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: 26 MAY 2023

SIGNATURE

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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

J U D G M E N T : APPLICATION LEAVE TO APPEAL

VERMEULEN AJ

[1] For the ease of reference I will refer to the parties as they were cited in the main application. (Any reference to Mr. Thobejane is a reference to the Respondent in the main application).

[2] This matter initially came before me as an opposed application. In the main application the Applicant sought relief to make a Deed of Settlement that was entered into between the parties an order of Court. This application was opposed by the Respondent.

[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".

[4] Subsequently on the 3rd of March 2023 I provided comprehensive reasons for my order.

[5] The Respondent filed an application for leave to appeal against my order of the 3rd of March 2023.[1]

[6] The essence of the application for leave to appeal revolves on the ground that the Honourable Court erred by misdirecting itself:

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[1] See: Notice of Application for leave to appeal, Case line, p. 37 – 1 to 37 3

- in determining the validity and enforcement of the Settlement Agreement which is not what the Court was allegedly called upon to do by the Applicant;

- that the Applicant had only called upon the Court to grant a consent order under circumstances where the Respondent had withdrawn its consent;

- in acting as it did the Honourable Court committed an error by overreaching its jurisdiction.

- in the premises the Honourable Court erred in that the consent order was no longer a consent order in that it was imposed on the Respondent by the Court and it does not serve the purpose of settling the dispute between the parties.

[7] The application for leave to appeal was duly argued before this Court on Thursday, the 25th of May 2023. At the hearing of this application for leave to appeal the Applicant was again represented by Adv. Minnaar and the Respondent (Mr Thobejane) again appeared in person.

[8] Before me Mr Thobejane argued that because it was clear at the hearing of the main application that the Respondent withdrew its consent that the Deed of Settlement be made an order of Court, the Court could not make the said settlement an order of Court. Mr Thobejane was adamant that the consent to make the Deed of Settlement an order of court should be separated from the validity of the Deed of Settlement and had nothing to do with one another.

[9] In elaboration of this point Mr Thobejane in argument today before me submitted that he **does not dispute that the Settlement Agreement stands**. He merely

submitted that the agreement could not be made an order of Court because the Respondent had withdrawn its consent.

[10] In its Heads of Argument Mr Thobejane formulated his main argument as follows:

> *"6. The applicant argues that the court, once it was placed in a position to confirm that the applicant opposes the application to make the settlement agreement a consent order of court, the court was therefore not entitled to grant a consent order where the consent is placed in dispute.*"

[11] In support of this submission the Applicant relied on the constitutional judgement in ***Eke v Parsons***[2]*.*

[12] Mr Thobejane referred me to paragraphs 25 and 26 of the ***Eke*** judgement supra that read as follows:

> *"[25] 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'. 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.'*
>
> *That is so because the agreement would be unrelated to litigation.*
>
> *[26] 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.*

[2] *2016(3) SA 37 (CC) at para. 25 and 26*

Also, they must not be at odds with public policy. Thirdly, the agreement must 'hold some practical and legitimate advantage'. "

[13] I am in full agreement with the requirements as was determined by the Constitutional Court in the ***Eke*** matter aforementioned. Neither one of these passages to which the Court was referred to by Mr Thobejane nor any other portion of that judgment, however, assists the Respondent in the arguments presented to the Honourable Court in the present application for leave to appeal.

[14] On the contrary, the Deed of Settlement which the Applicant wished to make an order of Court in the present application complied with all three of the requirements as provided for in paragraphs [25] and [26] of the ***Eke*** judgment.

[15] Mr Thobejane also referred this Court in support of his submission to the matter of ***AvW v SvW & Others*** [3]. In particular Mr Thobejane referred the Court to paragraph [12] of the said judgment that reads as follows:

"[*12]* *In this matter the First Defendant, based on the papers before me, signed the consent paper whilst being legally represented and had no issue with the contents of the consent paper for a period of almost 3 months. Only days before the matter was to be finalised on the opposed roll the First Defendant consulted another attorney and raised the very technical, and to some extent convoluted reasons, as to why the matter should not proceed to trial and not be finalised based on the consent paper. Whilst I have some doubt as to whether the First Defendant would succeed with her contentious as set out in her affidavit and proposed amendments to her counterclaim, a trial court would be the appropriate forum to determine these issues.*"

[3] *(3118/2021)(2022) ZAWCHC74*;

[16] Some of the "*issues*" referred to in paragraph [12] of that judgement were ***inter alia*** discussed by the Court in paragraph [6.1] of that judgment and *inter alia* related to the following:

[16.1] The agreement did not satisfactory make a provision for the maintenance needs of the parties' minor son;

[16.2] The Defendant believed that the Plaintiff had not disclosed the correct values of the assets held by various Trusts which the parties had agreed should form part of their respective estates;

[16.3] The Defendant believed the proprietary award was less than that was due to her; and

[16.4] The Defendant had waived her claim for personal maintenance while being unable to support herself and did not know what she was waiving.

