

HELD AT MASERU

In the matter between:

‘MAPABALLO MOKUOANE

APPLICANT

And

CARE LESOTHO

RESPONDENT

JUDGMENT

Date: 7th August 2013

A claim for a unfair dismissal owing to the retrenchment of Applicant. Respondent raising a preliminary point of preclusion to bring a claim by Applicant. Court further raising a point of jurisdiction over the matter, on own motion. Court finding that Applicant is precluded from bringing this claim. Court further finding that it has no jurisdiction over Applicant’s claim. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is a claim for unfair dismissal owing to the retrenchment of Applicant. It was heard on this day and judgment was reserved. The background of the matter is essentially that Applicant concluded a settlement agreement with Respondent in terms of which his contract of employment was terminated and certain monies were paid to her in full and final settlement of the matter. It was a term of the contract that both parties were barred from instituting any proceedings in respect of the issues settlement by the conclusion of the said agreement.
2. Subsequent thereto, Applicant referred the current claim with this Court and claimed to have been unfairly dismissed. Respondent then raised a preliminary point that Applicant was barred from instituting these proceedings by virtue of the agreement. The Court also *mero muto* raised the issue of its jurisdiction over the claim on the ground that the matter had

been settled. We were also of the view that bringing this claim contrary to the settlement agreement, was tantamount to disputing the same agreement, which this Court also lacked jurisdiction to entertain. Both parties were given the opportunity to make their addresses and Our judgment is thus in the following.

SUBMISSIONS AND ANALYSIS

3. Advocate Malebanye for Respondent submitted that this Court has no jurisdiction over the Applicant's claim in that the matter was finalised through settlement. He referred the Court to annexure "c" to Respondent answer. He submitted that bringing this claims amounts to disputing the terms of the agreement. He added that the settlement agreement finalised the matter and Applicant is disputing same. He further submitted that in terms of the authority in *Muyanja & others v Labour Commissioner o.b.o Samuel Mokhehi C of A (CIV) 40/2011*, all disputes against settlement agreements are not adjudicable before this Court as it lacks such jurisdiction.
4. Advocate Malebanye further submitted that according to the terms of the said agreement, and in particular clause 9 thereof, all parties are barred from instituting proceedings in respect of issues settled upon. He added that a settlement agreement is a binding compromise between parties, whose legality does not depend on there being a prior cause of action or the existence of a legal right pre-existing said settlement. He made reference to the authority in *Hamilton v Van Zyl 1983 (4) SA 379 (ECD)*. He concluded by adding that the settlement agreement concluded still stands and for as long as it does its terms, particularly clause 9, operate against Applicant. He prayed for the dismissal of this matter with costs. He added that an award of costs was appropriate in the circumstances, in that Applicant had strongly opposed the matter thus causing Respondent to incur further costs.
5. Advocate Rafoneke submitted that Applicant is not disputing the settlement agreement. He stated that Applicant is merely enforcing her rights that flow from the provisions of the Labour Code against an unfair dismissal. He stated that Applicant is challenging the substantive element of the retrenchment process and not the settlement agreement. He argued that on these bases, the authority in *Muyanja & others v Labour*

Commissioner o.b.o Samuel Mokhehi (supra), is inapplicable in her case. He added that the above authority deals with settlement agreements concluded before the DDPR whereas the settlement agreement in issue was concluded outside the DDPR.

