REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case nos: JS 94, 95, 96, 97, 98/2011

In the matters between:

G J C MYBURGH & others	**Applicants**
and	
MINISTER FOR PUBLIC SERVICE & ADMINISTRATION	**First Respondent**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Second Respondent**
GOVERNMENT EMPLOYEES PENSION FUND	**Third Respondent**

Heard: **4 February 2015**
Delivered: **26 February 2015**

Summary: Application to make settlement agreement order of court. Agreement accepted by state attorney, signed by first respondent, disputed by second respondent. *Quaere*: whether agreement is binding on second respondent.

JUDGMENT

STEENKAMP J

Introduction

[1] Five applications served before this Court to make a settlement agreement in respect of five different applicants in different cases orders of court in terms of s 158(1)(c) of the Labour Relations Act.[1] The applicants in each case were represented by the same attorneys and counsel. The respondents in each case are the Minister for Public Service and Administration; the Minister of Justice and Constitutional Development; and the Government Employees Pension Fund, respectively. The latter (the third respondent) is cited only because it has an interest in the outcome. The first respondent, the Minister for Public Service and Administration, is represented by the State Attorney. It abides the judgment of this Court. The second respondent—the Minister of Justice and Constitutional Development – is, surprisingly, not represented by the State Attorney but by private attorneys and counsel. The second respondent opposes the relief sought. The parties all agreed that the Court should hear one matter (under case number JS 94/2011) and that the outcome will be binding on the other four disputes.

[2] The second respondent was represented by the state attorney at the time the settlement agreement was concluded. But he contends that he had not mandated the state attorney to settle the various disputes on his behalf; that he did not sign the agreement; and that he is not bound by it.

Background facts

[3] The applicant in this (test) case was a principal state law adviser employed by the state in the Department of Justice and Constitutional Development until he retired. He, like the applicants in the other four cases, instituted litigation against the first and second respondents. It arose from the implementation of an Occupation Specific Dispensation that would entail financial benefits for the applicants. The state attorney acted for both respondents.[2] The attorney in that office responsible for the

[1] Act 66 of 1995 (LRA).

[2] Where I refer to “both respondents”, I mean the first and second respondents.

litigation, Mr L Kopman, engaged in settlement negotiations with the applicants' attorney, Mr Ian Weir-Smith.

[4] Mr Kopman, for the Office of the State Attorney and on behalf of both respondents, sent Mr Weir-Smith a settlement proposal together with a draft settlement agreement in respect of the various disputes on 8 April 2011. The applicants made a counter-offer. The state attorney, acting for "the respondents", rejected it on 2 August 2011. On 19 August 2011 the applicants accepted the original offer contained in the state attorney's letter of 8 April 2011 and set out in detail in the written settlement agreement.

[5] An authorised representative of the first respondent signed the settlement agreement. In the heading to the agreement, both respondents are reflected as being parties to the agreement. It deals with the introduction of an "Occupation Specific Dispensation" for legally qualified employees in the public service and in the Department of Justice and Constitutional Development. In terms of that agreement, the second respondent would make certain payments, to be verified by the first respondent, to the applicants.

[6] The chief director: legal services in the Department of Public Service and Administration, Adv S M van Schoor, sent the agreement – signed by the first respondent – to Mr Dick Muzwayine, a director for human resources in the Department of Justice and Constitutional Development, stating:

> "Herewith please find the original settlement agreements in each of the above matters signed by the Minister for the Public Service and Administration. Kindly attend to obtain signatures thereon on behalf of the Minister of Justice and Constitutional Development and return to us."

[7] Mr Muzwayine was present in the without prejudice meeting on 28 March 2011 where messrs Kopman (of the state attorney's office) and Weir-Smith discussed settlement of the disputes, leading to Kopman's settlement proposal of 8 April 2011 that the applicants accepted. The state attorney acted on behalf of both the respondents at that stage.

[8] On 28 September 2011 Muzwayine wrote to a number of the applicants by email, stating:

> "I have received the settlement document from the DPSA yesterday. You [i.e. the applicants] are requested to contact me to make arrangements so that you can read through the document for you to decide on signing the agreement. The DPSA has signed the document on behalf of the MPSA." [i.e. the Minister].

