HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 16432/2019

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 3rd MARCH 2023

SIGNATURE

In the matter between:

MERCEDES-BENZ FINANCE AND INSURANCE, a division of MERCEDES-BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD Applicant

And

LERUMA EMMANUEL THOBEJANE Respondent

JUDGMENT

VERMEULEN AJ

[1] This matter came before me as an opposed application. The Applicant seeks relief to make a Deed of Settlement that was entered into between the parties, an order of Court. Respondent opposes the relief sought.

[2] At the hearing of this matter the Applicant was represented by Adv. Minnaar and the Respondent (Mr Thobejane) appeared in person. Although Mr Thobejane appeared in person Mr Thobejane is not a novice in the field of law. Mr Thobejane appeared before me fully robed and advised me that he was an admitted attorney practising in the division of this Court.

[3] After the matter was argued I found in favour of the Applicant and made an order in accordance with the relief contained in the notice of motion as was incorporated in a draft order which I had marked "X". My reasons are set out below.

[4] The relevant background to this application is:

[4.1] On or about the 13th of March 2019 the Applicant (as Plaintiff) instituted action proceedings[1] against Mr Thobejane (as Defendant) in this Court under the above mentioned case number;

[4.2] Both parties were apparently under the mistaken impression that the matter was duly set down for the trial to be heard on the civil trial roll for the 4th of August 2021. Neither Counsel for the Applicant

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[1] *See: Case line, p. 01 – 3;*

nor Mr Thobejane could advise why the matter was not on the trial roll that day. There is no evidence before me to explain this;

[4.3] Although the matter was not on the trial roll that day, the parties utilised their time productively, were able to compromise their disputes and on the 4th of August 2021 entered into a written Deed of Settlement. Mr Thobejane signed the Deed of Settlement on the 4th August 2021 and the Applicant on the 5th of August 2021.[2]

[4.4] It is common cause that this Deed of Settlement was entered into and signed by Mr Thobejane personally and a representative acting on behalf of the Applicant.

[4.4] On the 11th August 2021 the Applicant launched the present application.

[5] In the Written Deed of Settlement, the parties agreed to ***inter alia*** the following terms, which are material to the application before me:

"5.1 The Defendant acknowledges himself to be truly and lawfully indebted and bound unto the Plaintiff in the sum of R1 461 966.45 together with interest, at the contractually agreed upon rate and costs as well as administrative charges (the full outstanding balance);

5.2 The Defendant shall be liable for all of the Plaintiff's legal costs on a party and party scale. The Defendant consents to the legal costs

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[2] ***Deed of Settlement uploaded on case line, p. 14 – 1;***

herein, being debited to the account in question as and when they become due and payable;

5.3 *The Plaintiff and Defendant consent to the Deed of Settlement being made an order of the above Honourable Court at the hearing of the matter or at any time thereafter on Application;*

5.4 *The Defendant waives compliance with the rules of Court as well as the requirements of service insofar as any application is brought to make the settlement agreement an order of Court*;

5.5 *This Agreement represents the settlement entered into between the parties in respect of Case no. 16432/2019;*

5.6 *No variation or consent or cancellation of this Agreement shall be of any force or effect unless reduced to writing and signed by all the parties;*

5.7 *The Defendant by his signature hereto, confirms that he has read the settlement Agreement and that he fully understand the contents hereof. "*

[6] If regard is had to the content of the Written Deed of Settlement it is apparent that in at least 2 places Mr Thobejane in his own hand writing amended the Deed of Settlement.[3] It is thus clear that Mr Thobejane applied his mind to the content of this document. This is borne out by the fact that each page of the Written Deed of Settlement was duly initialled by Mr Thobejane. In any event Adv Minnaar correctly submitted that the

[3] See paragraphs 2.2, 3.1.

caveat sub scriptor rule applies to the Defendant signing the Deed of Settlement.

[7] From paragraph 12 of the answering affidavit it appears that Mr Thobejane, when the present application was served upon him, was aggrieved that the Applicant intended to seek costs of the application against him. Mr Thobejane states that on receipt of the application he send an email to the Applicant's attorneys[4] stating that he did not agree with the prayers of the notice of motion as same was not agreed between the parties. Mr Thobejane requested that the notice of motion be amended, failing which Mr Thobejane would oppose the application.

[8] Mr Thobejane submits that because the Applicant did not respond to his email aforementioned, the Applicant deliberately repudiated the Deed of Settlement, which repudiation was accepted by Mr Thobejane with the result that the Applicant is no longer entitled to make the Deed of Settlement an order of court.

[9]

[9.1] Mr Thobejane again raised this issue in court. There is no merit in this ground of opposition. The Deed of Settlement in paragraph 5.1 makes provision that the Deed of Settlement be made an order of court by way of an application to this court and Mr Thobejane in clause 3.1 agreed to pay all of the Applicant's costs on a party and party scale. There is nothing ambiguous about these provisions.

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[4] Annexure "LE" to answering affidavit page 21-7 case lines.

