REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 30147/18

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED.

30 June 2021
..... DATE

..... SIGNATURE

In the matter between:

THE COMPENSATION COMMISSIONER First Applicant

DIRECTOR-GENERAL OF THE DEPARTMENT OF LABOUR OF THE NATIONAL GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Second Applicant

MINISTER OF LABOUR Third Applicant

and

COMPENSATION SOLUTIONS (PTY) LTD Respondent

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

The judgment and order are accordingly published and distributed electronically. The date and time of hand down is deemed to be 10:00 on 30 June 2021

TEFFO, J:

[1] The applicants seek leave to appeal the judgment and order of this Court delivered on 17 July 2020.

[2] The respondent opposes the application.

[3] In order to succeed with the application, the applicants must show in terms of section 17 of the Superior Courts Act ("*the Act*") that:

(a)(i) the appeal would have a prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[4] The application is premised on various grounds. These grounds are, in actual fact as the respondent has correctly argued, a regurgitation of the arguments which were made in the main application to support the applicants' stance that the settlement agreement was not meant to deal with future claims which did not form part of the litigation before Makhafola J. Basically this application is aimed at challenging the order and judgment on the basis that the court should have found that the issue before Makhafola J was the backlog of processing the invoices that were already submitted to the

applicants, and in their possession, and therefore outstanding and being the subject of the litigation on 31 July 2009.

[5] It is not my intention to deal with each and every ground in that central to the application is the interpretation of the settlement agreement.

The grounds of appeal

The COIDA procedure is not included in the settlement agreement. Therefore, the settlement agreement without the required submission of the enquiry form W.C1.20 overrides or created a special billing procedure for the respondents only.

[6] It was submitted in the respondents' heads of argument in the main application that the applicants had intimated to the respondent not to use the W.C1.20 procedure to query non-payment of the accounts. Further that the Umuhleko system that was previously used did not provide for the use of such a procedure, and that the applicants had abandoned reliance upon such procedure. These allegations were made in the respondent's answering affidavit in the main application but were not disputed in the replying affidavit, save to say that the applicants only replied by saying "*the allegations are noted and will be dealt with in argument*".

[7] The respondent further submitted that as Mr Mafata has stated in the founding affidavit in support of the main application that COIDA provides that the applicants should be given sufficient time and opportunity to investigate the validity of each claim, COIDA does not prescribe any time period whatsoever for the validation of claims and/or payment of accounts. It

claimed that it was common cause that such had to take place within a reasonable period of time. The parties to the settlement agreement decided that 75 days would be appropriate. Mr Mafatsa concedes in paragraph 13 of the founding affidavit in support of the main application that the procedure adopted by the respondent in submitting claims accords with COIDA and its regulations.

[8] This ground of appeal is neither here nor there. It loses sight of the fact that the parties decided on the terms of the settlement agreement to suit their needs and eventually made the settlement agreement an order of court by agreement.

The effect of the judgment and order basically mean that the respondent is permanently entitled to charge the state department a special interest rate of 15,5% without fully complying with COIDA regulations, yet all other service providers of the applicants who are required in law to comply with COIDA are not entitled to this special interest rate.

[9] The argument cannot be correct. Clause 4 of the settlement agreement reads:

> "*The first respondent shall pay the applicant interest at the current legal rate of interest (being 15,5 per cent per annum) on all currently outstanding medical accounts to which the letter of demand dated 25 March 2009 relates, from such date of demand to date of payment of each such respective account.* (My emphasis.)

[10] The letter of demand was attached to the founding papers as annexure "JL 12". Clause 3 of the agreement reads:

> "*The first respondent shall process the backlog of medical accounts referred to in Annexure JL 12, at page 88 of the record in this application, by 30 October 2009.*"

[11] The payment of the interest of 15,5% per annum as referred to clause 4 of the settlement agreement clearly related to outstanding medical accounts which were included in the letter of demand dated 25 March 2009 ("JL 12"). This related to the backlog that was referred to in clause 3 the processing of which would be completed by 30 October 2009.

