had elected to conclude a settlement and reduce it to writing.[6]

[11.5] He held:

> *"If the court has no jurisdiction to grant an order of this nature simply because of the absence of pending proceedings, it would mean that legal proceedings would first have to be instituted, should it then be resolved and a settlement agreement is concluded, only then would the court be empowered to make such an order. This will lead to an unnecessary duplication of legal proceedings. The term 'inherent jurisdiction' refers to the court's function of securing a just and respected process of arriving at a decision and it is not a factor which*

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[4] Act 59 of 1959. The equivalent provision of the Superior Courts Act 10 of 2013 is section 21.

[5] *Growthpoint Properties* at para 8

[6] *Growthpoint Properties* at paras 12 - 13

determines what order the court may make after due process has been achieved."[7]

[11.6] He therefore proceeded to make the settlement agreement an order of court.

[12] The second and third judgments were both delivered by Van der Linde J, approximately a month apart. They are the matters of *Lodestone Investments*[8] and *National Youth Development Agency.*[9]

[12.1] Each matter concerned an application to make a written agreement an order of court, notwithstanding that there had been no prior litigation between the parties.

[12.2] In *Lodestone Investments*, the effect of the agreement at issue was that the respondents acknowledged an indebtedness in respect of arrear rental amounts and undertook to repay the amount in instalments. In *National Youth Development Agency,* the effect of the agreement at issue was that the second respondent, a natural person, guaranteed the liabilities owed by the first respondent to the applicant.

[12.3] Van der Linde J was not convinced that the court had the power to make settlement agreements an order of court where there was no prior litigation.

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7 *Growthpoint Properties* at para 14

8 *Lodestone Investments (Pty) Ltd v Muhammad Ebrahim t/a Ndimoyo Transport* GLD Case No. 5716/2016 (29 April 2016)

9 *National Youth Development Agency v Dual Point Consulting (Pty) Ltd and Ano* GLD Case No. 06982/2016 (19 May 2016)

[12.4] However, he found it unnecessary to finally decide the issue in either matter before him and declined to do so.

[12.5] In the *Lodestone* matter Van der Linde J held that it was unnecessary to decide the issue because, even if he had the power to make such an order, it was discretionary in nature and he would not have exercised his discretion in favour of the applicant. In the *National Youth Development Agency* matter, Van der Linde J held that it was unnecessary to decide the issue because there had not been service on the first respondent and the matter would in any event have to be postponed.

[13] Notwithstanding the fact that Van der Linde J declined to decide the issue, in *National Youth Development Agency* he emphasised a number of considerations which appear to me to be important and helpful regarding the proper resolution of this issue.

[14] First, Van der Linde J drew a distinction between a settlement agreement of the sort before him (and the sort before me), and arbitration proceedings. He explained:

> *"There is legislation specifically designed to the availing of the enforcement mechanisms of this court, to extra-judicial processes. That occurs under and in terms of s. 31 of the Arbitration Act 42 of 1965.*
>
> *That Act sets out in some considerable detail the prerequisites that would have to be followed before an award made under it would be made an order of court. For instance, there is required to be an arbitrator who has to conduct him/herself in accordance with a minimum standard, and the like.*

> *The point made here is that the legislature has expressly acknowledged the value of extra-judicial dispute resolution; and has respected to a significant degree party autonomy in the parties' running of that process. And it has, under those prescribed conditions, aided by the machinery of the Law in other respects, for instance the subpoenaing of witnesses lend also the enforcement arm of the Law to the process.*
>
> *If the legislature were prepared to lend the enforcement arm of the Law no matter what the underlying process; no matter how the settlement came about; no matter whether there was a fair underlying process; one would have expected explicit legislation to that effect. There is no such."*[10]

[15] Second, Van der Linde J drew attention to the primary function of the courts as being to determine disputes between parties:

> *"[I]n my view the primary function of the courts is to determine disputes between parties, whether vertically between state and an individual or whether horizontally between person and person. The notion of contempt of court for noncompliance with the court order is more compatible with the court order where the parties had first engaged the dispute resolution facilities of the courts, even if not to their final pronouncement, than when there was no attempt at all to engage them."*[11]

[16] Third, Van der Linde J expressed concern about the notion of a court assuming the role of a debt collector without its processes previously being engaged:

> *"[T]he settlement agreement is sought to be made an order of court principally to have the sword of Damocles hang over the debtor's*

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[10] *National Youth Development Agency* at paras 12 to 15

[11] *National Youth Development Agency* at para 16

head. It seeks thus to engage the court as debt collector, and that in respect of debt collection that did not first come to this court."[12]

[17] It is therefore clear that there is a sharp divergence between the approach adopted by Van der Byl AJ in *Growthpoint Properties* and the approach of Van der Linde J in *National Youth Development Agency.*

[18] I have considered whether it is necessary for me to express a view on this divergence. I have come to the conclusion that I cannot avoid doing do so, for the following reasons.

