IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 2886/2022**

In the matter between:

DUMISANI HARRINGTON MKHONTA **Applicant**

And

PIGG'S PEAK TOWN COUNCIL **Respondent**

Neutral Citation: *Dumisani Harrington Mkhonta vs Pigg's Peak Town Council* (2886/2022) [2023] *SZHC* 299 (26/10/2023)

Coram: **K. MANZINI J**

SUMMARY: *Civil Procedure: Deed of settlement And Law relating to circumstances that warrant registration of same as an order of Court revisited – Parol Evidence Rule applicable herein.*

Held: application dismissed with costs.

JUDGMENT

26 OCTOBER, 2023.

K. MANZINI – J:

[1] The Applicant herein is Dumisani Harrington Mkhonta, an adult LiSwati male of Piggs' Peak, Hhohho Region.

[2] The Respondent is the Piggs' Peak Town Council, a Municipal Authority duly established in terms of the Urban Government Act No. 8/1969, and having its principal place of business in Piggs' Peak, Hhohho District.

[3] The Applicant herein has moved an application before this Court, for an order in the following terms:

> *"1. The Deed of Settlement signed by the parties on the 11th of July 2019 which is Annexure "DHM" hereto, is made an order of Court and the contents thereby;*

2. *Granting the Applicant further and/or alternative relief."*

THE APPLICANT'S CASE

[4] In the Founding Affidavit the Applicant on or about the 11th of July 2019, the parties herein concluded a Deed of Settlement in respect of damages. The background of the matter herein being summons issued by the Applicant, against the Respondent wherein the sum claimed was E2 039 051.50 (Two Million Thirty Nine Thousand and Fifty One Hundred Emalangeni and Fifty Cents) The said sum claimed was in respect of damages, and legal costs (see paragraph 6 Founding Affidavit). The parties herein proceeded to conclude a Deed of Settlement. The said Deed of Settlement was annexed to the application and marked **Annexure "DHM".**

[5] The Applicant further averred in paragraph 8 of the Affidavit that on the date of signature, the Respondent was represented by Mzwandile Ndzimandze, whilst he represented himself. In paragraph 9, the Applicant averred further that:

"In terms of Clause 6.1 of the Deed of Settlement, same shall only be made an order of Court in the event there is default by either

party. The Respondent is in default, and despite above Notice to fix such default, it has failed to do so."

[6] In paragraph 10 the Applicant proceeded to state as follows:

"The purpose of this application is to request the Court to register the Deed of Settlement and its contents thereof to be made an order of Court."

The Applicant's Counsel submitted that the Respondent opposed the application on the basis that the parties had concluded a deed of settlement, the terms of which entailed that they were entering into a **"set-off with no further claims"** against one another, however the Applicant herein was of the view that there is merit to this application. The Applicant's Counsel contended that there is no basis for a finding that a set-off had been made herein, and that indeed the Respondent is in breach of their settlement agreement.

[7] To support the premise that the Respondent herein is in breach of the settlement agreement, he submitted that the Deed of Settlement was concluded as a compromise, subsequent to the Applicant (who was the Plaintiff therein) issuing summons against the Respondent (who was the Defendant therein) for damages in the amount of E2 039 051.50 (Two Million Thirty Nine Thousand and Fifty One Hundred Emalangeni and Fifty Cents). According to the submission of Counsel for Applicant, this was in respect of refurbishment of the Plaintiff's complex which is situated in Piggs' Peak. This figure was juxtaposed with the indebtedness in rates owed by the Plaintiff in the sum of E257 129.61 (Two Hundred and Fifty Seven Thousand, One Hundred and Twenty Nine Emalangeni and Sixty One Cents), and in that fashion, a set-off would be achieved.

[8] The submission of Counsel herein was that the Court is being called upon to determine whether a set-off in this context means that there was an automatic extinguishment of the claims of the Applicant, or whether the smaller debt was extinguished, and the larger amount automatically reduced by the amount of the smaller debt. It was the case of the Applicant's Counsel that in terms of the law for an effective set-off to take place the following must be in place:

8.1 Both debts must be of the same value and must be due.

8.2 These debts must be liquidated, meaning, that they must be sounding in money which is ascertained and does not require extensive evidence to prove it.

8.3 Where the amounts are not the same, the smaller amount is extinguished and the larger automatically is reduced by the sum of the smaller debt.

