IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

Case No.: 451/09
Date Heard: 12 March 2015
Date Delivered: 16 April 2015

In the matter between:

COPPERMOON TRADING 13(PTY) LTD Applicant

and

THE GOVERNMENT OF THE PROVINCE OF THE EASTERN CAPE First Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL OF THE GOVERNMENT OF THE PROVINCE OF THE EASTERN CAPE FOR THE DEPARTMENT OF ROADS AND PUBLIC WORKS Second Respondent

---

JUDGMENT

EKSTEEN J:

[1] During 2004 the parties herein entered into an agreement relating to the sale of the immovable property being erf 312 Bhisho and the buildings situated thereon, known as the Amatola Sun Hotel, Bhisho (hereinafter referred to as "the Amatola Sun"). Thereafter a dispute arose between the parties and the respondents declined to proceed with the sale. Summons was thereafter issued for specific performance of the contract in October 2005. In due course and prior to trial settlement

negotiations were entered into and during October 2007 the parties entered to a "deed of settlement". The applicant now seeks the following relief:

> "1. That the Deed of Settlement signed by the Applicant on 19 October 2007 and signed by the First and Second Respondents' on 29 October 2007 and 23 October 2007 respectively, be made an Order of Court.
> 2. That the terms of the court order be embodied in a written lease agreement to be concluded by the parties within 14 days of the date of this order.
> 3. …
> 4. That the First and Second Respondents pay the Applicant's costs on a scale as between attorney and client."

[2] The status and interpretation of and the legal consequences flowing from the "deed of settlement" (herein referred to as "the deed") are central to the dispute between the parties. The deed provides as follows:

> '**WHEREAS** the Plaintiff has instituted an action against the First and Second Defendants for specific performance, alternatively an amount for damages;
>
> **AND WHEREAS** the parties have reached agreement regarding the settlement of the dispute;
>
> The parties now wish to record the settlement agreement and to have the terms thereof made an Order of Court;
>
> **NOW THEREFORE** the parties agree as follows:
>
> 1. The First Defendant shall lease to the Plaintiff the portion of erf 312 Bhisho and the buildings situated thereon, known as the Amatola Sun Hotel, Bhisho (hereinafter referred to as "the property") for a period of 49

years, subject to an option in favour of the Plaintiff to renew the lease agreement for a further period of not less than twenty years.

2. At the expiration of the initial period of 49 years, the parties shall negotiate a reasonable market related rental; the full terms whereof shall be incorporated in the lease agreement.

3. The amount of R5 million originally tendered by the Plaintiff for the purchase of erf 312 Bhisho shall be allocated in the following manner:

   3.1 R3 million in respect of rental for the period of 49 years, and

   3.2 R2 million as purchase price for the furniture and fittings contained in the Amatola Sun Hotel complex.

4. The amounts referred to in 3.1 and 3.2 above shall be payable on the date of signature of the lease agreement by the parties.

5. The Plaintiff shall be liable for all rates, taxes and municipal service fees for the property (as described in paragraph 1 above) during the currency of the lease.

6. The Plaintiff shall at its own costs, refurbish the Amatola Sun Hotel in order that it be upgraded to a four star status.

7. The Plaintiff's attorneys shall be tasked with the drawing of the lease agreement necessary to give effect to the intention of the parties.

8. Upon signature of the finalised settlement agreement between the Plaintiff and the First and Second Defendants, the Plaintiff shall withdraw its action and each party shall pay its own legal costs.'

[3] Mr Nassimov, the managing director of the applicant deposed to the founding affidavit and states that the settlement negotiations were aimed at the settlement of the action as a whole. He declares that this goal was achieved when the parties

concluded and signed the deed during October 2007. Nassimov states, however, that after signature of the deed the applicant caused the action to be stayed pending the finalisation of the terms of the "deed of settlement". This, it seems, is a reference to the "finalised settlement agreement" envisaged in paragraph 8 of the deed.

[4] During this period in which the action was stayed the applicant instructed land surveyors to conduct a survey on the leased property as a cadastral description was required for the notarial deed of lease. Considerable dialogue followed between the applicant's legal representative and the office of the chief state law adviser, one Benningfield.