[18.1] First, the issue of the court's powers on this score arises squarely before me. On the facts of the present matter, if I do have the power to make the settlement agreement an order of court, I consider that on the facts I would not be properly exercising that discretion by refusing the application. In other words, the question of the court's powers is necessary for and central to my determination of this matter.

[18.2] Second, it appears to me to be in the interests of justice that this principled issue is dealt with. This is because it appears to be a somewhat recurrent practice that parties apply to have settlement agreements made an order of court in circumstances where there is no litigation preceding those agreements. As I have indicated, I had two such matters on my roll – which were unrelated and involved separate attorneys – and the legal representatives before me were somewhat taken by surprise by the concern that I raised. It is therefore in the

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[12] *National Youth Development Agency* at para 18

interests of justice to decide this issue, one way or the other.

[18.3] This is particularly the case as no court has yet considered how this question is affected by the judgment of the Constitutional Court judgment in *Eke v Parsons* and the judgment of the Eastern Cape Full Court in *PL v YL.*[13] As I explain in what follows, it seems to me that these two judgments have a significant effect on this issue. It is therefore necessary and appropriate to consider whether the conclusions reached in *Growthpoint Properties* remain correct in light of them.

The effect of the decisions in *Eke v Parsons* and *PL v YL*

[19] In *Eke v Parsons*, the Constitutional Court delivered a judgment dealing with the status of settlement agreements that were made orders of courts.

[20] It emphasised that that once a settlement agreement has been made an order of court, *"it is an order like any other"*.[14] Its effect is to change the status of the rights and obligations between the parties and, save for litigation that may be consequent upon the nature of the particular order, "*the order brings finality to the lis between the parties; the lis becomes res judicata".* Moreover, the order can then be enforced by contempt or other appropriate proceedings.[15]

[21] *Eke v Parsons* did not concern a settlement agreement that had been concluded without litigation having been begun. Nevertheless, in dealing extensively with

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[13] *PL v YL* 2013 (6) SA 28 (ECG)

[14] *Eke v Parsons* at para 29

[15] *Eke v Parsons* at para 31

the nature of a consent order and the circumstances in which it can be made, Madlanga J held as follows for the majority:[16]

> *"This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper.[17] A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place "relate directly or indirectly to an issue or lis between the parties".[18] Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. On this Hodd says:*
>
> > *'[I]f two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to Court to have that agreement made an order, merely on the ground that they preferred the agreement to be in the form of a judgment or order because in that form it provided more expeditious or effective remedies against possible breaches, it seems clear that the Court would not grant the application.'[19]*
>
> *That is so because the agreement would be unrelated to litigation."*

[22] On its face, this dictum appears to indicate that a court is precluded from making a settlement agreement an order of court, where that agreement was not preceded by litigation.

[23] Counsel for the applicant sought to persuade me that what was said in *Eke v Parsons* had a more limited effect.

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[16] *Eke v Parsons* at para 25

[17] Citing *PL v YL* 2013 (6) SA 28 (ECG) at para 15

[18] Quoting *PL v YL* 2013 (6) SA 28 (ECG) at para 15

[19] Quoting *Hodd v Hodd; D'Aubrey v D' Aubrey* 1942 NPD 198 at 204

[23.1] She accepted that the judgment would certainly preclude an ordinary commercial agreement without more being made an order of court. But she contended that the position was different where the parties had been engaged in a genuine dispute and had resolved the dispute via a settlement agreement shortly before the launch of litigation.

[23.2] She drew attention in this regard to the Constitutional Court's endorsement of the quotation from *Hodd* which, while dealing with the limits of the courts' powers to make an agreement an order of court, makes reference to ordinary commercial agreements.

[23.3] She also contended that the formulation of the Court's dictum appeared to allow for an agreement to be made an order of court even if it was only "*indirectly*" related to an "*issue or lis"* between the parties.

[23.4] In those circumstances, she contended, there was nothing to prevent the settlement agreement being made an order of court.

[24] In my view, this is not a correct reading of the judgment in *Eke v Parsons.*

[24.1] In this regard, it is important not to seek to read the judgment in *Eke v Parsons* as though it were a statute.[20]

[24.2] Properly understood, the approach of the Constitutional Court seems to be at odds with the approach contended for by the applicant. The Court held that "*parties contracting outside of the context of litigation may not*

[20] *Hotz v Hotz* 2002 (1) SA 333 (W) at para 8

approach a court and ask that their agreement be made an order of court". [21] That, on its face, appears to indicate that where litigation has not yet commenced, a settlement agreement may not be made an order of court.

