



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3625/2007

In the matter between:

TOTAL NAMIBIA (PTY) LIMITED

APPLICANT

And

OBM ENGINEERING & PETROLEUM

DISTRIBUTORS CC

RESPONDENT

Neutral citation: *Total Namibia (Pty) Ltd v OBM Engineering & Petroleum Distributors CC (I 3625/2007) [2016] NAHCMD 169 (14 June 2016)*

Coram: MILLER AJ

Heard: 17 May 2016

Delivered: 14 June 2016

Flynote: Interlocutory application – Compliance with rule 32 of the High Court Rules – Application brought under the same case number as that of the action case - law pertaining to settlement agreements – Whether such settlement agreements can put an end to the entire proceedings.

Summary: This is an application brought by the applicant to seek an order from the Honourable Court that the meeting envisaged in clause 11 of settlement agreement between the parties dated 7 October 2010 be held for the purposes set out in that agreement and such to restrain the Respondent from taking any steps to have a warrant of execution issued based on the Supreme Court Judgment relief sought set out above – Court held: the Court is satisfied that the Applicant is entitled to bring application on these papers.

ORDER

1. The Respondent must file its answering Affidavit within 14 days after delivery of this judgment.
2. The Applicant must file its replying Affidavit if any, within 7 days after receipt of the Respondent's answering affidavit.
3. Matter will be placed on the Case Management Roll on the 4th of August 2016 at 15h30.

JUDGEMENT

MILLER, AJ:

Background

[1] The matter originated in October 2003 when the parties concluded a written agreement in terms whereof Total Namibia agreed to supply fuel to OBM at pre-determined prices. In addition Total Namibia debited OBM with an additional amount referred to in the papers as the 'transport differential'. This agreement endured until August 2007 when it was terminated.

[2] On 21 November 2007, OBM directed correspondence to Total Namibia indicating its intention to seek execution upon Total Namibia, where OBM overpaid Total Namibia for an amount levied by Total Namibia as a 'transport differential' of N\$4 609 940.72 together with certain additional relief that Total Namibia allegedly owed.

[3] Shortly thereafter and during December 2007, OBM issued summons against Total Namibia for the sum of N\$4 609 940.72.

[4] On the eve of the commencement of the trial, on 27 October 2010 before Judge Hoff J, the parties reached settlement agreement, which was made an order of court. The agreement reads as follows:

'AGREEMENT

GENERAL

1. The court will be requested to postpone the hearing *sine die* and to incorporate this agreement in the aforesaid order.
2. The accountants for the parties will be instructed to verify all transactions underlying the current account of plaintiff with defendant (with reference to the source documents) in order to determine, by agreement, any liability of defendant to plaintiff or *vice versa* in accordance with the following:
 - 2.1 All litres transported by plaintiff from Walvis Bay to Otjiwarongo to be calculated at 14 c / litre.
 - 2.2 All litres delivered and transported by plaintiff from Otjiwarongo to defendant's customers at the bulk transport rate of 14 c / litre for the initial period p to 31 June 2006 and thereafter at the bulk transport rate of 15 c / litre as from 1 July 2006.
 - 2.3 In respect of the same litres referred to in clause 2.2 above, a delivery / handling fee as stipulated in clause 7.2 of the agreement attached as annexure "A" to plaintiff's particulars of claim (annexure "A").
 - 2.4 In respect of the rebate, as per clause 7.1 of annexure "A".
 - 2.5 The COC to be debited and the same COC to be credited in respect of purchases by plaintiff and deliveries to defendant's customers.

OPENING BALANCE

3. Plaintiff deems the opening balance to be zero as at 1 June 2005.
4. Defendant is entitled to prove a different opening balance with reference to source documents, but subject thereto that such source documents will only relate to the contract period in annexure "A".

DEFINITION OF COC PRICE

5. The COC price in clause 2.5 above shall be the price as debited by defendant in respect of upliftment at Walvis Bay.

PLAINTIFF'S LUBRICATION CLAIM

6. Defendant shall pay an amount to be determined from annexure "Z" to plaintiff's amended particulars of claim but limited to the time period stipulated in paragraph 14 of plaintiff's amended particulars of claim, plus interest at the Namibian *mora* rate, calculated as from 1 September 2007 to date of final payment.
7. The result of the lubrication claim shall not affect the liability for costs referred to below and any amount found to be due shall be paid within fourteen (14) calendar days of final determination.