[5] After completion of the necessary survey referred to above various draft lease agreements were exchanged between the parties. Nassimov opines that the various drafts dealt with minor amendments. The nature of the dissension does not, however, appear from the papers. Several meetings were held with officials from the office of the Premier of the Eastern Cape, the Director: Property Administration of the Eastern Cape Province, the applicant's attorneys and Nassimov himself during February and March 2008 to discuss and attempt to settle the various amendments on the proposed lease agreements referred to earlier. In May 2008 a further revised agreement was forwarded by the applicant's attorneys to one Fortune of the office of the Premier of the Eastern Cape. On 4 August 2008 Nassimov states that the applicant's attorney caused the original notarial deed of lease agreements to be hand delivered to Fortune at the state attorney's office. When no response had been received by 6 October 2008 the applicant's attorneys contacted Fortune. Fortune

indicted that the notarial lease agreements had not been signed and that they would be considered shortly.

[6] On 11 March 2009 the applicant's attorneys were informed by the state attorney that the first respondent had decided on 25 February 2009 that it was "not in a position to proceed with the existing terms of the settlement agreement and the draft lease agreement". In these circumstances the present application was launched.

[7] An answering affidavit was deposed by one Muthwa, the Director General of the Eastern Cape Province who serves also as the secretary of the Executive Council of the Province. Muthwa denies that a final and binding settlement agreement was concluded between the parties. A number of legal defences were raised in the answering affidavit. In the final analysis, as more fully set out below, none of these defences were persisted with in argument before me. It is accordingly not necessary to deal with these legal issues.

[8] Muthwa sets out the background leading up to the signature of the settlement agreement. He states that at a meeting of the Executive Council held on 12 September 2007 one Willem Hugh Nel, the then member of the Executive Council (MEC) for Finance, raised the question of settlement of the action between the parties. He advised that he had been approached by Nassimov to pursue the question of settlement on the applicant's behalf. Nel expressed the view that settlement would be in the best interests of the Province for the following reasons:

1. The Amatola Sun was standing empty, not being utilised and in a state of decay.
2. The then existing state of affairs was costing Government a lot of money to secure the premises;
3. The refurbishment of the Amatola Sun would address the problem of scarce conference facilities in the Bhisho/King William's Town area; and
4. The court action which had been instituted by the applicant was, in his view, not winnable by the Government.

[9] Nel advised the Executive Council that the proposed settlement was that the Amatola Sun should be leased to the applicant for 49 years and that on the land adjacent to the hotel, which, together with the hotel, were the subject of the action, an office park should be developed. At that stage no draft deed of settlement was placed before the Executive Council.

[10] Muthwa declares that the Executive Council was receptive to the idea of pursuing a possible settlement and it took a resolution that an out of court settlement "be supported".

[11] On 10 October 2007, shortly before the signature of the deed a further meeting of the Executive Council was held. Muthwa states that on this occasion the draft deed forming the subject matter of the current litigation was presented. Muthwa says that conditional approval for the signing of the deed was granted to the MEC for Finance and the MEC for Public Works, both of whom were present at the meeting. The approval, he says, was conditional upon The Head: Shared Legal Services in

the Office of the Premier first seeking and obtaining external legal advice to ensure that the settlement was not at variance with the relevant legal prescripts.

[12] I pause to record that this stage, that subsequent to the filing of the answering affidavits the applicant called for the discovery of the minutes of the Executive Council meetings held on 12 September 2007 and 10 October 2007 respectively. The respondents were not forthcoming and a dispute arose in this regard. It was ultimately resolved in the applicant's favour and the minutes of the said meetings were discovered. The minutes of the meeting of 12 September 2007 reflect the following in respect of the Amatola Sun building:

> "Advocate P Benningfield briefed the Executive Council on the latest developments with respect to the Amatola Sun building. He indicated that the legal dispute on this matter is being settled out of court and a forty-nine (49) year lease agreement will be signed with (the) company.
>
> It was acknowledged that the matter was complex and a memorandum should be prepared and presented in the next Executive Council.
>
> The issue of development of office space for the Provincial Government should be dealt with separately.
>
> ***Resolutions***: It was resolved that:
>
> - The out of court settlement for the Amatola Sun building that involves the forty-nine (49) year lease agreement with the Provincial Government be supported.
> - The development of office space for Provincial Government should be treated as a separate matter and a memorandum should be submitted to the Economic Growth and Infrastructure Cabinet Committee and the Executive Council for endorsement. The Department of Public Works should lead the process."

