IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/544/2020**

In the matter between:

MOJALEFA SOLWANDLE **PLAINTIFF**

AND

SECURITY LESOTHO (PTY) LTD **DEFENDANT**

Neutral Citation: Mojalefa Solwandle v Security Lesotho (Pty) Ltd. (CIV/T/544/2020) [2021] LSHC 41 (06 MAY 2021)

JUDGMENT

CORAM: **MOKHESI J**
DATE OF HEARING: **31 MARCH 2021**
DATE OF JUDGMENT: **06 MAY 2021**

SUMMARY

CIVIL PRACTICE: *Enforcement of a deed of settlement reached before the DDPR through summary judgment procedure- the defendant raising a point in*

limine of jurisdiction, the argument being that the enforcement of the settlement agreement can only be done before the Labour Court as a specialised court in terms of s.34 of the Labour Code Order 1992 or before the Commercial Court- Held, the matter involves an enforcement of contract which the High Court has jurisdiction over, and has nothing to do with the employer-employee relationship- The defendant further raising a defence to the settlement agreement which should have been raised before the DDPR- Held, the defendant not allowed to raise defences to the original cause of action when sued on the compromise.

ANNOTATIONS:

Legislation:

Labour Code Order 1992

BOOKS:

Van Loggerenberg, **Superior Court Practice 2nd Ed. Service 3, 2016**

Heinrich Schulze **et al General Principles of Commercial Law 8th ed. Juta**

Cases:

Boliba Multi-Purpose Cooperative v 'Mamolise Lelosa CIV/APN/363/2015 (unreported, dated 03rd June 2019)

Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)

Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport) 1986 (3) SA 654 (c)

Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C.P.D)

Hamilton v Van Zyl 1983 (4) SA 379

[1] **Introduction.**

This is an application for summary judgment. The parties will be referred as they are in the summons, for purposes of convenience. The plaintiff was the defendant's employee and had resigned. A dispute about terminal benefits due to him by the defendant arose, and it was conciliated by the Directorate on Dispute Prevention and Resolution (DDPR). It is during that process that both the plaintiff and the defendant duly represented entered into a settlement agreement in terms of which the defendant undertook to pay the former an amount of M48,154.04 in fourteen equal monthly instalments of M3,439.58 from the end of November 2019 until final payment.

[2] The defendant did not honour its side of the bargain, thereby prompting the plaintiff to sue out summons from this court claiming payment by the former the amount of M43,654.04 plus interest calculated at the rate of 15% per annum from June 2019 to the date of payment. The defendant filed its Notice of Appearance to defend and in response, the plaintiff filed the current application for summary judgment. In reaction to this application, the defendant filed an answering affidavit in terms of which it raised two points in *limine* all related to jurisdiction of this court to hear this matter. I now turn to deal with these points *in limine*.

[3] **Points in *limine***

It is the defendant's contention that this court does not have jurisdiction to enforce the settlement agreement concluded between itself and the plaintiff. The argument goes that only the Labour Court in terms of S. 34 of the Labour Code 1992 can enforce the settlement agreement concluded in this context (labour dispute context). Allied to this is the argument that

the summons ought to have been instituted in the Commercial Court as the course of action is a contract.

[4] These arguments are without any merit and ought to be dismissed. The same argument was raised and rejected by this court in a matter which was similar to the current one in **Boliba Multi-Purpose Cooperative v 'Mamolise Lelosa CIV/APN/363/2015 (unreported, dated 03rd June 2019)** at para. 12 where the following was said:

> *"[12] With regard to settlement agreement stemming from an employment dispute being questioned before ordinary courts as against the Labour Court, the Court in* ***Food Workers Council of SA and Others v Sabatino's Italian Restaurant (1996) 17 ILJ 197 (IC) para. 202*** *said:*
>
> *'It is therefore clear that the dispute concerns the settlement agreement and actions subsequent to the conclusion of the agreement. The dispute does not concern the original employer – employee relationship. I agree with the view held in* ***Van Staden v Busby Sawmills (Pty) Ltd at 1102 A – B*** *that settlement agreement of this nature constitutes a compromise. The compromise has the effect of res judicata and is the original cause of action, viz, the applicant is accordingly confined to her remedies on the settlement agreement. These remedies have to be sought in the ordinary courts as the Industrial Court does not have jurisdiction over disputes not arising from an employer – employee relationship, but from a contract of a different nature.'*
>
> *This decision was followed in* ***Lesotho National Federation of Organization of the Disabled v Mojalefa Lobhin Mabula and Another LAC/CIV/A/07/2010 (unreported at para. 11****; and I am in full agreement with the sentiments expressed in these two decisions…"*