[9.2] The fact that the Applicant did not respond to Mr Thobejane's email does not constitute a repudiation of the Deed of Settlement. On the contrary I am of the opinion that the email of Mr Thobejane did not even call for a response. It was factually and legally incorrect. There are cases where a party's failure to reply to a letter, and therefore his silence, may be taken to constitute an admission by him of the truth of an assertion contained in such letter. [5] This is not such a case.

[9.3] In addition, Mr Thobejane provided in his own email the sanction he would follow if no response was received. The Applicant could receive the email, decide that it did not agree with the content thereof and await that Mr Thobejane should follow the sanction which he himself has elected in his email at his own peri, i.e. the opposition of the present application. Such a decision would in no way affect the validity of the Deed of Settlement nor constitute a repudiation thereof.

[10] In response to the allegation that he never received a copy of the signed Deed of Settlement the Applicant in reply indicated that the signed Deed of Settlement was already uploaded onto case line on the 5th August 2022, the same date it was signed by the Applicant. Mr Thobejane as a party to the litigation had access to case lines and as I have indicated above is not a novice in the field of law but a practicing attorney of this Honourable

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[5] **See: McWilliams v First Consolidated Holdings [[[Pty) Ltd 1982(2) S A 1(A) at 10E-H; Benefit Cycle Works v Atmore 1927 TPD 524 at 530-1; Hamilton v Van Zyl 1983(4)SA 379(E) at 388E-H; Hoffmann and Zeffertt The South African Law of Evidence 4th ed 180-1.)**

Court. I am satisfied that he could have accessed the Deed of Settlement at any time on case lines since that date. Applicant also states that Mr Thobejane in any event had never requested a signed copy.

[11] Before this court Mr Thobejane raised further grounds of opposition not raised in his opposing papers. As I understood his argument[6]:

[11.1] he argued that the Deed of Settlement was conditional of being made an order of the Court on the 4th or 5th of August 2021;

[11.2] that the Deed of Settlement was conditional on the trial court on the 4th or 5th August 2021 accepting the incorporated terms in the Deed of Settlement;

[11.3] that the trial date served as a condition for the enforcement of the Deed of Settlement; and

[11.4] the Deed of Settlement was made conditional upon the approval by the court, which entails that the court at the trial of the dispute, not on application, must consider the Deed of Settlement as resolving a dispute that is before the court, approving the Deed of Settlement and making an order of court.

[12] Mr Thobejane did not raise any of these alleged conditions in his answering affidavit. This was raise for the first time in his heads of argument that were filed. In the premises the court would only be able to determine whether such conditions were applicable by determining if the parties agreed to such

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[6] *Paragraphs 9-13 of the Respondent's Heads of Argument on case line page 32-4 to 32-5*

conditions within the Deed of Settlement itself or alternatively whether such conditions could be implied.

[13] I could not find any support for these submissions within the Deed of Settlement itself. It is apparent that the Deed of Settlement itself does not contain any of the alleged conditions. As aforementioned the parties also agreed to the non-variation clause.

[14] In support of his argument in respect of the conditions, Mr Thobejane also relied on the matter of **Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd**. [7] Reference to this matter may be relevant to determine whether such conditions should be implied in the present matter.

[15] I could not find any assistance for Mr Thobejane's submissions in the Buffalo City matter. In that matter the Honourable Constitutional Court Justice Theron inter alia dealt with the duties imposed upon a court when a settlement agreement is to b e made an order of the court. It was inter alia held as follows:

> *"[22] The request for withdrawal of the application for leave to appeal is contingent upon the settlement agreement being made an order of this Court. I must first consider the terms of the settlement agreement. The effect of a settlement order is to vest the terms of the settlement agreement with the status of an order of court.**[15]***
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> *[23] This Court, in Eke, cautioned that a court should not be mechanical in its approach to making a settlement agreement an order of court. A court can only make an order that is*

[7] ***(2010) ZACC 15***

*"competent and proper" and in accordance with the Constitution and the law.**[16]** Madlanga J, writing for the majority, stated:*

> *"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. 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'.*
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> . . .
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> *Secondly, 'the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order'. That means, its terms must accord with both the Constitution and the law."*[17]

*[24] Froneman J, on behalf of the majority in ACSA, confirmed the principles emanating from Eke, and in particular that "a settlement agreement between litigating parties can only be made an order of court if it conforms to the Constitution and the law".**[18]***

*[25] There are sound reasons why a court should carefully scrutinise a settlement agreement before making it an order of court. Once a settlement agreement is made an order of court, it is interpreted in the same way as any judgment or order and affects parties' rights in the same way.**[19]** Madlanga J in Eke put the matter thus:*

> *"The effect of a settlement order is to change the status of the rights and obligations between the parties. 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(literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order."**[20]***

In addition, an order from this Court is not appealable to any other court, so this Court's pronouncement truly becomes final on the issue.

[26] .....