[9] To buttress this position Counsel for Applicant relied on the following authority being; **Wille's Principles of South African Law 8th edition 483**, which he cited as follows:

> ***"The four conditions for set-off to operate are that both debts must be (i) of the same value, (ii) liquidated (iii) fully due, (iv) payable by and to the same person in the same capacity. " See: Exclusive Access Trading 73b(Pty) Ltd v Lynne Janet Bouwer & Another case No.3829/2009***

[10] The Applicant's Attorney further referred to **Gibson, South African Mercantile and Company Law (8th Edition), at page 103** as follows:

> ***"Where two persons are in debt to each other and the debts are due and liquidated, both debts are automatically extinguished if they are of the same amount. (SA Metropolitan Life Assurance Co. (Pty) Ltd v Ferreira 1962 (4) SA 213 (0).....If one is larger than the other, the smaller is extinguished and the larger amount automatically reduced by the amount of the smaller debt. This process is known as "set-off" and is equivalent to payment (in re Trans-African Insurance Co. (Ltd) S.A. 324 (W)."***

[11] The Applicant's Counsel contended that in the case at hand since the amounts were not equal, and therefore the position that obtains herein is that the smaller amount is extinguished by the larger amount, with the remaining balance being payable to the other party. He proceeded to argue that the balance between the two figures of E783 05.50 (Seven Hundred and Eighty Three Thousand and Five Emalangeni and Fifty Cents) owed to Plaintiff by Defendant for refurbishments and the sum of E257 127.61 (Two Hundred and Fifty Seven Thousand, One Hundred and

Twenty Seven Emalangeni and Sixty One Cents) owed by the Plaintiff in ratio is an amount of E525 921.89 (Five Hundred and Twenty Five Thousand, Nine Hundred and Twenty One Emalangeni and Eighty Nine Cents). He submitted that his amount of E525 921.89 remains due owing and payable to the Plaintiff.

[12] The submission of Applicant's Counsel was also that the Plaintiff in line with the above proposition, had written to the Minister of Housing and Urban Development on the 28th day of September, 2021 explaining about the amount which had been off-set, and the remainder of E533 051.50 (Five Hundred and Thirty Three Thousand and Fifty One Emalangeni and Fifty Cents) which he deemed was to be paid to him by the Respondent Council. In the letter the Applicant stated that he is still waiting for Council to make the payment. It was the submission of Counsel for Applicant that when his client concluded the settlement agreement, it was not his intention to the completely extinguish the debt claimed, and/or owed between the parties. The Applicant herein, it was argued by his Attorney, was not represented by legal Counsel when he entered the said settlement agreement. Counsel herein submitted that the Respondent at the time of entering the said agreement, was clearly misguided in as far as its own understanding of the legal position regarding set-offs.

[13] Counsel herein submitted that this is a matter that is quite old, as it dates back to the year 2009. Despite this fact, the Defendant has never delivered on the agreement in terms of the Deed of Settlement in that it has failed to pay to the Plaintiff the outstanding amount of E533 051.50 (Five Hundred and Thirty Three Thousand and Fifty One Emalangeni and Fifty Cents). It was also submitted by Counsel for the Applicant that the agreement which was concluded by the parties, whilst the Applicant was not represented had actually left the Applicant worse off because his property continues to deteriorate, and has actually, become uninhabitable over time. The Applicant's Counsel prayed for the order to be granted in terms of the Notice of Motion, as well as costs. Indeed, it was contended by the Applicant's Attorney that the Respondent's actions cannot be justified, and is *mala fide* and/or vexatious because the Applicant herein is a man of straw, and has been **"put out of pocket"** by having to approach Court to ask the Court to enforce his rights in terms of the Deed of Settlement.

THE RESPONDENT'S CASE

[14] In *replicando*, it was submitted on behalf of the Respondent that it is not true that the Applicant was not represented at the time that the parties herein concluded the Deed of Settlement. Counsel he submitted that the Applicant was in actual fact represented by the Offices of the Law Firm

Associates at the initial stages of the matter, and then later on by the Law Firm which is mentioned in Clause 4.2 of the Deed of Settlement which is featured from page 8 up to page 12 of the Book (Justice Mavuso & Associates). Respondent's Counsel during his oral submissions stated that although the Applicant was clearly legally represented, he had proceeded to sign the Deed of Settlement to signify his willingness to be bound by the terms of this very same agreement that he is today challenging.