[9] Some confusion ensued. One of the applicants, Pierre van Wyk, wrote back to Muzwayine after having received the agreements. He noted that Ms van Schoor had remarked in her covering letter that the second respondent "must also sign and then the settlement must come back to her". In a later email he suggested "that the settlement agreements duly signed by the respondents be forwarded to Empie [Adv van Schoor] to forward to the State Attorney for submission to our attorney, Mr Ian Weir-Smith". Muzwayine, on the other hand, indicated his understanding "that we have to obtain the signature of DOJ [*sic*] after you [the applicants] have signed the settlement to indicate your acceptance".

[10] The applicants asked for the calculation of the settlement amounts. Muzwayine had a change of heart. On 4 October 2011 he wrote to them again and said:

> "I think I made a mistake by giving you the settlement documents. Pierre please return them for us to present to the minister for signature. You were at the beginning right that you have to wait for our Minister to sign first."

[11] Time passed. Weir-Smith repeatedly wrote to Kopman, asking for the signed agreements, over a period of five months. Out of the blue, on 22 February 2012, the second respondent's new attorneys of record, Mpoyana Ledwaba Inc, entered the fray for the first time. They wrote to Weir-Smith and said that they were now instructed to act for the second respondent in all the underlying disputes. They filed a notice of appointment as attorneys of record five days later, on 27 February 2012. It initially referred to their appointment for "the plaintiff". They eventually corrected that seven months later, on 27 September 2012, to reflect "the 2nd respondent".

[12] On 4 May 2012 Weir-Smith wrote to Mpoyana Ledwaba and noted that the state attorney was on record in the litigation in this Court as well as the High Court. He further noted:

> "In the circumstances, could you kindly advise as to whether it is your offices, or those of the state attorney, who are now acting on behalf of the Minister of Justice & Constitutional Development.
>
> With regard to the status of these cases, our clients and our offices are of the view that the matters are settled. Although the first respondent has already signed the settlement agreements, neither our offices nor our clients, despite repeated requests, have been provided with copies of the settlement agreements as signed by the Minister for Public Service & Administration and signed by the Minister of Justice & Constitutional Development.
>
> We can accordingly advise that we hold instructions to proceed with applications to have the settlement agreements made orders of court, which applications will be delivered shortly."

[13] Mpoyana Ledwaba replied and said that they act for the second respondent. They expressed the view that the matter is not settled as their client had not signed the settlement agreement. Weir-Smith responded, reiterating that the state attorney was on record for the second respondent, but agreeing, as a matter of courtesy, to serve this application on Mpoyana Ledwaba. He did so on 26 July 2012. The second respondent, now represented by the new attorneys, oppose the application. The first respondent, still represented by the state attorney, does not. The state attorney only withdrew as attorney of record on 8 August 2012.

Evaluation / Analysis

[14] Has the dispute been settled? The applicants say that it has, and the first respondent appears to accept it. The second respondent does not.

[15] The second respondent argues that the agreement was subject to his signing it. Mr *Rip* argued that the second respondent had to first consider the proposed settlement agreement and indicate concurrence with it by signing it before a final settlement agreement could have come into place.

He also points to the following terms of the settlement agreement that was signed by the first respondent but not by the second respondent:

15.1 Clause 3.2 records that the agreement "is entered into and signed[3] by the parties without admission of any liability by either party".

15.2 Clause 4 contains a non-variation clause, including the provision that no variation will be effective "unless reduced to writing and signed by, or on behalf of, both [*sic*] parties".

15.3 It is recorded that "the signatories to this agreement warrant that they are duly authorised to represent the parties affected by the agreement."

[16] From these clauses Mr *Rip* argues that the parties intended a signed written agreement at all times.

[17] As to the agreement reached by Messrs Weir-Smith and Kopman, Mr *Rip* argued that it was simply not in line with the actual terms of the written document. He maintains that all of the parties to the settlement agreement intended it to reflect their agreement and that it could only take effect once signed by all the parties. Because Kopman did not sign the agreement on behalf of the second respondent, he argues, no agreement binding the second respondent came into existence.

[18] Mr *Van der Merwe*, on the other hand, pointed out that the second respondent does not dispute that Messrs Weir-Smith and Kopman reached consensus on the terms of the settlement agreement; and that it is common cause that the second respondent had instructed the state attorney to act on his behalf in the litigation instituted by the applicants.

[19] An attorney has the ostensible authority to conclude a settlement agreement on his or her client's behalf. Once clothed with such ostensible authority, it is irrelevant that the attorney did not have the client's actual mandate to conclude a settlement agreement.[4] The exception – where the other party induced the agreement by misrepresentation – does not arise in this case.

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[3] His underlining.

[4] *Hlobo v Multilateral Motor Vehicle Accident Fund* 2001 (2) SA 59 (SCA) par 10-11.