The judgment ignored what the parties specifically stated that the court order was to settle the application and bring an end to it.

[12] In its answering affidavit to the main application, the respondent contended that Mr Mafatsa, the current Compensation Commissioner who deposed to the founding affidavit in support of the main application, was not involved in the negotiations leading up to and the conclusion of the settlement agreement. The respondent attached the notice of motion and the amendment thereof under case no. 35047/09 which served before Makhafola J on 31 July 2009 to support its assertions that the purpose of the application was to implement measures that would ensure that future accounts were dealt with expeditiously and thereby avoid a situation again arising of millions of rands of accounts remaining unpaid for inordinately long period of time.

[13] The respondent further contended that the issue of the accounts outstanding at that time was not raised, although reference thereto was made in the letter of demand (annexure JL 12) attached to the founding papers. It was for that reason that clause 3 of the settlement agreement was incorporated into the agreement. I have considered the notice of motion referred to above together with the amendment thereof. This is the application that culminated into the settlement agreement that the parties concluded and which was then made an order of court by agreement. Clearly, it cannot be concluded that the settlement agreement was limited to the outstanding accounts which were existing at the time and did not relate or regulate claims submitted after the order was granted if one considers the purpose of the application. It therefore follows that this ground of appeal has no merit.

The learned judge erred in not finding that the applicants are organs of state and operates on public funds.

[14] This ground is not of assistance to applicants' case. The Compensation Fund is not named in section 1 of Act 40 of 2002 as an organ of state. It is cited in the current proceedings in its official capacity as an administrator by virtue of section 2 to 4 of COIDA.

The learned judge erred in that she failed to take into account the fact that the respondent is not a service provider of the applicants and that there is therefore no formal contract of service between the parties.

[15] It has been argued that I should have found that the respondent's relationship with applicants only comes into existence if the respondent takes cession of the invoices that are payable to the individual service providers of

the applicants. In that event such a cession will take place only with effect from the date of the conclusion of such a cession agreement. Such cession does not operative retrospectively.

[16] Furthermore, that the rights and duties in terms of the cession agreement are limited. A cedent actually cedes to the cessionary, as at that date. It follows that a service provider of the applicants who cedes in 2020, had nothing to do with a settlement agreement concluded in 2009 where he was not a cedent or may not have ever been a doctor or service provider of the applicants.

[17] I find these contentions irrelevant. The settlement agreement was concluded with the respondent who is not a service provider of the first applicant. It had nothing to do with the service providers of the first applicant. There is therefore no merit on this ground of appeal.

The learned judge erred in finding that the respondent is to this day entitled as its cause of action to rely on a settlement agreement concluded in respect of the cession agreements it concluded during or pre-2009 with individual cedents who were the service providers of the applicants.

[18] It was submitted that I should have found that upon final settlement of the backlog that was the mischief cured by the settlement agreement and resolution of those issues, the settlement agreement becomes fully satisfied and immediately therefore, falls away once and for all.

[19] This argument is in my view flawed. It is clear from the application that served before Makhafola J on 31 July 2009 that a declarator was sought that

addressed the future conduct of the applicants *vis-à-vis* the respondent's accounts and a court order was granted by agreement to that effect. This ground of appeal is therefore meritless.

The learned judge erred in failing to find and/or properly interpret the real purpose of a settlement agreement, namely to settle and thereby bring finality and end the issues before court. The judge erred and misdirected herself in finding that the settlement agreement was intended to create a future and permanent contractual relationship between a single company and a government department. The judge erred in not finding that the effect of the settlement agreement is to bring finality to litigation between the parties, the *lis* becomes *res judicata*. The court order cannot be used as a cause of action into future litigation. The court order can only be enforced by execution or contempt proceedings not as a cause of action into the future.

[20] I found it prudent to deal with these grounds together. It is clear from the 2009 court order that the purpose was to regulate future conduct of the parties in relation to the claims. I do not agree that the principle of *res judicata* applies to claims that arose subsequent to the 2009 order. The claims are regulated by the agreed procedure in terms of the court order of 31 July 2009.