[27] The settlement agreement further seeks to settle not only the litigation between the parties in this Court, but two other matters before the High Court under case numbers 1158/2017 and 313/2018. This Court is not privy to the details of these cases, save for the fact that they were stayed pending the outcome of this matter and emanate from the Turnkey contract. ***The settlement agreement traverses litigation unrelated to the proceedings in this Court. In the settlement agreement, the parties are contracting on matters outside the context of the litigation in this Court. They seek to have their agreement, which in part relates to matters to which this Court has no knowledge, made an order of court. This the Court cannot do.*** *Eke explains why:*

> *"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'. 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:*
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> > *'[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.'

*That is so because the agreement would be unrelated to litigation."**[21]** (Footnotes omitted.)*

[28] This Court is not in a position to consider whether the order in respect of cases 1158/2017 and 313/2018 would be competent and in accordance with the Constitution and the law."

(highlighted emphasis added and footnotes omitted)

[16] Although I am in total agreement with the legal principles enunciated in the judgement above, it does not assist Mr Thobejane in the present application. The Constitutional Court in that matter did not deal with any "conditions" but inter alia dealt with the question when it would be appropriate for a court to make a deed of settlement an order of court and the duties of a court in considering the settlement was competent and proper.

[17] In the Buffalo City matter the Constitutional Court refused to make a settlement agreement that inter alia regulated proceedings in other courts that never served before the Constitutional Court an order of court. The facts in the present matter is completely distinguishable from the Buffalo city matter. In the deed of settlement that was presented to that Court, the parties were contracting on matters outside the context of the litigation in

that Court. They sought to have their agreement, which in part related to matters to which that Court had no knowledge, made an order of court. This the Court could not do. It was not in a position to determine whether the settlement was *competent and proper,* i.e. scrutinise the deed of settlement to determine ***inter alia*** whether it *'related directly or indirectly to an issue or lis between the parties'.*

[18] In the present matter the action proceedings have been instituted and brought to fruition in the above Honourable Court. The Deed of Settlement in the present application relates to an action in this court. On the contrary, it relates to the action instituted under the same case number. All the pleadings and process in the action proceedings have been uploaded onto case line and are accessible to the court to scrutinise if deemed necessary. This court is in the same position as a trial court would have been to determine whether the Deed of Settlement is competent and proper and that the agreement is not objectionable, that is that its terms are capable, both from a legal and a practical point of view, of being included in a court order. I wish to reiterate that the matter became settled before the matter even commenced in any trial court. Any trial court that would have been presented with the Deed of Settlement on that day would have found itself in the exact same position as this Court.

[19] In any event, due to the severe congestion of matters on the trial roll, litigation parties in civil trial proceedings in this division are encouraged to

remove matters from the trial roll if it becomes settled. Should the parties thereafter be desirous to make a settlement an order of court, litigants are entitled to bring an application as was done in the present matter. The procedure followed by the Applicant is well accepted and cannot be faulted. I am surprised that Mr Thobejane, who is an admitted attorney and who practices in this division, has frowned upon and the opposed the procedure adopted by the Applicants, particularly in circumstances where he has pertinently agreed to the procedure that was utilised.[8] If he had not the opposed the application his liability for the costs on an unopposed scale would have been the minimum.

[20] In addition, as indicated above, the parties in the Deed of Settlement specifically agreed that the Deed of Settlement may be made an order of the above Honourable Court *"at the hearing of the matter or at any time thereafter on Application"*.

[21] The Buffalo City matter does not assist to determine whether the said conditions should be implied. No other grounds have been provided or argued by Mr Thobejane from such conditions should be implied or applied. To conclude this aspect I find that no conditions as submitted by Mr Thobejane can be implied in the present matter.

[22] In the premises I find that there is no prohibition against this Court to consider and determine whether the Deed of Settlement is competent and proper and no prohibition in making it an order of court.

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[8] ***Paragraph 5.1 of Deed of Settlement***

[23] Lastly the court was requested by Mr Thobejane that in the event that the court find in favour of the Applicant to make the Deed of Settlement an order of court, that the court should order that the Applicant is not entitled to any costs for the trial date of the 4th August 2021 when the matter should have proceeded on trial but was not enrolled on the trial roll.

[24] This court is not in the position to make such an order. No evidence was placed before the court to indicate the reasons why the matter was not on the trial roll that day. It may be that the Applicant was completely blameless and the problem may have emanated in the office of the Registrar. The court will not speculate in this regard. The Court is of the opinion that the Taxing Master's discretion should not be limited in this regard and that this is an issue which the parties can properly address before the Taxing Master.

[25] In the premises the court has satisfied itself that the Deed of Settlement is competent and proper and is satisfied that the Applicant has made out a proper case for the relief in the notice of motion. I was provided with a draft order by the Applicant which draft I had marked "X" and made an order of court.

P J VERMEULEN
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 2nd March 2023
Date of Judgement: 3rd of March 2023

APPEARANCES:
Attorney for Applicant: Hammond Pole Majola Inc.
Counsel for Applicant: Adv J Minnar.
Attorney for Respondent: Botha Massyn & Thobejane.
Counsel for Respondent: In Person.