

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-LAB-MOT-GEN-2018/00071

In the matter between:

ELLEN SAKARIA

APPLICANT

and

NAMPOST LIMITED

FIRST RESPONDENT

FESTUS HANGULA

SECOND RESPONDENT

Neutral Citation: *Sakaria v Nampost Limited* (HC-MD-LAB-MOT-GEN-2018/00071) [2020] NALCMD 5 (23 March 2020).

CORAM: **MASUKU J**

Heard: 11 March 2020

Delivered: 23 March 2020

Flynote: Civil Procedure – application to compel compliance with an arbitral award registered and made a court order of the Labour Court – Compromise or *Transactio* – its nature and effect on original cause of action –

whether a party can still sue based on the original cause of action in the face of a compromise.

Summary: The applicant, an employee of Nampost Limited, applied for a transfer from Windhoek to either Swakopmund or Walvis Bay, for family reasons. The application was not granted and instead, another employee was granted that transfer. The applicant lodged a dispute of unfair discrimination against the employer, which was upheld by the arbitrator. An award in her favour, ordering the respondents to transfer her was accordingly issued. The parties, thereafter, entered into a settlement agreement in terms of which the applicant was granted the transfer and she chose to move to Walvis Bay, which the respondents confirmed. The applicant later filed an application to compel compliance with the order for transfer, pursuant to the arbitral award, alleging that the respondents had not complied with their undertaking.

Held: That the settlement agreement entered into *inter partes*, served to extinguish the previous cause of action, as it had the same effect as *res judicata*. It serves to terminate the issues in dispute between or among the parties.

Held that: Barring allegations of fraud, coercion or duress, which would have served to affect the reality of consent of one of the parties, who would have the right to declare it void even if made an order of court, the settlement agreement effectively extinguished the original claim.

Held further that: In the circumstances, the applicant was not at large to overlook the settlement agreement and sue on the original cause of action.

The application was thus dismissed with costs.

ORDER

1. The Applicant's application to compel the Respondent to comply with the arbitral award dated 24 May 2017, is hereby dismissed.
 2. There is no order as to costs.
 3. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

MASUKU J:

Introduction

[1] Context is critical. Certain words, used in normal parlance assume a different character and meaning when employed in a legal setting. One such word is 'compromise'.

[2] The all-important question for determination in this judgment is whether the facts that will be recounted shortly, support the respondents' argument that 'a compromise', as understood in law, took place between the litigants in this matter and thus rendered the original cause of action *cadit quaestio* and thus at an end.

[3] The applicant vociferously denies this assertion. Thus the issue for determination is this - who between the two parties is on the correct side of the law? That, simply stated, is the task at hand for the court to resolve.

Compromise - at law

[4] In *Metals Australia Limited and Another v Malakia Joses Amukutuwa*¹ O' Regan AJA dealt with the concept of compromise in the following terms:

'A compromise is a form of agreement the purpose of which is to put an end to existing litigation or to avoid litigation that is pending or might arise because of a state of uncertainty between the parties. Ordinarily, the validity of an agreement of compromise does not depend on the validity of a prior agreement. An agreement of compromise may follow upon a disputed contractual claim but it may also follow upon any form of disputed right and "may be entered into to avoid a spurious claim". The effect of an agreement is that it bars the bringing of proceedings on the original cause of action.'

[5] In *Elizabeth Mbambus v Motor Vehicle Accident Fund*,² Van Niekerk J, dealing with the same subject of our discourse, stated the following, citing with approval the definition given to a compromise, otherwise referred to as a *transactio* in *Estate Erasmus v Church*,³ where the following appears:

'A *transactio* is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the manner in which they agree on; and which everyone of them prefers to the hopes of gaining, joined with the danger of losing.'

[6] Shorn of all the frills, it would appear that a compromise or *transactio* is an agreement between or among parties to a dispute pending in court, in terms of which they settle the matter by reaching an agreement on how the matter will be resolved. This settlement thus brings the pending dispute to an end, the parties thereto retiring, so to speak, their arsenal, which was otherwise calibrated and prepared for assault in the heat of battle.

Background

¹ Case No. SA 31/2009, para 21 (Delivered on 05 November 2010).

² (Case No. I 3299/2007) [2013] NAHCMD 2 14 January 2013).

³ 1927 T.P.D. 20, p 24.

[7] The facts in this case will be briefly recounted with a view to deciding whether they bear out, as contended by the respondent, a compromise. The facts are the following, briefly set out: The applicant is a lady in the employ of the respondent, Nampost Limited. She is resident in Swakopmund.