[13] As recorded earlier the draft deed in the form set out in paragraph 2 above was before the Executive Council on 10 October 2007. The minutes of the meeting held on 10 October 2007 reflect the following in respect of the settlement of Amatola Sun dispute:

> "A memorandum was presented and discussed. The purpose was to inform the Executive Council of the outcome of the settlement negotiations in the dispute between the Provincial Government and Coopermoon (*sic*) Trading (Pty) Ltd concerning the old Amatola Sun premises. Further, to request the Executive Council to note the settlement agreement and approve the signing of such agreement by the MEC for Finance on behalf of the Provincial Government as First Defendant and the MEC for Public Works as Second Defendant.
>
> The matter was discussed extensively and it was agreed that the memorandum would be noted but the Executive Council be kept informed on the progress on this matter.
>
> ***Resolutions:*** It was resolved that:
>
> - The Deed of Settlement in the dispute between the Provincial Government and Coopermoon (*sic*) Trading (Pty) Ltd concerning the old Amatola Sun premises be noted. However, the Executive Council be kept informed on the progress on this matter.
>
> - The signing of the draft Deed of Settlement Agreement by the MEC for Finance on behalf of the Provincial Government as First Defendant and the MEC for Public Works as Second Defendant be approved. However, the Head of Shared Legal Services in the Office of the Premier should receive external legal advice to ensure compliance with the law."

[14] Reverting to the answering affidavit Muthwa states that as far as he was able to ascertain no such legal advice was ever obtained. *Ex facie*, however, the minutes the authority given to the said MEC's to sign the draft was clearly not subject to legal advice first being obtained. In reply Nassimov adopts the position that the Executive Council, of which the Premier is a member, resolved on 12 September 2007 to support the settlement of the action on the basis of a 49 year lease and on 10 October 2007 gave its unqualified approval to the terms of the deed. He states that the settlement agreement was of the greatest consequence as it constituted a settlement of an action instituted by the applicant against the respondents. Subsequently, he states, the parties conducted themselves on the basis that the settlement agreement was valid and binding.

[15] There is no dispute that subsequent to the signature of the settlement agreement numerous attempts were made to reach agreement in respect of a lease agreement as envisaged in the deed. It was, as set out earlier, only on 11 March 2009 that the applicant's attorneys were advised that the first respondent had decided that it was not in a position to proceed with the existing terms of the settlement agreement and the draft lease agreement. The applicant, as was the case in respect of the earlier minutes of the Executive Council, called for discovery of the minutes of the meeting of 25 February 2009. This too gave rise to a dispute. This dispute too was ultimately resolved in the applicant's favour. They have now been provided and they reflect the following in respect of the Amatola Sun matter:

> "The MEC for Public Works presented a memorandum on the matter. The purpose was to brief the Members on the out of court settlement negotiations between the Department of Public Works and Provincial Treasury and Copper Moon Trading (*sic)* to resolve the dispute regarding the Amatola Sun complex and the legal opinion of a Senior Counsel on the matter. The Senior Counsel advised that the sale agreement with Copper Moon (*sic)* was invalid for its lack of compliance with the Act as the Premier did not delegate or assign an MEC to dispose of the land. Secondly, the deed of settlement is currently not binding on the Department of Public Works and the Provincial Government and therefore is not a court order at this stage.
>
> The matter was discussed extensively and it was agreed that the legal advice of the Senior Counsel be noted."

[16] Clearly the letter from the State Attorney dated 11 March 2009 was prompted by this resolution. The minute does not reflect the reasons for senior counsel's opinion that the deed is not binding upon the respondents.

[17] On 12 December 2013 the respondents delivered a notice of intention to apply for leave to file a further affidavit consequent upon the employment of different counsel. Applicant did not oppose the application. In this affidavit the respondent now gave notice of its intention to raise certain legal points *in limine*. The affidavit was attested to by one Mgujulwa, a Senior Assistant State Attorney at the office of the State Attorney, Bhisho. The affidavit gives notice that it will be argued on behalf of the respondents, *inter alia*, that:

1. The agreement (the deed) cannot be enforced as an order of court;
2. The wording thereof is not clear and unambiguous;

3. The enforcement thereof depends upon the discretion of persons bound thereby;

4. It does not provide closure. In this regard reference is specifically made to paragraph 7 of the founding affidavit of Nassimov where he stated:

> "After the Deed of Settlement was signed and concluded the Applicant caused the action to be stayed pending the finalization of the terms of the Deed of Settlement."; and

5. Clause 8 of the deed specifically provides for signature of a "finalised settlement agreement", upon signature of which the plaintiff will withdraw its action. This, it is argued, clearly indicates that a further, comprehensive agreement still had to be negotiated and concluded.