[17] The defence in paragraph 16.2 above refers to some type of misrepresentation and the defence in 16.4 to some sort of ***error***. The exact details are not disclosed. It is thus clear, that in the said matter the Defendant in that matter attacked the validity of the Deed of Settlement itself by ***inter alia*** alleging misrepresentation and ***error.*** Should the Defendant have been successful with these contractual defences it would result in the Settlement Agreement being set aside. It is understandable that the court found that the nature of those defences could not be decided on paper but only at a trial. For this reason and various other the said judgement is clearly distinguishable.

[18] This is not the position in the present matter. In the present matter Mr Thobejane accepts and even submits that the Settlement Agreement is valid and stands.

The validity of the agreement is not attacked. He merely wishes to argue that he had a change of mind at some stage and no longer consents to the Settlement Agreement being made an order of Court. That his withdrawal of consent was clear from the opposition of the main application per se.

[19] The ***AvW v SvW*** judgement renders no support for the Respondent's submissions before me today. In any event in ***AvW v SvW*** the Court placed substantial reliance upon the majority judgement in the matter of ***Maswanganyi v Road Accident Fund***[4] to arrive at its decision.[5] The majority judgments in ***Maswanganyi v Road Accident Fund*** was however overturned by the Supreme Court of Appeal in ***Road Accident Fund v Taylor & Others***[6]. In the premises the said judgment was also overturned.

[20] In the present matter the Applicant approached the Court to make a Deed of Settlement an order of Court where one of the terms of the Deed of Settlement, agreed upon between the Applicant and the Respondent is that the Applicant may approach the Court to make the Deed of Settlement and order of Court. As I have already indicated above, the Respondent does not dispute the validity of the Deed of Settlement, does also not dispute the validity of this term.

[21] The Court could not merely ignore this term that is contained in the Deed of Settlement because Mr Thobejane had a change of heart.

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[4] *2019 (5) SA 407 SCA*

[5] *See: para. [25] to [28]*

[6] *Neutral Citation (1136/21); 1137/21; 1138/21; 1139/21; 1140/21; (2023) ZASCA 64 (8 May 2023), a judgment by Appellate Justice van der Merwe (with whom Saldulker & Meyer JJA & Kathree-Setilone and Olsen AJJA concurred) See paragraphs [37] read with paragraphs [43], [48] to 49.*

[22] The principle of ***pacta sunt servanda***[7] applies.

[23] In ***Barkhuizen v Napier***[8] in the majority judgment of Ngcobo J. he emphasised that public policy requires the contractual obligations freely and voluntarily undertaken should be honoured, precisely because this requirement gives effect to the central constitutional values of freedom and dignity. This emphasis is entirely harmonious with the approach by the Supreme Court of Appeal to the same question in *inter alia*, ***Brisley v Drotsky***, ***Afrox Healthcare Limited v Strydom***[9]***, South African Forestry Co. Ltd v York Timbers Ltd*** [10]***, Bredenkamp v Standard Bank***[11]***, Law Society of the Northern Provinces v Mahon***[12] and ***Potgieter & Another v Potgieter NO & Others***[13]

[24] It is noteworthy that in the arguments presented in opposition of the main application the Respondent did attempt to attack the validity of the Deed of Settlement by alleging a repudiation thereof by the Applicant ***alternatively*** that the Deed of Settlement was conditional and that the condition was not fulfilled. Both of these defences were duly dealt within the Court's judgment and found to have no merit. In the present application for leave to appeal Mr Thobejane did not rely on any of these findings for his application. On the contrary Mr Thobejane accepted that the Deed of Settlement was valid. The Respondent merely refuses that the Applicant give effect to the provisions of the deed of settlement by stating that he withdraws his consent that the agreement be made an order of court without any legal basis whatsoever.

