REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2019/00463

In the matter between:

KOLELA JONATHAN MAIBA	**APPLICANT**
and	
COMMISSIONER GENERAL RAPHAEL HAMUNYELA: NAMIBIAN CORRECTIONAL SERVICE	**1st RESPONDENT**
CHARLES NAMOLOH: MINISTER OF SAFETY AND SECURITY	**2nd RESPONDENT**
OFFICER IN CHARGE ASSISTANT COMMISSIONER AXA-KHOEB: WALVIS BAY CORRECTIONAL FACILITY	**3rd RESPONDENT**
THE NURSING STAFF: WALVIS BAY CORRECTIONAL FACILITY	**4th RESPONDENT**
SERGEANT KENCHELE: WALVIS BAY CORRECTIONAL FACILITY	**5th RESPONDENT**
SUPERINTENDENT KAUTA: WALVIS BAY CORRECTIONAL FACILITY	**6th RESPONDENT**
SUPERINTENDENT SALUFU: WALVIS BAY	

CORRECTIONAL FACILITY **7th RESPONDENT**

Neutral citation: *Maiba v Commissioner General Raphael Hamunyela: Namibian Correctional Service* (HC-MD-CIV-MOT-GEN-2019/00463) [2023] NAHCMD 175 (6 April 2023)

Coram: MASUKU J
Heard: **31 January 2023**
Delivered: **6 April 2023**

Flynote: Civil Practice – Settlement Agreements and their binding nature on parties of full age and in complete possession of their mental faculties.

Summary: The applicant is a sentenced prisoner, who suffers from chronic gastritis. He is on a diet prescribed by the doctor as well as on prescribed medication. The applicant brought two applications that were consolidated into one. Both applications had similar prayers. The one standing out is that the Walvisbay Correctional Facility procured the specific dietary food and medication that were prescribed to the applicant in treating the chronic gastritis that he suffers from.

The respondents opposed the application and the parties entered into a settlement agreement and it was duly signed and filed of record. The applicant, after the settlement agreement was filed on Ejustice, filed a notice of withdrawal of settlement agreement wherein he wanted to add certain clauses to the settlement agreement. The addition proposed, was not accepted by the respondents and the parties considered that settlement had failed.

Held: settlement agreements reached between or among parties to litigation, are binding and should be complied with as long as the parties are of full age and in full possession of their mental faculties when the agreement in question, is entered into.

The settlement agreement entered into by the parties herein, is binding and enforceable.

ORDER

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1. The settlement agreement entered into by the parties and signed on 1 and 2 December 2021, respectively, and filed of record, be and is hereby made an order of court.
2. It is declared that the said agreement is binding on the parties and is thus enforceable.
3. There is no order as to costs.
4. The application is finalised and removed from the roll.

JUDGMENT

MASUKU J:

Introduction

[1] The court is seized with an opposed application wherein the applicant, a sentenced prisoner, seeks various types of relief against the respondents. The relief sought by the applicant ranges from the court ordering the members of the Walvisbay Correctional Facility to procure and provide the necessary dietary food as prescribed by the doctor, to the court ordering members of the Walvisbay Correctional Facility's nursing staff to stop interfering with the applicant's diet prescription.

[2] The parties entered into a settlement agreement in respect of the above matter, from which the applicant now seeks to distance, himself after appending his signature thereon.

The parties and their representation

[3] The applicant is Mr Kolela Jonathan Maiba, an adult inmate serving his time at the Walvisbay Correctional Facility.

[4] The first respondent is Mr Raphael Hamunyela, the Commissioner-General of the Namibia Correctional Service. His address of service is at Sanlam Building, Independence Avenue, 2nd floor, Windhoek, Republic of Namibia.

[5] The second respondent is Mr Charles Namoloh, the Minister of Safety and Security. His address of service is also at Sanlam Building, Independence Avenue, 2nd floor, Windhoek, Republic of Namibia.