[8] Namibia Postal Limited, the applicant's employer, is cited as the 1st respondent. It is an entity incorporated in terms of Posts and Telecommunications Companies Establishment Act,⁴ having its principal place of business situate in Windhoek. The 2nd respondent, Mr Festus Hangula is the head of the 1st respondent. I will collectively refer to both respondents in this judgment, as 'the respondents'.

[9] The applicant had applied from her employer, the 1st respondent, for a transfer to a post in Walvis Bay of Control Postmaster. She wanted to be close to her husband. It would appear that the applicant was promised that her application would be considered. The transfer did not materialise though as a Mr. Awaseb was offered the post instead.

[10] Aggrieved by the decision not to offer her the post, the applicant lodged a dispute with the Office of the Labour Commissioner of unfair discrimination and an unfair treatment by her employer. At the end of the proceedings, the arbitrator found that the applicant had been unfairly discriminated against by her employer by not considering her for a transfer to Swakopmund or Walvis Bay. An award in her favour, described below was issued by the arbitrator.

[11] In the present application, the applicant approached this court seeking an order compelling the respondents to comply with an order dated 24 May 2017, within 14 days of the issue of the court's order in her favour. She further sought leave from the court to approach the court if need be, on papers duly amplified, for an order that the 2nd respondent be held guilty of contempt of court if he does not comply with the order compelling the respondents to so comply.

⁴ Act No. 17 of 1992.

[12] In her founding affidavit, the applicant claims that an arbitration award was issued in her favour against the respondents on 29 March 2016 and it was made an order of the Labour Court on 24 May 2017. There is no doubt that the order came to the respondents' attention. The respondents opposed the application for the registration of the award by notice dated 9 June 2017.

[13] In terms of the award, the respondents were ordered to transfer the applicant to Walvis Bay, with effect from 1 May 2016. The respondents were further ordered to transfer a Mr. Terrence Awaseb to another duty station where a vacant post was available. The respondents' representative Mr. Johannes Kangandjara, was ordered, in his personal capacity, to pay an amount of N\$ 2000 as costs to the applicant. It was declared that the award was final and binding on the parties.

[14] It is the applicant's case that the respondents did not comply with the award and that they should be compelled by an order of court to do so, hence the relief sought. What is the respondents' take on the issue?

[15] The respondents filed an affidavit deposed to by a Ms. Eldorette Harmse, Head of Legal Services and Company Secretary of the 1st respondent. The nub of the respondents' contention, deposed to by Ms. Harmse, was that the applicant had not been fully candid with the court because the parties had amicably resolved the matter via correspondence between the parties' legal practitioners. In this regard, it was stated on oath that the respondents' legal practitioners made an offer to settle the matter and which offer was accepted by the applicant's legal practitioners on her behalf.

[16] It is a matter of note that indeed the respondents' legal practitioners wrote an email to the applicant's legal practitioners, dated 16 October 2018, in which they offered the applicant a post in the vicinity of the place she had applied to be transferred to, namely Narraville, Walvis Bay, effective 1 January 2019 or Mondesa, Swakopmund, which would have required 3 months' notice.

[17] By email correspondence dated 18 October 2018, the applicant's legal practitioners advised that the applicant was amenable to taking up the position in Walvis Bay, namely of Control Postmaster, C5 Grade. The applicant in this letter, also claimed costs in the amount of N\$ 26 548.83. On 19 October, 2018, the respondents confirmed that the applicant would be transferred to Walvis Bay and her grading and remuneration would remain as it then was. It was suggested by the respondents that each party should pay its own costs. It appears that no issue was raised by the applicant with the latter suggestion from the respondents.

[18] The applicant later complained of some misrepresentations having been made to her by the respondents regarding the settlement. This was vehemently denied by Mr. Philander, the respondents' legal practitioners. He maintained that his clients had performed in accordance with the agreement made between the parties and that the applicant chose Narraville and would maintain her grade and remuneration. Mr. Philander thus claimed that the settlement reached by the parties effectively compromised the original claim that the applicant might have had.⁵

[19] The question pertinently raised by the respondents is whether the applicant, in view of the water that had passed under the bridge, as described above, is still entitled to enforce the previous order sought, namely, of the respondents' complying with the arbitral award. The question what effect the settlement agreement had on the applicant's cause of action, if any, looms large.