6. Advocate Rafoneke further submitted that even this so called settlement agreement is not so much an agreement, but an account of what took place in the pre-retrenchment consultative negotiations, as contemplated by the law. Advocate Rafoneke further submitted that the fact that a settlement agreement was concluded, does not in any way preclude Applicant from instituting these proceedings. He added that the Court is bound in law to hear evidence to establish circumstances behind the settlement agreement before concluding that it acts as a bar from the institution of further proceedings.
7. Advocate Rafoneke made reference to the case of *Nokoane Mokhatla v Lesotho Brewing Company LC/REV/65/2010* in support of the above argument. He prayed that this matter proceed into the merits so that Applicant may lead evidence to establish to circumstances that led to the conclusion of the settlement agreement. He added that they will show through evidence that the agreement was induced by misrepresentation, in that Respondent had informed Applicant that it had no funds. Advocate Rafokene argued in conclusion that the point about Applicant being excluded from instituting these proceeds, is not properly raised as a preliminary point. He added that it ought to have been raised as a defence to Applicant's claim. He concluded by opposing an award of costs.
8. In reply, Advocate Malebanye submitted that while the facts in *Muyanja & others v Labour Commissioner o.b.o Samuel Mokhehi (supra)* may be dissimilar with the facts *in casu*, the principle enunciated therein was equally applicable to the case *in casu*. He stated that in the said authority no distinction is made in relation to the forum in which the settlement agreement is concluded. He further submitted that, although Advocate Rafoneke claims that Applicant is not disputing the settlement agreement, the fact that he intends to lead evidence to prove that the agreement was induced by misrepresentation proves contrary to his suggestion.

9. It was added that to argue that Applicant is not disputing the settlement agreement but merely seeks to enforce her rights, is tantamount to requesting this Court to ignore the very existence of the settlement agreement. It was further submitted that the *Nokoane Mokhatla v Lesotho Brewing Company (supra)* is both distinguishable and inapplicable *in casu*. He added that, *in casu* there is an agreement about the termination of the employment relationship, which factor was no-existent in that case.
10. As both the pleadings and submissions of parties reflect, it is not disputed that a settlement agreement was reached in respect of the termination of the employment of Applicant. Our law is clear in respect of disputes resolved in this fashion. In *Ford v Austen Safe Co. (Pty) Ltd (1993) 14 ILJ 751*, the Court had the following to say with regard to settlement agreements, “*The settlement agreement constitutes an extra-judicial compromise of the respective claims of the parties... Such a compromise has the effect of res judicata...*”
11. The principle in *Ford v Austen Safe Co. (Pty) Ltd (supra)* has been accepted and interpreted by Our Courts to mean that once a settlement has been reached, it puts an end to the matter (see *CGM Garments v DDPR & another LC/REV88/2006*). This principle was approved in the Court of Appeal decision in *Muyanja & others v Labour Commissioner o.b.o Samuel Mokhehi (supra)*, wherein the Court also extended the application of the principle to oust the jurisdiction of the Labour Court in respect of matters resolved by settlement.
12. From the authorities in *Ford v Austen Safe Co. (Pty) Ltd (supra)* and *Muyanja & others v Labour Commissioner o.b.o Samuel Mokhehi (supra)*, Our understanding is that for as long as the settlement is in its subsistence, this Court would have no jurisdiction to entertain a claim in respect of issues resolved by settlement, unless the said settlement agreement has been vitiated. It is therefore Our attitude that any attempt by this Court to resolve issues that have been resolved by the said agreement, such amounts to a disguised attempt to dispute the terms of the settlement agreement.

13. In is an established principle of law that this Court lacks the jurisdiction to entertain disputed settlements. Our view finds support in *Muyanja & others v Labour Commissioner o.b.o Samuel Mokhehi (supra)*, where the Court stated as thus, “ [7] Now, the material sections insofar as the present dispute is concerned are undoubtedly sections 226 (2) and 228 F of the Labour Code (Amendment) Act 2000..... [8] It is apparent, as it seems to me, that none of the foregoing sections gives either the DDPR or the Labour Court jurisdiction to determine disputed settlement agreements, as opposed to awards.”
14. Whereas, Applicant argues that the above authority is inapplicable to the case *in casu*, We hold a different opinion for the obvious reason that, the Court of Appeal has stated in no uncertain terms that neither this Court nor the DDPR have jurisdiction to deal with disputed agreements. In Our view, the authority is applicable at least to this extend. In fact, We agree with Advocate Malebanye that the principle enunciated in the said authority is fully applicable as it does not make any distinction in respect of where the settlement agreement has been concluded, for purposes of the jurisdiction of this Court.
15. It cannot be accurate that Applicant is not disputing the settlement agreement but rather enforcing her rights that flow from the provisions of the law. In terms of the settlement agreement, a compromise was reached in respect of the rights that Applicant purports to be enforcing, the result of which was the mutual termination of her contract of employment with Respondent. In essence, that claim that Applicant is attempting to enforce was dealt with to finality through the said settlement agreement.
16. Applicant’s reference to the authority in *Nokoane Mokhatla v Lesotho Brewing Company (supra)* and the supporting submissions do not support her case in two major respects. Firstly, the authority is inapplicable in that there was no settlement agreement, whereas there is one *in casu*. Secondly, they fortify Our attitude that Applicant is attempting to dispute the settlement agreement through these proceedings. Clearly, if Applicant is asking the Court to allow her to lead evidence that will expose the circumstances under which the settlement agreement was reached, she evidently seeks to challenge same.