[15] The Respondent's Counsel submitted that the Applicant in view of the prayers made in the Notice of Motion, in essence is seeking to be paid the sum of E525,921.89 (Five Hundred and Twenty-five Thousand, nine hundred and Twenty One Emalangeni and eighty nine Cents) which he believes is due to him in terms of the Deed of Settlement. He pointed out that the Deed of Settlement itself does not contain a clause that obligates the Respondent to pay the Applicant this amount of money. The Respondent's Attorney stated that the only obligation contained in the settlement document relates to the cancellation of the rates owed by the Applicant. He stated that the Respondent does not dispute this. It was also not in dispute, according to Counsel for the Respondent that the parties then concluded a Settlement Agreement after the Applicant instituted a claim through action proceedings against the Respondent for the sum of

Emalangeni and Fifty Cents) in respect of damages to his building. After the action was defended by the Respondent herein, the parties proceeded to conclude the Settlement Agreement which is in issue in the present proceedings. He stated that in terms of clauses 2.3, 2.4 and 2.5, the essence of the terms of the agreement which the Court is now called upon to interpret.

[16] The Respondent's Attorneys pointed out that the Applicant compromised his original claim or agreed to a set-off in full and final settlement of his claim. The Respondent's Attorney further contended that the Applicant did not reserve his rights in the Deed of Settlement, to proceed on the original claim or even for the balance. He pointed out that in clauses 2.3 and 2.4 the Applicant bound himself to a position where he will no longer have any further claims against the Respondent in relation to this matter.

[17] It was submitted by the Respondent's Attorney that the Deed of Settlement provides that the **"The Deed of Settlement shall only be made an Order of Court in the event there is default by either party"** (See: Clause No. 6.1 on page 33 of the Book of Pleadings). The Respondent's Counsel submitted that the Respondent herein had not committed a breach, and

therefore, there are no grounds that warrant the registration of the Settlement Agreement as an order of this Court.

[18] Respondent's Attorney proceeded to elaborate on the proposition that in terms of the law, every obligation has as its object a particular performance, which is expected from another. He submitted that an obligation can be terminated by agreement between the parties by means of a set-off and compromise. The Respondent's Counsel, proceeded to cite LAWSA Volume 19 page 169 where a compromise is defined as an agreement by which parties settle a dispute between them. Further to this, the Attorney herein referred the Court to the case of **Mirriam Kingsley v The Principal Secretary in the Ministry of Public Works and Transport and Another High Court Case No. 853/2018** wherein the Court described a compromise as follows:

> ***"An agreement of compromise creates new rights and obligations as a substantive contract that exists independently from the original cause. The purpose of the compromise is two fold;***
>
> ***(c) to bring an end to existing litigation; and***
>
> ***(d) to prevent or avoid litigation."***

[19] The Respondent's Counsel proceeded also to cite the case of **S.S. Dlamini N.O. and Others v Phineas Mancele Dlamini and Others Court of Appeal Case No. 19/2005** where the Court stated the following:

> ***"The use of the phrase full and final settlement has been subject of discussion and determination in several cases decided in the South African Court. What seems to be clear from the above decisions to which I have been able to refer is that the phrase is correctly used, and is binding on the creditor, where it accompanies a tender in the form of a compromise in an attempt to settle a dispute. By accepting the amount so tendered the creditor willingly abandons the balance of his claim. The matter is then settled and the creditor cannot pursue his original claim."***

[20] Further to this, Counsel for the Respondent also referred the Court to the case of Charles **Joseph Stopforth and Others v Nedbank Limited unreported South African High Court Case No. HCAA 20/2019**. The Appellants in this case, it was submitted by Respondent's Counsel herein, had appealed an Order of the Magistrates Court which had ordered that they are liable to pay a balance of a debt after they had signed a settlement

agreement that on the debt they would only pay E800,000.00 (Eight Hundred Thousand Emalangeni). In setting aside the Judgment of the Court a quo, the High Court held that the Bank (the creditor) had compromised its claim by signing a Deed of Settlement to be paid only 800,000.00 (Eight Hundred Thousand Emalangeni) by the sureties as opposed to the whole debt owed by the principal debtor.

[21] In applying the law to the facts of the case before Court at present, the Respondent's Counsel pointed out that by signing the Settlement Agreement, the Applicant had effectively accepted that the rates owed will be used to set-off the amount he claimed in the summons as full and final settlement, and no further claims would be made by Respondent against the Applicant. It was further pointed out that at the time Applicant entered into the Settlement Agreement, he was legally represented in the matter.