[24.3] This is particularly so when *Eke v Parsons* is read together with the decision of the Eastern Cape High Court in *PL v YL,* which the *Eke* judgment repeatedly quotes and approves. There, in dealing with the powers of a court to make a settlement agreement an order of court, Van Zyl ADJP held as follows for the Full Court:

> *"[I]t must be competent for the court to make the settlement agreement an order. That is, it must relate directly or indirectly, to an issue or lis between the parties that is properly before the court, and in respect whereof, but for the settlement agreement, it would possess the necessary jurisdiction to entertain."*[22]

[24.4] The underlined passage is of particular significance for present purposes. It makes clear that, not only must there have been a dispute between the parties that led to the settlement agreement, but the issue or lis concerned must be "*properly before the court*" and, but for the settlement agreement, the court would have to entertain that dispute. That is not the case where a settlement agreement is concluded without litigation having been launched. In those circumstances, there is no dispute before the court at all.

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[21] *Eke v Parsons* at para 25

[22] *PL v YL* at para 15 (emphasis added)

[24.5] Moreover, the Full Court in *PL v YL* places an important gloss on the decision in *Hodd,* which decision was cited both by it and by the Constitutional Court in *Eke v Parsons*. The Full Court held that the approach in *Hodd*:

> *…is premised on the adversarial model on which dispute resolution is based in our law, namely that the court's mandate or jurisdiction is determined by the lis between the parties. The court's authority in other words does not extend beyond the issues which the action is capable of raising, and which the parties themselves have raised in their pleadings…"*[23]

[24.6] Again, this seems to me to be a strong indication that the power to make a settlement agreement an order of court is limited to those cases where there is already a pleaded lis between the parties before the Court. Outside of this context, the court ordinarily has no power to do so.

[25] I am mindful of the fact that neither *Eke v Parsons* nor *PL v YL* concerned an attempt to make a settlement agreement an order of court without prior litigation. In each case, a High Court action had been instituted before the settlement agreement was concluded.

[26] In the circumstances, the passages I have quoted from these two decision are, technically speaking, obiter dicta. They are therefore not binding on me. The dicta are however very heavily persuasive, particularly those from *Eke v Parsons* given that they are carefully considered statements coming from the highest court in the country. This is because, depending on the source, even obiter dicta may

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[23] *PL v YL* at para 24

be of *"potent persuasive force"* and may only be departed from after due and careful consideration.[24]

The proper approach

[27] After having considered the relevant authorities, I have concluded that I have no power to make the present settlement agreement an order of court.

[28] It seems to me that the approach taken in *Eke v Parsons* and *PL v YL*, while not binding on me, is correct.

[29] The practice of making a settlement agreement an order of court has a long history in common law.[25] However, this invariably appears to have taken place where the settlement agreement was reached between parties which were already engaged in litigation. Apart from the *Growthpoint Properties* case, which I deal with below, there appears to be no judicial support for the contention that a court has a power to make a settlement agreement an order of court where litigation has not commenced by the time that the settlement agreement is concluded.

[30] This is unsurprising. The primary function of the courts is to determine disputes between parties.[26] The basis upon which a court makes a settlement agreement an order of court is therefore that there is a dispute between the parties which is already before the court and that, absent the settlement agreement, the court

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[24] *Turnbull-Jackson v Hibiscus Court Municipality and Others* 2014 (6) SA 592 (CC) at para 56

[25] *PL v YL* at para 17

[26] *National Youth Development Agency* at para 16

would have to adjudicate that dispute.[27]

[31] When the parties resolve the dispute that is before the court, the court may then (after satisfying itself that the settlement agreement is a permissible one) make the settlement agreement an order of court. Such an order of court becomes an order of court "*like any other*"[28] – there is no difference between such an order, and one granted by the court after dealing with the merits of the dispute.[29] This is a coherent and consistent approach to the manner in which courts adjudicate and give orders in the disputes before them.

[32] It is quite a different matter to allow parties who are not engaged in any litigation before the court at all to transform their agreement into court order of this type. As the Full Bench held in *Mansell* more than sixty years ago:

> *"For many years this Court has set its face against the making of agreements orders of Court merely on consent. We have frequently pointed out that the Court is not a registry of obligations. Where persons enter into an agreement, the obligee's remedy is to sue on it, obtain judgment and execute."*[30]

[33] Moreover, the misgivings raised by this court in *National Youth Development Agency*, albeit without deciding the issue, in my view have much to commend them. In particular, as Van der Linde J put it:

> *"[T]he settlement agreement is sought to be made an order of court principally to have the sword of Damocles hang over the debtor's*

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[27] *PL v YL* at para 15

[28] *Eke v Parsons* at para 29

[29] *Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others* 2017 (5) SA 508 (SCA) at para 16

[30] *Mansell v Mansell* 1953 (3) SA 716 (N) at 721.

head. It seeks thus to engage the court as debt collector, and that in respect of debt collection that did not first come to this court."[31]

[34] A breach of a court order is a serious matter. Disobedience of a court order constitutes a violation of the Constitution and can give rise to contempt proceedings, with consequences such as incarceration.[32] It does not seem permissible or appropriate for parties to be free to clothe their agreement with these consequences, in circumstances where the agreement is not resolving a matter already before the court.