The different clauses of the settlement agreement whether read together as a whole or individually, prove strongly that the purpose of the settlement agreement and order was to settle the backlog and not contract into future relations.

[21] This submission cannot be correct. The interpretation of the settlement agreement by the applicants is in direct contrast with its clear and

unambiguous terms. It is clear from the face of the settlement agreement that it was intended to regulate the future conduct of the parties. In a similar matter between the same parties decided in this Court by Coetzee AJ under case no. 84089/2018, the court made the same finding and held as follows:

> "*… The procedures in clauses 2 and 5 would have been redundant if the agreement only regulated the backlog claims as on 21 September 2009 … The agreement also regulates the processing of claims after 2009.*" (My emphasis.)

I align myself with this view. Leave to appeal was refused in the matter referred to *supra* and the applicants petitioned the SCA for leave to appeal. The SCA dismissed the application for leave to appeal under case no. 1164/2019 with costs on the grounds that there is no reasonable prospect of success in an appeal, and there is no compelling reason why an appeal should be heard.

Conflicting judgments

[22] The applicants submitted that there are compelling reasons why leave to appeal should be granted. There are conflicting judgments from this division regarding the interpretation of the settlement agreement. They relied on two decisions which were decided in their favour. The respondent disagreed and submitted that the cases referred to are not conflicting in nature. The submission is simply based on the different outcomes in the different cases that involved the same parties. It has not been shown that the different judgments dealt with the same issues and arrived at different conclusions.

[23] In the two matters relied upon by the applicants, viz, case numbers 47268/18 and 20293/15 summary judgement was refused in actions instituted by the respondent based on the settlement agreement.

[24] In case no. 20293/15 Sibuyi AJ refused summary judgment on the basis that the respondent failed to identify the claims which were allegedly validated and approved for payment from its papers. He further held that the court order does not provide any remedy in the event of the applicants failing to process, validate and effect payment on the validated medical accounts within 75 days from the date of acceptance of the claim. These findings have got nothing to do with the interpretation of the settlement agreement.

[25] In case no. 47268/18 in dismissing the summary judgment application, Collis J held that the particulars of claim did not comply with the provisions of Rule 18(4) of the Uniform Rules of Court.

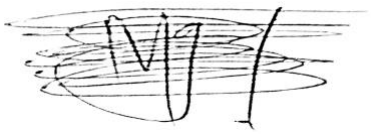
[26] In both matters the court did not find that the settlement agreement did not regulate the future relationship between the parties. The respondent has attached a long list of cases between same parties which dealt with the same issues which included the interpretation of the settlement agreement. Summary judgment was granted in all those matters after it was held that the settlement agreement regulated the future relationship between the parties.

[27] Mr Maakane SC for the applicants also referred me to the Supreme Court of Appeal judgment between same parties where Mr Mkhonto, the erstwhile Compensation Commissioner was found guilty of contempt of court for failure to comply with the court order of Makhafola J. He submitted that the decision was set aside by the Constitutional Court on the basis that the

court order of Makhafola J was *res judicata*. This submission is not correct. The Constitutional Court in case no. CCT 99/16 set aside the SCA decision on the basis that the reason for the non-compliance of the court order was not *mala fide* in that there was an explanation by the applicants that there were logistical problems at the first applicant's offices. Further that Mr Mkhonto was not joined as a party to the proceedings.

[28] Having considered all the grounds for leave to appeal, I am not persuaded that the appeal would have a reasonable prospect of success and that is some other compelling reason why the appeal should be heard.

[29] Accordingly, the application for leave to appeal is dismissed with costs.



M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the applicants	S S Maakane SC & A N Tshabala
Instructed by	State Attorney Pretoria
For the respondent	C J Welgemoed
Instructed by	Quiryn Spruyt Attorneys c/o V D T Attorneys
Heard on	16 March 2021
Handed down on	30 June 2021