The arguments raised there seem to imply that the contract was *contra bonos mores* or unlawful.

17. On the second preliminary point, a challenge has been placed regarding its competence. We find it apposite to set the record straight on this issue. A point of law becomes preliminary if, among others, the authority to deal with merits of the matter depend on it being addressed first. In Our view, the point raised by Respondent qualifies as a preliminary point for the reason that its determination ascertains whether or not this Court will proceed to deal with the merits of the matter. Consequently, the Applicant's argument does not hold water.
18. In Our view, the fact that the existence of the settlement agreement is acknowledged by both parties, brings its provisions into the picture. Clause 9 of the settlement agreement, as rightly stated by Advocate Malebanye, clearly precludes Applicant from instituting any proceedings against Respondent in respect of issues resolved by the said agreement. The issue of termination of the employment of Applicant has been resolved through the said settlement agreement. Essentially, clause 9 of the settlement agreement precludes Applicant from instituting the current proceedings.
19. As Suggested by Advocate Malebanye, Applicant's submissions seem to suggest to the Court to ignore the existence of the settlement agreement. Applicant is in effect asking this Court to make a conclusion that she is not barred or precluded from instituting these proceedings. This is a matter that both parties agreed upon in terms of the settlement agreement. It would thus be erroneous for this Court to ignore same, particularly when the said settlement agreement has not been set aside. For this Court to attend to the school of thought advocated by Applicant, that would be tantamount to nullifying the settlement agreement, which jurisdictions We have already indicated that this Court lacks.
20. It is Our view that each one of the preliminary the points raised is sufficient to warrant the dismissal of the Applicant's claim. Consequently, We find that this Court has no jurisdiction to entertain this matter as it has been disposed off by agreement and that Applicant is precluded from instituting the current proceeding by clause 9 of same.

21. On the issue of costs, it is Our view that costs are awarded in the most extreme circumstances where the Court finds that a party has abused its processes and to the prejudice of the other party. Advocate Malebanye argued that by strongly opposing the preliminary point, Applicant has occasioned costs on the part of Respondent. Essentially Advocate Malebanye is requesting that the costs should follow the event, so that if Respondent wins on the points raised, then an award of costs should be made against Applicant.

22. This Court is a court of equity and fairness and an award of costs cannot be made solely on the basis of who appears victorious in a matter. As early indicated, an award of costs is made in extreme circumstances because an award of costs is not intended to bar or discourage parties from attempting to enforce their rights. Circumstances contemplated as extreme may include where parties have brought or defended frivolous claims or where parties have engaged in vexatious conduct during the proceedings. We do not find the circumstances of the present matter to qualify as being extreme. Consequently, We decline to make an award of costs.

AWARD

We therefore make an award in the following terms:

- a) That this matter is dismissed; and
- b) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 12th DAY OF AUGUST 2013.

**T. C. RAMOSEME
DEPUTY PRESIDENT (a.i)
THE LABOUR COURT OF LESOTHO**

**Mr. M. MOSEHLE
MEMBER**

I CONCUR

**Mrs. M. THAKALEKOALA
MEMBER**

I CONCUR

**FOR APPLICANTS:
FOR RESPONDENT:**

**ADV. RAFONEKE
ADV. MALEBANYE**