[6] The third respondent is the officer-in-charge Assistant Commissioner Axa-Khoeb of the Walvis Bay Correctional Facility. His address of service is at Sanlam Building, Independence Avenue, 2nd floor, Windhoek, Republic of Namibia.

[7] The fourth respondents are the nursing staff of the Walvis Bay Correctional Facility. Their address of service is also at Sanlam Building, Independence Avenue, 2nd floor, Windhoek, Republic of Namibia.

[8] The fifth respondent is Sergeant Kenchele of the Walvis Bay Correctional Facility with his address of service at Sanlam Building, Independence Avenue, 2nd floor, Windhoek, Republic of Namibia.

[9] The sixth respondent is Superintendent Kauta of the Walvis Bay Correctional Facility, with his address of service at Sanlam Building, Independence Avenue, 2nd floor, Windhoek, Republic of Namibia.

[10] The seventh respondent is Superintendent Salufu of the Walvis Bay Correctional Facility with his address of service at Sanlam Building, Independence Avenue, 2nd floor, Windhoek, Republic of Namibia.

[11] The applicant is represented by Ms Chinsembu and the respondents are represented by Mr Khupe. The court records its indebtedness to both counsel for their assistance herein.

Background

[12] The applicant instituted an application (first application) under case no: HC-MD-CIV-MOT-GEN-2019/00436, to compel the members of the Walvisbay Correctional Facility to among other things, procure the specific dietary food that was prescribed to the applicant in treating the chronic gastritis that he suffers from.

[13] Under the first application the respondents did not file any answering papers. However, the first application was struck from the roll several times. The applicant then instituted a new application (second application), under case no: HC-MD-CIV-MOT-GEN-2020/00240. The respondents opposed the second application and filed an answering affidavit to the second application. The applicant then withdrew the second application.

[14] After withdrawing the second application, the applicant proceeded to set down the first application on the first motion roll. The parties, however, agreed that the first and second applications should be consolidated so that both applications can be heard on an opposed motion basis. The court then ordered that case no HC-MD-CIV-MOT-

GEN-2019/00463 be consolidated with case number HC-MD-CIV-MOT-GEN-2020/00240 on 08 April 2021. This was complied with.

[15] The court, on 21 September 2021, referred the matter to mediation and ordered the parties to attend the mediation conference that was scheduled to take place on 19 October 2021. It is common cause among the parties that the matter settled at mediation. The applicant's legal practitioner on 2 December 2021, filed a settlement agreement signed by the parties on 1 and 2 December 2021, respectively.

[16] The applicant thereafter, on 27 January 2022, filed a document termed 'Notice of Withdrawal from Settlement Agreement' with the Service Bureau at the High Court. Curiously, the said notice was not filed by the applicant's legal practitioners of record. The parties, subsequent to the filing of the said notice, proceeded to engage in further negotiations, which failed to bear fruit. The application consequently was dealt with in the normal cause as if there had been no settlement agreement filed and the court proceeded to hear the parties' arguments.

The applicant's case

[17] The relief claimed by the applicant under case number HC-MD-CIV-MOT-GEN-2019/00463 is set out as follows:

1. An order for the court to condone the applicant's non-compliance with the rules of court;

2. An order for the Court to order that the Namibian Correctional Service Authorities to liaise with the Ministry of Health to procure or purchase any prescribed medication(s) for the Applicant, whenever it is out of stock in the state hospital pharmacy;

3. An order for the Namibian Correctional Service to strictly comply with the Doctor's prescriptions and to provide the Applicant with the prescribed diet consistently on each day without failure, shortage or cost cutting excuses;

4. An order for the Honourable Court to order that the Namibian Correctional Service must purchase the prescribed foods (*sic*) in advance before the whole stock is exhausted to maintain continuity of care and doctors prescribed diet/menus and pork alternatives;