[22] It was also contended by the Respondent's Attorney that the aim of the Settlement Agreement was to settle the Applicant's claim in full, and did not in any of its provisions refer to an obligation on the part of the Respondent herein to pay to the Applicant the balance of the Applicant's claim made in the summons.

[23] The Respondent's Attorney argued that there is no dispute that the Respondent cancelled the rates owed by the Applicant pursuant to the Settlement Agreement. He pointed out that it is the Respondent's case that this, and the issue of settling Legal costs at the time, were the only obligations that the Respondent had herein, and this was accordingly performed by the Respondent. He contended further that the Court therefore has no grounds upon which to order that the Deed of Settlement be registered, because some of the terms of the Deed of Settlement have been breached by the Respondent in terms of Clause 6.1 of the Book of Pleadings. He pointed out also that each and every page of the Settlement Agreement was initialed, to show how consent and agreement to the terms as afore-stated. These being to cancel the rates owed, and to pay the Plaintiff's (Applicant *in casu*) costs.

[24] Respondent's Counsel opined further that it is not in any way a term of the Settlement Agreement that the Respondent would also in addition to the afore-stated duties, also refurbish the property of the Applicant. He pointed out that instead the Applicant is the one who is in breach of the Settlement Agreement because he has not withdrawn the action, and yet Clause 2.3 obligated him to do so. The Respondent's Counsel referred the Court to the **Mirriam Kingsley Case** (*supra*) to buttress this assertion. He insisted

that the Applicant having signed the Agreement in full and final settlement, cannot thereafter renege. He insisted that his client has honoured the terms of the Settlement Agreement in every respect because the rates were cancelled, and the Applicant has not alleged anything to the contrary.

[25] It was submitted by Counsel that the letter from the Applicant which was directed and addressed to the Housing Authority, being the Minister of Housing and Urban Development was not directed to the Respondent, (featured on page 35 of the Book of Pleadings). Respondent's Counsel stated that the letter was only copied to the Respondent, so no action was required from the Respondent in this regard. It was also the submission of Respondent's Attorney that this Court cannot create more rights for the Applicant than what the Settlement Agreement provides. The Respondent's Attorney argued that, there was lack of good faith on the part of the Applicant at the time of conclusion of the Settlement Agreement. It was submitted by Respondent's Counsel that from the time of conclusion of such Settlement, the Applicant was content, and lived with the said agreement as it stood, until the time that he decided that he should write to the Minister of Housing and Urban Development. The prayer made on the Respondent's behalf, by its Counsel was that the application should be

dismissed, with costs as a breach of the said Settlement Agreement has not taken place.

ADJUDICATION

[26] The Applicant herein has entreated the Court to issue an order in terms of the application made before Court. The Applicant's prayers are as follows:

26.1 That the Deed of Settlement signed by the parties on the 11th of July 2019 which is **Annexure "DHM"** hereto be made an order of Court and the contents thereof.

26.2 Granting the Applicant further and/or alternative relief.

[27] It is common cause that the Deed of Settlement in question contains the following clauses that regulate when or, in what circumstances it can be registered as an order of court. The provisions in question are as follows:

"2.3 That each party shall withdraw any and all reliefs sought by either party hereto against the other party, and all claims that either party may have against the other party in respect of the above-mentioned action/legal proceedings.

2.4 That the parties agree, without any admission as to liability whatsoever, to a set-off as a full and final settlement in all and every respect of all and every claims, reliefs, liabilities, loss and/or damage of whatsoever nature against or by whatsoever nature against or by whosoever that each Party has or may have raised, pleaded, disclosed, referred to and/or relied on in relation to action/legal proceedings or claims mentioned herein above.

2.5 That in terms of this settlement, the Parties herein record specifically that each party shall have no further claims against the other."

[28] The gist of the Applicant's claim herein is that it is an endeavor, on the part of this party, to get this Court to interpret the said clauses in the Deed of

Settlement in its favour, and to make a finding that the Respondent is in breach of the said agreement. The clause relating to breach of contract, or when it can be deemed that an instance of breach of the settlement agreement has taken place is the following:

> ***"6.1 The Deed of Settlement shall only be made an order of Court in the event that there is default by either party. The party not in breach or default shall be entitled to make the Deed of Settlement an order of Court wherein the defaulting party shall be given 30 (thirty) working day's written notice to fix the default before proceeding to enforce the agreement."***

[29] The Applicant herein has not been able to establish before Court that the Respondent has committed a breach of the Settlement Agreement. The Settlement Agreement is quite clear in terms of its contents, and there is no mention therein that the Applicant is owed the amount of E525,921.89 (five Hundred and Twenty Five Thousand, Nine Hundred and Twenty One Emalangeni and Eighty Nine Cents) being the balance or the difference between the amount E783, 051.50 (Seven Hundred and Eighty Three Thousand and Fifty One Emalangeni and Fifty Cents), duly claimed by

Applicant in the summons issued against Respondent (who was the Defendant) in those proceedings, and the amount of E257,129.61 (Two Hundred and Fifty Seven Thousand, One Hundred and Twenty Nine Emalangeni and Sixty One Cents) which is the amount of rates that were owed by the Applicant herein.