Discussion

[20] I am of the view that the applicant is on the wrong side of the law in this regard. What is abundantly clear, is that the parties settled the dispute *inter partes* out of court and amicably. In this regard, there is no question about the settlement having been agreed to by both parties. This cannot be in

⁵ Letter dated 8 February 2019, p 47 of the record.

contention for the reason that the fact of the settlement agreement was recorded in the joint case management report filed by the parties, dated 21 October 2019, as a fact not in dispute.

[21] In *Golin t/a Golin Engineering v Cloete*⁶ O'Linn J held s follows:

‘When a party claims that there has been a full and final settlement, the Court should recognise the settlement as a termination of the issues on the merits once the Court has, upon investigation of the settlement issue, been satisfied that there indeed was a settlement and that the settlement was voluntary, i.e. without duress or coercion, unequivocal and with full knowledge of its terms and implications as a full and final settlement of all the issues.’

[22] Dealing with the very issue of compromise, Van Niekerk J, in the *Mbambus* case, referred to *Georgias v Standard Chartered Finance Zimbabwe Limited*,⁷ where the following is recorded:

‘The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved . . . As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise the original defences to the original cause of action. . . But a compromise induced by fraud, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court.’

[23] It is plain, from the foregoing exposition of the law that the settlement entered into by the parties brought the original dispute or cause of action to an end. The applicant is accordingly not entitled, in the circumstances, to approach the court on the very cause of action that was settled and eternally put to bed by the parties. There is no allegation by the applicant in the papers, that her reality of consent was in any way, shape or form induced or influenced by fraud, duress or any other such conduct.

⁶ NLLP (1) 1998 121 NLC, 13 December 1995, p 123.

⁷ 2000 (1) SA 126 (ZSC), p 138I-140D)

[24] It is also plain, from reading the applicant's papers that she admits the fact agreement and its binding nature on the parties. It is a matter of note that the applicant has not approached the court seeking an order setting the agreement aside for the reason that it is vitiated by any of the factors mentioned above.

[25] It appears to me that the applicant, perhaps *bona fide*, operates on the mistaken premise that the previous cause of action is, notwithstanding the settlement agreement, still alive and well and is moving within the corridors of the High Court of Namibia. In terms of the law, the said cause of action has been extinguished by the settlement agreement. The applicant is accordingly not at large to treat the settlement agreement as *pro non scripto* by seeking the order that she previously sought before the settlement agreement was reached.

[26] Mr. Tjitemisa's contention that the respondent never complied with the court order holds no water in the present circumstances. If there was non-compliance by the respondents with the settlement agreement, that is a different issue altogether that the applicant can pursue at law. This would have to be a new cause of action, based on new facts, post the settlement agreement phase. I say so because the authorities cited above are clear that a *transactio* has the same effect as a plea of *res judicata* as it extinguishes the previous cause of action.

Conclusion

[27] Having regard to the foregoing discussion and consideration of the applicable law, I come to the ineluctable view that a compromise was reached in the current matter and which had the effect of extinguishing the applicant's original cause of action. As a result, the applicant is not entitled at law, to overlook the fact and effect of the compromise and conduct the litigation as if the settlement never took place. The applicant is, in terms of the letter of the

law, no longer entitled to the relief she seeks as a result of the life-ending effect of a compromise on her cause of action previously pursued.

Costs

[28] It is common cause that costs are not lightly granted by this court in labour matters. This is because of the provisions of s 118 of the Labour Act, 2007. It decrees that costs may only be granted in cases where the initiation, defence or continuation with proceedings is vexatious or frivolous. There is no such allegation made by the respondent in the instant matter.

[29] On an objective basis and having regard to the entire conspectus of the facts of the matter as canvassed in the background and elsewhere in the judgment, I do not gain any impression, distinct or otherwise, that there was any element of frivolity or vexatious intent on the part of the applicant in launching the proceedings. The fact that the applicant has been found to be on the wrong side of the law does not, without more, translate to her having acted vexatiously or frivolously in instituting the proceedings. I accordingly find that this is not a proper case in which to order costs, notwithstanding the dismissal of the applicant's case.

Order

[30] In the premises, the applicant's application is destined to fail. The proper order for the court to issue, in the premises, is the following:

1. The Applicant's application to compel the Respondent to comply with the arbitral award dated 24 May 2017, is hereby dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

T. S. Masuku
Judge

APPEARANCES:

APPLICANT: J. Tjitemisa
Of Tjitemisa and Associates, Windhoek

RESPONDENT R. Philander
Of ENSAfrica, Windhoek