TIME PERIODS

8. Plaintiff requires time until 30 November 2010 to reconsider its verification as summarized in annexure "A" to the summary filed in respect of Mr. Dreyer's expert summary.
9. Defendant's legal practitioner will deliver to plaintiff's legal practitioner on or before 31 January 2011 defendant's response to plaintiffs said verification.
10. Both plaintiff's amendment, if any, and defendant's response, shall be valid only insofar as supported by verified source documents.

11. On or before 15 February 2011, or such later date as may be requested by plaintiff on reasonable notice, a meeting will be held between the parties' legal representatives in Windhoek at a venue and time to be agreed upon for the following purpose:

11.1 To debate any issues raised in defendant's response and by plaintiff in reply to defendant's response (to be provided to defendant at least seven (7) calendar days prior to such meeting, if any).

11.2 To compile a list of issues, if any, which the parties are unable to resolve.

11.3 The trial will continue for the purpose of adjudicating any remaining issues, including the costs of such litigation.

DEFAULT

12. The plaintiff does not deliver its additional verification on or before 30 November 2010, annexure "A" will stand as plaintiff's verification.

13. If defendant does not deliver its response on or before 31 January 2011, plaintiff's verification shall be accepted.

INTEREST

14. Interest on the outstanding balance determined as envisaged in clause 2 above, will be calculated in accordance with the Namibian *mora* rate, calculated as simple interest as from 1 September 2007 to date of final payment.

COSTS

15. The party ultimately liable for payment to the other shall be liable for costs on the following bases:

15.1 Namibian party and party scale.

15.2 Private taxation by a tax consultant in Windhoek to be agreed upon between the parties.

15.3 In the event of defendant being entitled to costs, one instructing and two instructed counsel, plus the actual fees billed by the correspondent (Fisher, Quarmby & Pfeifer).

- 15.4 In the event of plaintiff being entitled to costs, one instructing and two instructed counsel.
- 15.5 For purposes of any taxation or agreement, the parties agree that the parties' experts are qualified and necessary witnesses.

PAYMENT

16. Payment of the amount envisaged in clause 2 above shall be made within fourteen (14) calendar days of final determination thereof, which payment shall not be affected by the outcome of any litigation envisaged in clause 11.3 above.
17. Payment of the amount envisaged in clause 15 above shall be made within fourteen (14) calendar days of taxation or agreement.

Dated at WINDHOEK on this 27 day of October 2010. '

[5] As the result, the matter was postponed *sine die* to enable the parties to give effect to the agreement and to continue, if needs be, on any remaining issues which might still remain thereafter.

[6] In the interim and consequent of the implementation of the judicial case management, the matter was assigned to me as the managing judge.

[7] Thereafter, a number of case management meetings followed, during the course of which Total Namibia intimated that it intended to move an application to rectify the settlement agreement and the order issued by Judge Hoff J pursuant thereto.

[8] I accordingly made the necessary orders and the matter was referred for hearing on 20 November 2012.

[9] Judgment was given by this Court against Total Namibia on 28th January 2013 under the above case number. Total Namibia appealed to the Supreme Court, which the Supreme Court upheld the judgment given by me in the High Court on the 30th of April 2015, under Case No SA 9/2013.

[10] I now turn to consider the application brought before me by Total Namibia.

The Application

[11] In the main application before me, Total Namibia seeks the following orders:

1. ' Directing the parties to reconstitute the meeting contemplated in clause 11 of the settlement agreement;
2. Failing agreement on all the outstanding issues being reached between the parties at the meeting contemplated in paragraph 11.1 above:
 - 2.1. Requiring the parties to complete a list of issues, if any, that the parties are unable to resolve;
 - 2.2. Directing that the matter is referred back to the trial court for the determination of those issues; and
3. That, pending the final determination of the relief sought in paragraph 9.1 and 9.2 above, the respondent is interdicted from taking any steps to procure or execute upon a warrant of execution in relation to any judgment issued in these proceedings. '

Issues

[12]

- 12.1. Firstly, whether it is competent for an Applicant to continue under the same case number and in the same proceedings in view of the Settlement Agreement?
- 12.2 Secondly, whether the settlement agreement puts an end to the entire proceedings and its cause of action, and substitutes it with its terms of the settlement agreement;

The Legal Principles Applicable

Settlement Agreements

[14] As it is apparent from the above facts, a written settlement agreement was reached between the parties on the 27th of October 2010 and same was made an order of Court.