[30] The Applicant herein is relying on a written document as the basis of his application for the registration of the signed Deed of Settlement. The Respondent does not dispute concluding and signing this document. Indeed, the Applicant does not deny that the rates were cancelled after, or at the time that the Deed was duly signed. It is clear therefore, to this Court that to the rule of evidence, known as the Parol Evidence rule is applicable herein.

[31] According to the Learned Authors L.F. Van Huyssteen et al, **"Contract General Principles", 5th Edition at page 303**:

> ***"In terms of parol evidence rule, a document which expresses a juristic act, such as a contract, is the exclusive memorial of the transaction, and extrinsic evidence which contradicts, varies (or***

rather is at variance with) or adds to its terms is not admissible."

(See 18 LAWSA "Evidence" paragraph 167)

[32] It is a trite principle of our law that when a contract has been reduced to writing no extrinsic evidence may be given of its terms except the document itself nor may the contents of such document be contradicted or varied by oral evidence as to what passed between the parties at the time when the agreement was negotiated, which negotiations ultimately led to the conclusion of the contract. Indeed, it is true that the written contract, memorializes the transaction. The Court in the Supreme Court Case of **Fathoos Investments (Pty) Ltd and 2 Others v Misi Adam Ali Civil Appeal Case No. 49/12** relied on this principle of our law, their Lordships at paragraph 29 expressed the following:

"This principle of our law is referred to as the Parol Evidence rule, and, its purpose is to prevent a party to a written contract from seeking to contradict or vary the writing by reference to extrinsic evidence at the risk of redefining the terms of the contract notable exceptions exist where the contract is vitiated by mistake, fraudulent misrepresentation, illegality or duress. See the cases of

Johnston v Leal 1980 (3) S.A. 927 (A) at 943; Soer v Mabuza 1982 – 1989 SLR 1 at 2G – 3A."

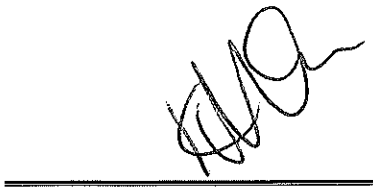
[33] The Court *in casu* is not in a position to read more into this Settlement Agreement than what the parties to this matter actually agreed to, when they appended their signatures to the document. I therefore, am unable to make a finding that there has been a breach of the said agreement. The Court herein aligns itself completely with the Court's findings in the case of **S.S. Dlamini N.O. and Others v Phineas Mancele Dlamini and Others**, (***supra***) as well as the case of **Mirriam Kingsley v The Principal Secretary of the Ministry of Public Works and Transport and Another (*supra*).** The entire aim of concluding the Settlement Agreement by the parties herein was clearly to create a compromise wherein the parties sought to bring an end to the litigation instituted by the Plaintiff (Applicant herein) when he issued summons against the Defendant. The parties further clearly intended to relinquish all further claims against one another subsequent to the conclusion of the Settlement Agreement. This is evident from two Clauses which are quoted herein order:

"2.4 That the Parties hereby agree, without any admission as to liability whatsoever, to a set-off as a full and final settlement in all and every respect of all and every claims, reliefs, loss and/or damage of whatsoever nature against or by whosoever that each party has or may have raised, pleaded, disclosed, referred to and/or relied on in relation to action/legal proceedings or claims mentioned herein above.

2.5 That in terms of this settlement, the parties herein record specifically that each party shall have no further claims against the other."

[34] In view of the findings made herein above it is my finding that the Applicant has not been able to make out a case of breach of contract on the part of the Respondent, and therefore there are no grounds upon which this Court can register the Deed of Settlement as an order of Court.

[35] In the premises, judgement is entered in the Respondent's favour. The application herein is accordingly dismissed with costs.



K. MANZINI
JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: **H. MAGAGULA (Dynasty Inc. Attorneys)**

For the Respondents: **N.D. JELE (Robinson Bertram)**