[20] An important further consideration in this case is that the applicants rely on the ostensible authority of the state attorney. It is common cause that the state attorney acted on behalf of both respondents up to the point of settlement. The Supreme Court of Appeal has held that the state attorney has an even wider general authority than an ordinary attorney, as the state attorney derives its authority from statute. Thus, even if a senior government official is unaware of and has not expressly approved of a settlement agreement, it does not entitle the government to avoid that agreement.[5]

> "The proper approach is to consider whether the conduct of the party who is trying to resile from the agreement has led the other party to reasonably believe that he was binding himself. Viewed in this way it matters not whether the attorney acting for the principal exceeds his actual authority, or does so against his client's express instructions. The consequence for the other party, who is unaware of any limitation of authority, and has no reasonable basis to question the attorney's authority, is the same. That party is entitled to assume, as the respondents did, that the attorney who is attending the [pre-trial] conference clothed with an 'aura of authority' has the necessary authority to do what attorneys usually do at a [pre-trial] conference – they make admissions, concessions and often agree on compromises and settlements. In the respondents' eyes the State attorney quite clearly had apparent authority."[6]

[21] The same holds true for the case before me. The state attorney, represented by Kopman, acted for both respondents when they entered into the settlement agreement. There was no doubt in his mind that the dispute had been settled. It is on that basis that the first respondent signed the agreement. Conspicuous by its absence is also any affidavit by Kopman disputing his authority to act on behalf of the second respondent at the time. In all the circumstances, the applicants were entitled to rely on the state attorney's authority to settle the dispute on behalf of both respondents. The agreement is binding.

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[5] *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2010 (4) SA 122 (SCA) paras 9-20.

[6] *Kruizenga (supra)* para 20 [per Cachalia JA].

[22] The fact that the second respondent did not sign the settlement agreement does not, in the circumstances, invalidate it. As Innes CJ held in *Woods v Walters*[7]:

> "The broad rule is that writing is not essential to the validity of a contract. The consensus of parties need not be so evidenced. There are certain definite exceptions to that rule, but none which affect the present dispute. The parties may of course agree that the contract shall not be binding until reduced to writing and signed, and if they so agree there will be no vinculum between them until that has been done. But the mention of a written document during the negotiations will be assumed to have been made with a view to convenience of record and facility of proof of the verbal agreement come to, unless it is clear that the parties meant that the writing should constitute the contract. That was the rule laid down by this court in *Goldblatt v Fremantle* (1920 AD 128) and it is based on ample authority. It follows of course that where the parties are shown to have been ad idem as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed until the due execution of a written document, lies upon the party who alleges it."

[23] Even though the written agreement in this case refers to "signatories" and makes provision for both respondents to sign it, it simply embodies the agreement already reached between the state attorney and the applicants' attorney.

Conclusion

[24] In all these circumstances, I am persuaded that the settlement agreement is binding on the second respondent.

[25] The applicant also asked for ancillary relief flowing from the settlement agreement. It will be prudent to grant that relief. Failing to do so will only lead to further litigation and further unnecessary costs.

[26] With regard to costs, I take into account that all five cases forming the subject matter of the present dispute are essentially identical. As long ago as November 2012, Mr Weir-Smith proposed to Mpoyana Ledwaba that

[7] 1921 AD 303. See also *Pillay v Shaik* [2009] 2 AllSA 435 (SCA); *SOS-Kinderdorf International v Effie-Letin Architects* 1991 (3) SA 574 (Nm).

only one matter be set down for hearing, with the result in that matter to be applied equally to the other four, with a view to saving costs. The second respondent refused. It is only on the day that all five matters were set down for hearing that the second respondent's legal representatives agreed to the sensible approach suggested to them more than two years earlier. The second respondent must be held liable for the costs in each application.

Order

I therefore grant an order in the following terms:

26.1 The settlement agreement dated 22 September 2011 (annexure "L" to the founding affidavit is made an order of court.

26.2 The respondents are ordered to provide to the applicants the quantified settlement amounts, together with their calculations, as well as the calculations of the pay progression referred to in paragraphs 2.2, 2.3 and 2..4 of the settlement agreement.

26.3 The second respondent is ordered to pay the applicant's costs in each application.

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Steenkamp J

APPEARANCES

APPLICANT:	F van der Merwe Instructed by Martins Weir-Smith.
SECOND RESPONDENT:	M M Rip SC (with him M B Matlejoane) Instructed by Mpoyana Ledwaba Inc.