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[7] *Brisley v Drotsky 2002 (4) SA (1) SCA;*
[8] *2007 (5) SA 323 (CC);*
[9] *2002 (6) SA 21 (SCA);*
[10] *2005 (2003) SA 323 SCA;*
[11] *2010 (4) SA 468 (SCA*);
[12] *2011 (2) SA 441 (SCA)*;
[13] *2012 (1) SA 637 (SCA);*

[25] Of relevance is finding of the Supreme Court of Appeal in ***Road Accident Fund v Taylor*** in paragraph [51] where it held as follows:

> *"[51] To some up, when the parties to litigation confirmed that they have reached a compromise, a court has no power or jurisdiction to embark upon an enquiry as to whether the compromise was justified on the merits of the matter or was validly concluded. When a court is asked to make a settlement agreement an order of court, it has the power to do so. The exercise of this power essentially requires the determination or whether it would be appropriate to incorporate the terms of the compromise into an order of court."*

[26] It is evident from my judgement that I was satisfied that it was *appropriate to incorporate the terms of the compromise into an order of court.*

[27] I am not satisfied that the Respondent has succeeded in indicating that in terms of Section 17 of the Superior Courts Act, Act 10 of 2013:

[27.1] that this appeal would have a reasonable prospect of success; or

[27.2] that there is some other compelling reason why the appeal should be heard.

[28] In the premises the application for leave to appeal is dismissed.

[29] In respect of costs the following:

[29.1] In ***Public Protector v South African Reserve Bank***[14] the majority of the Constitutional Court, with reference to ***Orr v Schoeman***[15] stated at 318 C – 319 A as follows:

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[14] *2019 (6) SA 253 (CC);*
[15] *1907 TS281*

"*More than 100 years ago, Innes CJ stated the principles that cost on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct, vexatious conduct, and conduct that amounts to an abuse of the process of court*."

[29.2] In the present matter the Court is of the opinion that there is no merits whatsoever in the application for leave to appeal and that it is clear that the said application is a contrived attempt to delay the Applicant from executing upon its valid judgment.

[29.3] In this sense the conduct of the Respondent in bringing the application for leave to appeal amounts to an abuse of the process of the Court.

[29.4] The Courts have awarded costs against a losing party on an attorney and client basis where a defence was raised that was dishonest and only for the purposes of gaining time.[16]

[29.5] It has even been held that an abuse of the process of Court may form the basis of an award of costs on an attorney and client scale, although the intent may not have been such.[17]

[29.6] I am satisfied that the actions of the Respondent in bringing the present application for leave to appeal justify an order of costs on a penalising scale. Not only was there no merit in any of the defences raised by the

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[16] *SASS v Berman 1946 WLD 138; Wool Textiles Manufactures v Goldberg 1952 (4) SA 116 (W);*

[17] *See: In re: Alovial Creek Ltd 1929 CPD 532; Lemore v African Mutual Credit Association 1961 (1) SA 195 (C); Marsh v Odendaalrus Cold Storages Ltd 1963 (2) SA 263 (W) at 270; Phase Electric Company (Pty) Ltd v Zinmans Electrical Sales (Pty) Ltd 1973 (3) SA 914 (W);*

Respondent in opposition to the main application, but after the main application was dismissed in favour of the Applicant, the Respondent came to Court with the present application for leave to appeal where he did not rely on any of the findings in respect of the dismissal of his defences raised in the main application but raised a new ground being that consent was withdrawn. Not one cogent reason could be provided why the Court should not give effect to the provisions of the Deed of Settlement that was validly entered into between the parties and which agreement the Respondent admitted during the present proceedings still stood unaffected. It is clear that the present application for leave to appeal constitutes an abuse of the process of the Court and was merely a step taken to delay finality in the proceedings.

[30] In the premises the following order is made:

1. The application for leave to appeal is dismissed;

2. The Respondent in the main application (Applicant in the application for leave to appeal) is ordered to pay the costs on a scale as between attorney and client.

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P J VERMEULEN

Appearances

Counsel appearing on behalf of Applicant	Mr Thobejane
in application for leave to appeal:	
Attorney for Applicant:	Botha, Massyn and Thobejane attorneys

Counsel appearing on behalf of 1ST Respondent:	ADV. J Minnaar
in application for leave to appeal:	
Attorney for respondents:	Hammond Pole Majola Inc.

Date of Hearing:	25th May 2023
Judgment delivered:	26th May 2023