[35] That leaves the contrary approach adopted by the court in *Growthpoint Properties* in support of its conclusion that it did have the power to make the agreement concerned an order of court. I am in respectful disagreement with the court's reasoning in this regard.

[35.1] In that matter, Van der Byl AJ relied on the court's jurisdiction in terms of section 19 of the then Supreme Court Act, which conferred jurisdiction on the court *"in its discretion and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination"*.[33]

[35.2] It correct, as Van der Byl AJ pointed out, that since *Ex Parte Nell* a court's power to grant a declaratory order does not depend on there being a live

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[31] *National Youth Development Agency* at para 18

[32] *Eke v Parsons* at para 64

[33] *Growthpoint Properties* at para 8

dispute between the parties,[34] albeit that the absence of such a dispute may militate against such an order being granted.[35]

[35.3] But the usual circumstances in which a declaratory order is granted without a live dispute at least involve a situation in which there is an uncertainty as to the correct legal position. As the Full Court explained in *Oakbay Investments* regarding the effect of *Ex Parte Nell:*

> *"The dictum on this requirement in Ex parte Nell is not without qualification. … The following extract from that judgment reflects the reason why the court granted the declaratory relief even though there was no live dispute between the parties:*
>
> > *"The need for such an order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and where an uncertain legal position could be contested by one or all of them. It is more practical, and the interests of all are better served, if the legal question can be laid before a court even without there being an already existing dispute."*[36]

[35.4] In a case where a settlement agreement has been reached and is sought to be made an order of court, there is inevitably no live dispute between the parties, but it is also difficult to conceive what "*uncertain legal position*" could be applicable. The very point of the application before me (and the application before Van der Byl AJ in *Growthpoint Properties)* is

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[34] *Ex Parte Nell* 1963 (1) SA 754 (A) at 759H

[35] *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another* [2019] ZACC 2 (1 February 2019) at para 82

[36] *Minister of Finance v Oakbay Investments (Pty) Ltd and Others* 2018 (3) SA 515 at para 62 (emphasis added by Full Court)

that the parties are not in dispute or a state of uncertainty about the existence of their agreement. It is on this basis that I am asked to enforce the agreement via court order. It therefore seems to me that section 21 of the Superior Courts Act[37] does not provide me with the necessary jurisdiction to make the settlement agreement an order of court.

[35.5] Van der Byl AJ was also persuaded by what he described as the "*unnecessary duplication of legal proceedings*" that would result if he declined to make the agreement an ordered of court. This is because the parties would have to first institute legal proceedings and then settle, if they wanted a court order to be granted.[38]

[35.6] I am in respectful disagreement with this approach. Even if the present application is dismissed, the settlement agreement between the parties before me is (absent some challenge to it) already a legally binding agreement. If the respondents adhere to their obligations under the agreement, there will be no need for legal proceedings or a court order at all. If they do not adhere to their obligations, the applicant will then be entitled to institute proceedings based on the settlement agreement and seek a court order requiring compliance with the terms of the agreement.

[35.7] This in my view does not produce any "*unnecessary duplication of legal proceedings*". Rather, it ensures that legal proceedings and the involvement of the court are confined to pronouncing on real disputes

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[37] The successor provision to section 19 of the Supreme Court Act.

[38] *Growthpoint Properties* at para 14

between parties or resolving legal uncertainty, but only if and when such disputes or uncertainty arise.

[36] In all the circumstances, I am of the respectful view that the decision in *Growthpoint Properties* is clearly wrong, particularly in light of the reasoning in the subsequent decisions of *Eke v Parsons* and *PL v ML*. I am therefore entitled to depart from the decision in *Growthpoint Properties.*

Conclusion

[37] For the reasons set out, I am of the view that I do not have the power to make the settlement agreement an order of court.

[38] I accordingly make the following order:

"The application is dismissed."

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S BUDLENDER
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	C. VAN DER LINDE
ATTORNEYS FOR APPLICANT	C DE VILLIERS ATTORNEYS
DATE OF JUDGMENT	4 March 2019