5. An order for the Honourable Court to strongly reprimand the unethical conduct of Sergeant Kenchele and nursing staff of intermittently stopping or interfering with the Applicant's diet prescription and that all staff must refrain from doing so henceforth;

6. An order that the staff of NCS refrain from violating the fundamental human rights and the NCS authorities to allow applicant to access court and other necessary institutions for remedy;

7. An order that the NCS staff must never threaten, discriminate or humiliate the applicant for taking the matter to court since they failed to solve the infringements / complaints thereto;

8. An order that the correction officer who assaulted be charged and prosecuted on a crime he committed.

[18] While under case number HC-MD-CIV-MOT-GEN-2020/00240, the relief sought by the applicant is set out as follows:

1. An order that the NCS, more specifically Walvisbay Correction Facility strictly comply and provide the applicant with the doctor’s prescribed diet consistently.

2. An order that the NCS authorities consistently provide the applicant with his prescribed medication.

[19] The applicant contends that the respondent violated regulations 216, 218, 224 and 225 of the Namibian Correctional Service Regulations. In this regard, the applicant contends that regulation 216, in particular, that makes provision for diet and preparation of food was not complied with.

[20] It is the applicant's case that the respondents have not provided for the applicant's prescribed diet and have also not provided him with his prescribed medication. The applicant further contends that the respondents have instead provided the applicant with alternative food and/or medication, which food and/or medication were not prescribed by the state doctor.

The respondents' case

[21] The respondents, in answering to the applicant's case, state that the applicant was never humiliated or discriminated against, nor was he denied access to courts as the applicant is currently litigating in a number of matters before this court against the same respondents.

[22] The respondents further contend that they have provided for alternative dietary food, which serves as substitutes for what was initially prescribed by the doctor. It is their case that it is the applicant who makes it difficult for the respondents by refusing to take the medication and food provided to him.

[23] The respondents further contend that the applicant's case is threadbare because it is riddled with his own *ipse dixit* (say so). The respondents further aver that the applicant has not provided any proof of the allegations made against them and that he brought the application for no other reason than to vex and annoy the respondents.

[24] The respondents also highlighted an important aspect of this application that was neglected by the applicant. This is that the parties entered into a settlement agreement, which was signed by all parties and uploaded onto the E-justice system. The respondents contend further that the settlement agreement is binding and should seriously be given effect to.

[25] The court, on 31 January 2023, after hearing arguments from both sides, gave the applicant another bite at the cherry by affording the applicant an opportunity to file further heads of argument regarding the question raised by the respondents, namely, that the settlement agreement is binding on the parties and must be given effect to. The applicant was ordered to file the supplementary heads of argument on or before 10 February 2023. The applicant did not take advantage of the opportunity extended and as such, only the respondents' submissions are before court, regarding this specific issue.

Determination

The settlement agreement

[26] As alluded to earlier in this judgment, the parties entered into a written settlement agreement after attending a mediation session. The parties thereafter, duly signed an agreement on which was affixed a revenue stamp, as required by law. The applicant, in hindsight, filed a notice of withdrawal of the settlement agreement after he had already signed the said agreement. At that stage, the said agreement was already filed of record. What is curious is that the applicant personally filed the said notice via the service bureau. It was not filed on his behalf by his legal practitioners of record, as was the case with all his other papers.

[27] In coming to a finding regarding the binding nature of the settlement agreement, the court agrees with the sentiments expressed by Uietele J in the case of *Markus v Telecom Namibia Limited*.[1] The learned judge, in his erudite judgment, referred to the case of *Burger v Central South African Railways*,[2] where Innes, C J, summarised the principle of law of contract as follows, 'It is a sound principle of law that when a man signs a contract, he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.' This makes it evident that however informal an agreement is, the parties are bound by the terms thereof, together with the consequences that flow therefrom.