[15] In the case of *Government of the Republic of Namibia and Others v Katjizeu and Other*¹ set out the following legal principles which are relevant to this matter.

[15] For the purpose of this judgement, it is also important to consider the law pertaining to settlement agreements. In *Gollach & Gomperts (1967) (pty) Ltd v Universal Mills & Produce Co (pty) Ltd and Others* 1978 (1) SA 914 (A) at 921A-922C, Miller AJ made the following observations:

‘In *Cachalia v Herbere & Co.*, 1905 T.S. 457 at p.462, SOLOMON, J., accepted the definition of *transactio* given by Grotius, Introduction, 3.4.2., as

“An agreement between litigants for the settlement of a matter in dispute”

Voet, 2.15.1., gives a somewhat wider definition which includes settlement of matters in dispute between parties who are not litigants and later, 2.15.10., he includes within the scope of *transactio*, agreements on doubtful matters arising from the uncertainty of pending conditions “even though no suit is then in being or apprehended”. (*Gane’s* trans., vol 1,p. 452.) The purpose of a *transactio* is not only to put an end to existing litigation but also to prevent or avoid litigation. This is very clearly stated by Domat, *Civil Law*, vol.1, para 1078, in a passage quoted in *Estate Erasmus v Church*, 1927 T.P.D. 20 at p 24, but which bears repetition:

“A transaction is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the matter which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing.”

¹ 2015 (1) NR 45 (SC)

. . .

A *transactio* whether extra-judicial or embodied in an order of Court, has the effect of *res judicata*.’

[16] In *PL v YL* 2013 (6) SA 28 (ECG) at 48D-H the court held that:

“The suggestion that besides legislative support the encouragement of a negotiated settlement also requires judicial support is in my view not something which is inconsistent with the policies underlying our law. The settlement of matters in dispute in litigation without recourse to adjudication is generally favoured by our law and our courts. The substantive law gives encouragement to parties to settle their disputes by allowing them to enter into a contract of compromise. A compromise is placed on an equal footing with a judgement. It puts an end to a lawsuit and renders the dispute between the parties *res judicata*. It encourages the parties to resolve their disputes rather than to litigate.

As Huber puts it:

“A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits.” ’

[16] The legal principles stated above, confirms that a settlement agreement is placed on an equal footing with a judgement. It puts an end to a lawsuit and renders the dispute between the parties *res judicata*. It encourages the parties to resolve their disputes rather than to litigate.

Applying the Law to the Facts

[17] It should be emphasised here that a Settlement Agreement, properly so called, has the effect that litigation is ended, leaving the parties to give effect to the terms of the Settlement Agreement. For all practical purpose, there is nothing left for the court to decide.

[18] The true dispute between the parties remains alive. Although the agreement we are concerned with is called a Settlement Agreement, it is not one in the true sense of the word. It is therefore important to note:

- (a) That the trial was postponed sine die pending the finalization of the steps and requirements contemplated in the Settlement Agreement.
- (b) Conceivably if the parties have met as contemplated by Clause 11 of their Settlement Agreement and resolved at such meeting who owes who and what amount, the matter might have then be regarded as having been settled.
- (c) Conversely, if that did not happen, the parties could have been at liberty to return to Court to adjudicate on any issues then outstanding.

[19] For these reasons, I am satisfied that the Applicant is entitled to bring this application on these papers.

[20] The following orders are made:

1. The Respondent must file its answering Affidavit within 14 days after delivery of this judgment.
2. The Applicant must file its replying Affidavit if any, within 7 days after receipt of the Respondent's answering affidavit.
3. Matter will be placed on the Case Management Roll on the 4th of August 2016 at 15h30.

P J MILLER
Acting Judge

APPEARANCE:

APPLICANT:

T J FRANK SC

INSTRUCTED BY:

Fisher, Quarmby & Pfeifer, Windhoek

RESPONDENT

R HEATHCOTE SC

INSTRUCTED BY:

Ellis Shilengudwa Inc, Windhoek