[18] In addition to these points *in limine* Mgujulwa states that the Amatola Sun, had been badly damaged by fire caused by unknown and unforeseen circumstances. In these circumstances it is contended that performance of the settlement agreement, if valid, had subsequently become impossible.

[19] In response the applicant filed yet a further affidavit. The applicant denies that there is any merit in the legal points raised. In respect of the reliance which the respondents place on the applicant's conduct after signature of the agreement as attested to by Nassinov and as set out earlier herein Nassimov responds as follows:

> "As regards paragraph 7 of my founding affidavit, it contains an obvious typographical error. Consistent with the explicit term of the Deed of Settlement that, upon signature of the Settlement Agreement the Applicant would withdraw its action, the Applicant did not, and has not since, taken further steps to prosecute the action. The Applicant's obligation to withdraw the action arose upon signature of the written Settlement Agreement which had been prepared in draft for scrutiny by the Respondent's legal advisors, formed the subject of consultation with the affected MEC's, was ultimately approved by the Executive Council and signed by a duly authorised representative of the provincial government. The Applicants action was not further prosecuted, the Applicant paid its legal costs and bore also the costs of the preparation of a notarial deed of lease."

It is, however, not in dispute that to date the action has not been withdrawn.

[20] The applicant further denies that performance of the obligations in the deed has become impossible. It contends that the respondents are obliged to deliver the property to the applicant in the condition in which it was at the time of the settlement agreement. The costs of the restoration of the building has been estimated at approximately R63 million. Of this amount R9 800 000,00 is attributed to the fire damage referred to earlier. The applicant contends, nevertheless, that it intends to discharge its obligation in terms of the settlement agreement, to pay the respondents the sum of R5 million under reservation of a right to claim a *pro rata* reduction of the applicant's counter performance and/or prosecute a claim for damages. The applicant accepts its obligation to restore the facility to the status of a four star hotel and to bear the costs thereof calculated as at the date of the conclusion of the deed, alternatively within a reasonable time after that date by which time the agreement of lease would have been signed.

[21] At the hearing of the matter, as indicated earlier herein, Mr **de Bruyn**, who appears on behalf of the respondents, did not persist in any of the substantive defences set out in the answering affidavit. He has contained his argument to the matters raised in the final affidavit which I have set out in paragraph 17 above. In the main Mr **de Bruyn** contends that the deed which the applicant seeks to enforce is not a final agreement which can be enforced by an order of court. He argues, that the document is clearly an unenforceable agreement to agree and that the terms of the "finalised settlement agreement" which is foreshadowed in the deed would depend upon the discretion of the persons who would be bound by the order sought by the applicant, namely the applicant and the respondents.

[22] On behalf of the applicants it is submitted that the deed is clear and unambiguous and constitutes a valid and binding agreement of lease containing all the essential elements of such a contract and that it therefore constitutes a compromise agreement. The essential elements of a lease on which the parties must agree are:

(a) that the lessor is to give and the lessee is to receive the temporary use and enjoyment of the property;

(b) the property which is let; and

(c) the rent for its use and enjoyment.

(See for example *WE Cooper*: *Landlord and Tenant* (2nd ed) at p. 3 and the authorities referred to therein.).

[23] It is argued that where the essentials of a contract of lease have been agreed upon and set out in the deed then, notwithstanding that there may be other important outstanding issues still to be negotiated a fully binding contract had come into existence.

[24] *Cooper supra* (at p. 3) opines, however, that even where the parties agree on all three essential elements and they "fail to agree on any additional term raised during negotiations", no lease is concluded. *Van der Merwe et al: Contract: General Principles* (2007) record at p. 79:

> "… and statements to the effect that what has been agreed upon is to be worked out in detail or that agreement will still be finalised suggest the absence of a contract."