[28] Having regard to the stainless principles of law quoted above, the applicant cannot and should not be allowed to frustrate the respondents merely because he chose to change his mind after the fact. The case of *AN v PN*[3], which was also endorsed by Prinsloo J in *Soroses v Gamaseb*,[4] laid down the principle that even a verbal agreement reached by the parties at mediation, is binding on them, as long as the parties thereto, are of age and were in full possession of their mental faculties when the agreement was made.

[29] In the instant case, it must be mentioned that the agreement in question was not just verbal. It was in writing and the parties thereto, in their full and sober senses, appended their signatures thereto. In such a case, the mediation process would become a mockery and an expensive and time-consuming exercise if parties in the applicant's position were allowed, to willy-nilly resile therefrom.

[30] It must be noted that the applicant, even after being granted a gratuitous opportunity to address the matter, declined to do so. There is thus no other contesting legal position before court, that assumes a different posture from the cases cited above.

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[1] *Markus v Telecom Namibia Limited* (I 286/2009) [2014] NAHCMD 207 (23 June 2014).
[2] *Burger v Central South African Railways* 1903 TS 571 at 578.
[3] *AN v PN* (HC-MD-CIV-ACT-MAT-2017/00135) [2017] NAHCMD 275 (27 September 2017).
[4] *Soroses v Gamaseb (*HC-MD-CIV-ACT-MAT-2020/00122) [2020] NAHCMD 530 (18 November 2020).

I am of the view that the law as expounded above is correct and I will follow the established legal principle in this case.

[31] The court is not, in the circumstances, required to deal with the merits of the case, as the issue of the settlement agreement renders the rest of the application academic, therefor not necessary to deal with. The legal position is that the matter ended at the time when the parties signed the settlement agreement in this matter. That, in law, rendered the case *caedit quaestio* i.e. the matter is at an end.

Costs

[32] The applicant, as mentioned earlier, is a sentenced inmate. He obtained the services of the Directorate of Legal Aid in getting legal representation in this matter. There should therefor, be no order as to costs as the court takes into account s 18 of the Legal Aid Act, 29 of 1990, which states the following:

'18. (1) No order as to costs shall be made against the State in or in connection with any proceedings in respect of which legal aid was granted and neither shall the State be liable for any costs awarded in any such proceedings.'

[33] In the matter of *Mentoor v Usebiu*[5], the Supreme Court held as follows:

'On the issue of costs, we have been informed that the appellant has been granted legal aid. Section 18 of the Legal Aid Act 29 of 1990 prohibits the making of a costs order in proceedings in respect of which legal aid had been granted. In the circumstances, no order as to costs will be made.'

[34] The provision quoted above has been held by the highest court in the land to mean that no order as to costs shall be made against the State in or in connection with any proceedings in respect of which legal aid was granted. This has been interpreted to mean that in a matter before court, where legal aid was granted to a party thereto and

[5] *Mentoor v Usebiu* (SA 24/2015) [2017] NASC 12 (19 April 2017) at para 21.

such fact is common cause between the parties, no costs order may be granted against the legally aided litigant. I am bound by that precedent and will not order costs against the applicant although he was unsuccessful in his application at the end of the day.

Conclusion

[35] In the premises, the settlement agreement entered into by the parties in December 2021, is binding and should be enforced. This renders the initial applications, which were consolidated, finally settled in terms of the agreement *inter partes* (between or among the parties). As such, there is no issue pending between the parties regarding the consolidated matters.

Order

[36] I find the following order to be appropriate in the circumstances:

1. The settlement agreement entered into by the parties and signed on 1 and 2 December 2021, respectively, and filed of record, be and is hereby made an order of court.
2. It is declared that the said agreement is binding on the parties and is thus enforceable.
3. There is no order as to costs.
4. The application is finalised and removed from the roll.

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T S MASUKU

Judge

APPEARANCES

APPLICANT:	W Chinsembu Of Henry Shimwutwikeni & Co, Inc, Windhoek.
RESPONDENTS:	M Khupe Of the Office of the Government Attorney, Windhoek