[5] **The Merits.**

This application was brought in terms of Rule 28 (1) (b) of the High Court Rules 1980, which permits the plaintiff to apply for a summary judgment for a liquidated amount in money together with any claim for interest and costs. The defendant who is faced with an application for summary judgment may invoke either Rule 28 (3) (a) or (b), and in this case the defendant chose the latter route. Rule 28(3) provides that:

> *"(3) Upon the hearing of the application for summary judgment, the defendant may –*
>
> *(a) give security to the plaintiff to the satisfaction of the Registrar for any judgment including such costs which may be given; or*
>
> *(b) satisfy the court by affidavit, or, with leave of the court, by oral evidence of himself or of any other person who can swear positively to the fact, that he has a bona fide defence to the action.*
>
> *Such affidavit shall be delivered before noon not less than two court day before the hearing of the application. Such affidavit or oral evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."*

[6] What constitutes compliance with Rule 28 (3) (b) was stated in the famous decision in **Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426 A – D** wherein Corbett, JA said:

> *"Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or*

new facts are alleged constituting a defence, the court does not attempt to decide these issues or determine whether or not there is a balance of probabilities in favour of one of the party or the other. All that the court enquires into is: (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully" as used in the context of the rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that , while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit disclose a bona fide defence."

[7] The purpose of this procedure is not to foreclose the defendant from mounting a deserving and well-founded defence to the plaintiff's claim, it rather permits the plaintiff to get a quick judgment without the need for going the route of resource – consuming trial where the defendant does not have a *bona fide* defence to the claim:

> *"The procedure is intended neither to give the plaintiff a tactical advantage in the trial nor to provide a preview of the defendant's evidence or to limit the defences to those disclosed in the affidavit opposing summary judgment …."* **(Van Loggerenberg, Superior Court Practice 2nd Ed. Service 3, 2016 D1 – 384)**

[8] It often happens that the defendant may, in his/her answering affidavit, in a less than ideal way set out the case opposing the granting of a summary

judgment. In that case the court is enjoined to have regard to the defendant's affidavit as a whole to determine whether the defence has been disclosed. Minor defects in the affidavit will be forgiven, however what will not be forgiven is a failure to disclose information supporting the defendant's defence. Thus, in **Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport) 1986 (3) SA 654 (c) at 659 C – H;**

> *"The discretion must be exercised judicially and upon the information which is before the court. The court must guard against speculation and conjecture and be astute not to substitute these for the actual information which has been placed before it. (citation omitted) where the facts before the court raise a doubt as to whether the plaintiff's case is what has been described as "unanswerable summary judgment should be refused (citations omitted).*
>
> ***….Where there is an absence of the necessary allegations upon which a defence can be founded, it would be contrary to a judicial approach to exercise a discretion against the plaintiff and in favour of the defendant."(emphasis added)***

[9] Where the defendant has complied with Rule 28(3) (b) by deposing to an affidavit in which he discloses a *bona fide* defence, the Court is bound by Rule 28 (5) to refuse summary judgment. But in a situation where the defendant has failed to find security or to satisfy the court (in compliance with Rule 28 (3)), in terms of Rule 28(6), the court has a discretion whether to grant summary judgment : See; **Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C.P.D) at 303 H – 304 E** wherein Corbett, J., at 304 F – G, said the following regarding the factors to be considered when exercising the discretion envisaged in Rule 28 (6):

"In my view, an important factor to be taken into account by the court in determining how to exercise its discretion is the consideration that the procedure of summary judgment constitutes an extraordinary and very stringent remedy: it permits a final judgment to be given against a defendant without a trial. It is designed to prevent a plaintiff having to suffer the delay and additional expense of the trial procedure where the defendant's case is a bogus one or is bad in law and is raised merely for the purpose of delay, but in achieving this it makes drastic inroads upon the normal right of a defendant to present his case to the court."

[10] I now revert to the case as framed by the defendant in opposing summary judgment. As already said, the plaintiff's claim is the enforcement of a settlement agreement concluded between himself and the defendant. The defendant resists the application for a summary judgment in para.14 of its answering affidavit as follows:

"-4-

AD PARAGRAPH 5 THEREOF: -

Bona Fide Defence

Contents herein are denied and Applicant is put to proof thereof. I aver that the Respondent has a bona fide defence because the settlement relied on in the summons was involuntarily reached and or coerced. Furthermore I aver that the settlement was not reached within the confines of the law as the claims in the referral had long prescribed in terms f the Labour Code and no application for late filing of the referral had been filed nor heard on the date the settlement was reached."