[25] In ***CGEE Alsthom Equipments Et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd*** 1987 (1) SA 81 (A) at 92A-C Corbett JA stated:

> "There is no doubt that, where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force. A good example of this kind of situation is provided by the case of *OK Bazaars v Bloch (supra*) (see also *Pitout v North Cape Livestock Co-operative Ltd (supra*)). Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that *consensus* on the outstanding matters would have to be reached before a binding contract could come into existence (see *Pitout's* case *supra* at 851 B-C)."

[26] Corbett JA, however, proceeded to state at p. 92C-E

> "The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand. (See generally Christie *The Law of Contract in South Africa* at 27-8.) Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances (see *Pitout's* case *supra* at 851D-G)."

(See also ***Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd*** 1996 (3) SA 320 (W) at 335F-G.)

[27] It is accordingly necessary to have regard to the intention of the parties as exhibited by their conduct, the terms of the agreement and the surrounding circumstances.

[28] A perusal of the deed reveals that there are a number of indicators in the document which suggest that the parties had failed to reach agreement on a number of important terms and that they intended to negotiate further in this regard after the signature of the deed. Paragraph 1 of the deed provides that the respondents would lease the Amatola Sun to the respondent for 49 years subject to an option in favour of the plaintiff to renew the lease agreement for a further period of not less than 20

years. The inference is that the duration of the option period had not been finally agreed, however, it can be said with certainty from the formulation of term that the option period would not be less than 20 years.

[29] Paragraph 2 of the deed postulates that at the expiry of the initial period of 49 years the parties would "negotiate a reasonable market related rental". The full terms thereof, so the deed records, shall be incorporated in the lease agreement. This, to my mind, is a strong indicator that the parties intended that the mechanism for the determination of the rental in the option period was still to be worked out in detail and the agreement, when it was reached, would be set out in the agreement of lease.

[30] Paragraph 7 of the deed provides that the plaintiff's attorney shall be tasked with the drawing of the lease agreement "necessary to give effect to the intention of the parties". This suggests the need for a further document which would set out in greater detail the intention of the parties in respect of the issues referred to in paragraphs 1 and 2 of the deed and further important issues.

[31] Finally, paragraph 8 of the lease agreement provides for the plaintiff to withdraw his action "upon signature of the finalised settlement agreement between the plaintiff and the first and second defendants". On a consideration of paragraph 8, and attributing to the language used therein its ordinary English meaning, it envisages that the original cause of action as contained in the summons will remain alive and may still be prosecuted until and unless a subsequent "final settlement

agreement" is concluded in writing. Only then will the action proceedings be withdrawn.

[32] Nassimov declared in his founding affidavit as set out earlier that after the signature of the deed he caused the action to be stayed pending the finalisation of the terms of the settlement. He did not withdraw the action. This conduct is consistent with the linguistic interpretation of clause 8 which I have set out above.

[33] When the argument that the deed was merely a preliminary agreement without contractual force was raised and reliance placed on the applicant's subsequent conduct as attested to by Nassimov, he sought to explain and amend his initial position.

[34] I have quoted earlier the response of Nassimov when the content of this paragraph in the founding affidavit was raised. It is unpersuasive. Nassimov states that paragraph 7 of his founding affidavit contains "an obvious typographical error". He has made no attempt to explain where the typographical error occurs or what it is. Mr **Quinn**, on behalf of the applicant, was unable during argument to identify the typographical error. Nassimov continues to suggest that, consistent with the explicit term of the deed that, upon signature of the settlement agreement the applicant would withdraw its action, the applicant did not and has not since taken further steps to prosecute the action. This explanation appears to me to be perfectly consistent with the statement in the founding affidavit. The proceedings remained in place and were stayed pending the signature of a final settlement agreement. During argument Mr **Quinn** submits that the applicant was not obliged to withdraw the action because

the respondents reneged on the agreement and they indicated that they would not be bound by the terms of the deed. This, however, occurred during 2009, some 18 months after the signature of the deed.

[35] The parties appear to be in agreement that the settlement pursued in the action proceedings were intended to constitute a compromise. The effect of a compromise is in law equivalent to a judgment by consent and is an absolute bar to an action on the cause of action compromised (see *RH Christie & GB Bradfield: Christie's: The law of contract in South Africa* (6th ed) 2011 at p. 478). To my mind paragraphs 7 and 8 of the deed make it clear that a further agreement was required to reflect the intention of the parties. The withdrawal of the main action, and accordingly the rights accruing to the applicant under the original cause of action, was designedly deferred until signature of a "finalised" settlement agreement. The conduct of the applicant after signature of the deed is consistent with such an interpretation. A binding compromise would therefore only be achieved upon signature of a further agreement. This militates firmly in favour of a conclusion that the deed was not intended to have contractual force until and unless the further agreement was concluded.

[36] I do not think that the resolution reflected in the minutes of the Executive Council on 10 October 2007 is destructive of this construction. It records that the purpose of the memorandum addressed to it was to inform the Executive Council of the outcome of negotiations in the dispute between the parties in respect of the Amatola Sun and to request the Executive Council to note the settlement agreement and approve the signature of such agreement. The agreement in issues was, of

course, the deed providing, as it does, for further negotiation prior to a final settlement. The resolution taken at such meeting reflects that the deed is noted subject to the Executive Council being kept informed on the progress of the matter. What, one may righty ask, would be the purpose of being kept informed of the progress in the matter if a final settlement was intended? If it were final there could be no further progress.

[37] Pursuant to the conclusion of the deed the parties continued as set out earlier to negotiate and numerous draft lease agreements were exchanged, amendments effected and counter proposals made. There is no reason to doubt that the parties negotiated in good faith during this period, but without reaching an agreement. In these circumstances I consider that the evidence shows that the parties contemplated that consensus on the outstanding matters would have to be reached before a binding contract could come into existence. Put differently, a consideration of the terms of the deed, the conduct of the parties and the surrounding circumstances indicates that the parties did not intend this initial agreement to have contractual force.

[38] In respect of the good faith of the parties in the endeavour to achieve consensus in respect of the lease agreement envisaged in the deed I raised with Mr **Quinn** the possibility of making an order that the respondents enter into negotiations in good faith in order to conclude an agreement of lease as envisaged. I referred counsel to the decision in **Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd** 2012 (1) SA 256 (CC). In Everfresh the parties had entered into an agreement of lease with an option to renew the lease on its expiry, subject to

agreement being reached on rental. At the conclusion of the initial period Shoprite, being the lessor, sought to evict Everfresh. Everfresh contended that Shoprite was barred from doing so because it was under an obligation under clause 3 of their lease agreement to make efforts in good faith to reach an agreement on rental which it could not frustrate by refusing to participate. The issue which arose in the Constitutional Court, but which was not decided, was whether the common law of contract had to be refashioned by the importation of a requirement of good faith. Mr **Quinn** disavowed any reliance on Everfresh and persisted that the applicant sought an order in the terms set out in the Notice of Motion. Mr **de Bruyn**, correctly in my view, submitted that the issue does not arise as no case has been made on the papers that the negotiations which ensued over an extended period after the signature of the deed were not pursued in good faith and no case has been made for the development of the common law.

Should the "deed of settlement" be made an order of Court?

[39] The deed itself records that the parties "wish to record the settlement agreement and have the terms thereof made an order of court". I have already concluded, for the reasons set out earlier herein, that the deed was not intended by the parties to have contractual force. I consider that on a proper reading of the deed, in particular having regard to paragraphs 1, 2, 7 and 8 thereof, the finalised settlement agreement envisaged was the agreement of lease which it was envisaged would contain the intention of the parties including, but not limited to, the ultimate agreement relating to the term of the option period and the full terms relating to the manner of determination of the rental payable during the option period. The deed is therefore an agreement to agree (a *pactum de contrahendo*). It left ample room for a

breakdown in negotiations prior to the conclusion of a contract, as indeed occurred. The deed is therefore not a final settlement which brings closure to the action. (Compare ***Siebert & Honey v Van Tonder*** 1981 (2) SA 146 (O).)

[40] In ***Premier, Free State, and Others v Firechem Free State (Pty) Ltd*** 2000 (4) SA 413 (SCA) the Supreme Court of Appeal had occasion to consider such an agreement. At p. 431G-H the following is stated:

> "Nor does it matter if the provision is cast as a term: *Christie (op cit* at 109). The result is the same. Accordingly, if the provision is potestative it does not matter for present purposes whether it is classified as a condition or a term. In either case enforcement is dependent upon the will of both parties, in this case particularly the will of the province. An agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree: … Such a discretion was vested in the parties as they were to sign 'a contract' the precise terms of which were not fixed in the letter of acceptance, …"

[41] The SCA proceeded to state at p. 431J:

> "There was, accordingly, room for a breakdown in negotiations before a contract was concluded."