[11] This is about all the defendant says about its defence to the main action. There are two issues which arise from the above excerpt, *viz*, (a) that the settlement agreement was reached after the defendant's representative was coerced, (b) the defendant, despite the existence of a settlement agreement,

seeks to go behind it by raising issues which should have been raised on the merits. I deal with these issues in due course. A settlement agreement is a contract, and like any contract, contract may be invalidated in circumstances where it was concluded based on duress (*metus*). Duress may take the form of either infliction of physical violence on the contractant or inducing in such a contractant a fear by way of threats, to conclude the contract. Duress can be implicit, tacit or by conduct. A person who concludes a contract induced by duress actually concludes a contract, and the law treats such contract as voidable in the sense that it is open to the threatened contractant to either rescind or uphold it. The situation is however different where a contractant's hand is physically forced to sign a contract. In such a case that contract is *void ab initio* (Heinrich Schulze et al **General Principles of Commercial Law 8th ed. Juta. p. 66).**

[12] For a party to be able to resist the enforcement of a contract on the basis of duress the following elements must be established:

(a) The party must objectively establish actual violence or a reasonable fear of violence or damage;

(b) The threat must be imminent or inevitable evil;

(c) The threat of harm or violence must be unlawful or *contra bonos mores*;

(d) The duress must be induced in the contracting party by the other contracting party;

(e) The threat to the contracting party or his family must have caused him to conclude the contract. (see **Heinrich Schulze et al** *ibid* at p.66**).**

[13] It takes no rocket scientist to see plainly that in the instant case, the defendant's affidavit falls awfully short of what is envisioned by Rule 28(3). The defendant has merely contended itself with stating the defence without any factual information backing it up. This court has not been told who exerted duress on the defendant's representative into signing the settlement agreement. The defendant's affidavit is dead-silent on establishing the elements of duress outlined above. In the circumstances of this case, it would be an injudicious exercise of discretion to deny the plaintiff's application for a summary judgment where, as in this case, the defendant has dismally failed to state at all the foundation of its defence.

[14] As observed earlier, the defendant in the latter aspect of what it considers its defence to the current application, raise what should have been raised as a defence to the merits of the referral before the DDPR. Currently, the court is dealing with the settlement agreement which disposed of the *lis* between the parties, which therefore means that, the defendant cannot re-open that matter. The defendant, once a settlement agreement has been concluded, cannot go behind it and raise defences to the original cause of action when sued on the settlement contract. This position of the law was correctly stated in **Hamilton v Van Zyl 1983 (4) SA 379** at 383G-384A as follows:

> *" An agreement of compromise, in the absence of an express or implied reservation of the right to proceed on the original cause of action, bars the bringing of proceedings based on the original cause of action. Mothle v Mathole 1951 (1) SA 785 (T); Jonathan v Haggie Rand Wire Ltd and Another 1978 (2) SA 34 (N). Not only can the original cause of action no longer be relied upon, but the defendant is not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise. Even invalidity or illegality attaching to the original cause of action will not affect a*

subsequent compromise. Dennis Peters Investments (Pty) Ltd v Olleerenshaw and Others 1977 (1) SA (W) at 202H-203A; Wessels (supra para 2458).

It is clear that a compromise, like novation, is a substantive contract which exists independently of the causa which gave rise to the compromise,, and which can be enforced without the necessity of proving a prior cause of action or establishing a legal right pre-existing the compromise. Like any other contract, defences to an action based on such compromise may be raised …,.but the defendant is not entitled to raise defences relating to the motives which induced him to agree to the compromise, or to the merits of the dispute which it was the very purpose of the parties to compromise. Gollach & Gomperts (Pty) Ltd v Universal Mills & Produce Co. (Pty) Ltd and Others 1978 (1) SA 914 (A).”

The defendant seems to have missed this crucial aspect of the law, as in the present matter is raising the defences which should have been raised on the merits before the DDPR.

[15] In the result the following order is made:

a) Application for summary judgment in the amount of M43,654.04 succeeds with costs.

b) The defendant must pay *mora* interest at the rate of 11.5% per annum from 30th day of September 2019 to the date of final payment.

MOKHESI J

For the Plaintiff: **Adv. K. E. Raseotsana**
Instructed by E. M. Sello & Co. Attorneys

For the Defendant: **No Appearance**