(See also ***Namibian Minerals Corporation Ltd v Benguela Concessions Ltd*** 1997 (2) SA 548 (A) at 567A-C.)

[42] The position may, of course, be different where the initial agreement contains a deadlock breaking mechanism in the event of negotiations breaking down.

(Compare for example ***Southern Port Developments (Pty) Ltd v Transnet Ltd*** 2005 (2) SA 202 (SCA) at 208; and ***Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk*** 1993 (1) SA 768 (A).) The deed contains no such deadlock breaking mechanism. In these circumstances an order in the terms sought in paragraph 1 of the Notice of Motion would not be capable of enforcement.

[43] In ***Mansell v Mansell*** 1953 (3) SA 716 (NPD) at 720D Broome JP, quoted from ***D'Aubrey v D'Aubrey*** 1942 NPD 198 where it was stated:

> "… assuming there is a *locus* to ask the Court to make an agreement part of its order, that agreement must contain only terms such as the Court can properly approve: that is to say, such as seem to the Court to be enforceable, both legally and practically."

[44] Broome JP expressed his agreement with this dictum. (See ***Mansell v Mansell*** *supra* at p. 720F.) I too find myself in agreement with these sentiments. For the reasons which I have set out earlier in this judgment I do not consider that the deed, if made an order of court, can be both legally and practically carried out. (Compare also ***Titaco Projects v AA Alloy Foundry*** *supra*; and *Contract: General Principles – Van der Merwe et al supra* at p. 225.) These considerations find equal application even where the parties, as in this case, have requested the court to make their settlement agreement an order of court. (See ***Lebeloane ve Lebeloane*** 2001 (1) SA 1079 (W) at 1085I-1086A.) In all these circumstances I conclude that the order sought in paragraph 1 of the Notice of Motion cannot be granted.

Can the court order that the terms of the "deed of settlement" be embodied in a lease agreement to be concluded by the parties?

[45] I have concluded earlier that the evidence shows that the parties contemplated that consensus on outstanding matters would still have to be reached. These matters would relate to the unresolved issues which appear from the deed itself and possibly certain additional terms which the parties may have required to be incorporated in the deed of lease. By virtue of that conclusion I consider that the relief sought in paragraph 2 of the Notice of Motion cannot be granted either. (Compare ***Titaco Projects v AA Alloy Foundry*** *supra* at p. 338D.)

Supervening impossibility

[46] Mr **de Bruyn** did not pursue the argument in respect of supervening impossibility with any measure of enthusiasm. He submits that it is merely an additional ground upon which I should find that the deed cannot be implemented. In these circumstances, by virtue of the conclusion to which I have come earlier it is not necessary to decide this issue and I make no finding in this regard.

Costs

[47] Mr **Quinn** urged upon me during argument that in the event that I find against the applicant I should make no order as to costs. He has referred me to the lengthy history of the matter and in particular to the numerous defences raised in the answering affidavit, none of which were persisted with during argument. He draws my attention too, to the unnecessary litigation which resulted from the respondents' reluctance to provide the minutes of the meetings of the Executive Council to which I have referred earlier.

[48] It is true that seemingly unnecessary applications were required to obtain discovery of the minutes, however, the costs of those applications were dealt with in those proceedings and cost orders were made against the respondents in each case.

[49] I am not called upon herein to determine the merits or demerits of the defences which were not persisted in. The respondents contented themselves with the limited argument presented to me. The conclusion to which I have come and which is fully set out earlier herein leads inevitably to the conclusion that the applicant was ill-advised to launch the application in the first instance. Irrespective of the merits of the legal defences raised in the answering affidavit the application could, in my view, not succeed. In the circumstances the ordinary rule that the costs should follow the result is to my mind appropriate.

[50] In the result, the application is dismissed with costs, such costs to include the costs of two counsel.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv R Quinn, SC & Adv M L Beard instructed by Smith Tabata Inc, King William's Town

For Respondents: Adv P J de Bruyn, SC & Adv M H Sishuba instructed by the Office of the State Attorney, East London