IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

Case No. 13/15

Held at Mbabane

In the matter between:

SIMON MBHAMALI **Appellant**

VS

THE TEACHING SERVICE COMMISSION **1st Respondent**

THE UNDER SECRETARY

MINISTRY OF EDUCATION **2nd Respondent**

ATTORNEY GENERAL **3rd Respondent**

Neutral citation: *Simon Mbhamali V The Teaching Service Commission, The Under Secretary, Ministry of Education and Attorney General [13/15] [2016] SZIC 04 14 October, 2016*

Coram: **MAPHALALA M.C.B : CHIEF JUSTICE**

DLAMINI M: AJA

FAKUDZE M.R: AJA

Heard: **26 September, 2016**

Delivered: **14 October, 2016**

Summary: *The Appellant is a former Head Teacher. He was charged with misappropriating school funds and found guilty by the Teaching Service Commission. He was not satisfied with the decision of the Teaching Service Commission and he reported the matter to CMAC as a dispute. The matter was resolved amicably between the Parties, resulting in the signing of a memorandum of agreement in full and final settlement of the dispute. The Appellant thereafter launched an Application with the Industrial Court claiming that the final settlement agreement had been signed by him under duress, pressure or that undue influence was exerted on him. The*

Industrial Court dismissed his Application basing it on the fact that by signing the agreement settling the dispute in full and final settlement, the Appellant compromised his claim against the employer. It was held further that there was no evidence before court that the Appellant signed the agreement under duress, pressure or that any undue influence was so exerted. The Appellant then appealed the decision of the Industrial Court to this Court.

Held – The Industrial Court did not misdirect itself that a full and final settlement had been reached between the parties;

Held Further – There was no evidence that any duress, pressure or any undue influence was exerted on the Appellant thus causing him to sign the settlement agreement; and

Held – It is not enough for a party to make a mere allegation that an agreement should be declared invalid on the grounds of public policy. There must be sufficient evidence to support this allegation. Impropriety that may result in the court's intervention must be well established. Appeal is therefore dismissed and each party to bear its own costs.

JUDGMENT

JUSTICE M.R. FAKUDZE

[1] This is an Appeal from a Ruling by the Industrial Court dated 19th October, 2015 in Case No. 158/07.

BACKGROUND

[2] The brief background to this Appeal is that the Appellant is a former employee of the Swaziland Government. He was employed by the Swaziland Government as a Primary School Teacher sometime in 1977. The Appellant served in various duty stations in the country and in various capacities. He first served as a Head Teacher at Maphalaleni Anglican Primary School. He then transferred to Enkalangeni Primary School and finally to Elangeni Primary School where he was relieved of his duties.

[3] It was while he was serving as the Head Teacher of Elangeni Primary School, that the Appellant was charged with misconduct involving the misappropriation of large sums of money belonging to the school. He was also charged with theft by false pretences in that he withdrew certain sums of money from the school's account having forged the Chairman's signature, which signature was necessary for purposes of countersigning the school cheques. The aspect relating to the misappropriation charges appears under

"Annexure A" of the Founding Affidavit. It is worth noting that for purposes of the disciplinary hearing, the only charge that was levelled against the Appellant was the one that related to the misappropriation of funds.

[4] The Appellant was invited to appear for a disciplinary hearing at the end of which, he was dismissed by the 1st Respondent, The Teaching Service Commission. Being not satisfied with the decision of the 1st Respondent, the Appellant reported the matter as a dispute with the Conciliation Mediation and Arbitration Commission (CMAC). The dispute was resolved amicably at CMAC and a Memorandum of Agreement was duly signed by both Parties on 4th October, 2015. The Memorandum was annexed to the 1st Respondent's Answering Affidavit and marked as "Annexure MBA 9".

[5] By way of Review, the Appellant approached the Industrial Court, seeking *inter alia,* that:

> "8.5 The Agreement reached at CMAC was unlawful and unenforceable.
>
> 8.6 The Agreement was obtained under undue influence.
>
> 8.7 The purported Agreement of settlement does not meet the requirements of a contract of waiver of statutory benefits.
>
> 8.8 The parties were not *ad idem,* either through the Appellant being coerced into signing it or that undue influence was exerted."

[6] Before the matter was argued in the court *a quo*, a point in *limine* had been raised by the Respondents in their answering papers arising from the fact that the Industrial Court had no power to revive a decision of CMAC since the matter had been finalised at conciliation stage. During argument, this point was not pursued by the Respondents. Instead, the Appellant led evidence in chief and was thereafter, cross examined by the Respondents' Attorney. Although the Respondents did not pursue the issue of reviving the matter that was concluded at conciliation, the court *a quo* invited the parties' representatives to address it on this issue.

[7] After hearing the parties' representatives, the court *a quo* dismissed the Appellant's Application on the basis that the court *a quo* had no jurisdiction over the disputes since same had been settled in full and final settlement by the parties. Based on the finding of the court *a quo*, the Appellant noted an Appeal on the 18th November, 2015 and the grounds of Appeal were as follows:

(a) That the court *a quo* erred both in fact and in law by holding that the Appellant compromised his claim by signing the Agreement in full and final settlement, in the face of evidence that he was not fully aware of all his rights with regard to the matter, The Appellant unrepresented at the time of such signing.

(b) The court *a quo* erred both in fact and in law by holding that there was no evidence that the Appellant signed the Agreement

under duress or that there was no undue influence exerted on him forcing him to sign. This is despite the evidence led to show that *prima facie* there was undue influence and or duress leading to the signing of the Agreement.

The Parties' Contention

Applicant's Case

[8] When the matter came before this court on the 26th September, 2016, Counsel for the Appellant moved an Application dealing with three issues pertaining the Appeal. These were (1) condonation for non-compliance with Rule 30 of the Rules of this Court; (2) granting the Applicant leave to file the Record of Proceedings of the court *a quo* on Appeal out of time; and (3) granting the Appellant leave to file Supplementary Heads of Argument. The Notice of Application had been filed on the 30th June, 2016. Since the Respondents were not opposed to this Application, it was accordingly granted by this court.

[9] When going through the Appellant's papers filed of record for purposes of this Appeal, one realises that Appellant's case centres around two issues; The first issue relates to the fact that the purported Memorandum of Agreement entered into between the parties at CMAC does not amount to a compromise because at no point in time did the Appellant waive his rights to institute further legal action against the Respondents. This submission by the Appellant suggests that this court must embark on the exercise of

interpreting the Memorandum or Agreement that was signed by the parties in full and final settlement at CMAC. I must hasten to point out though, that at paragraph 9 of Appellant's Heads of Argument, dated the 14th March, 2016, the Appellant sings a different song all together. He admits that the Agreement is a compromise, but there are some further issues around it. This court has reserved its observations on this aspect for the part where the court's analysis and conclusion in this judgment is considered.

In expanding on why the Appellant claims that he has serious issues with the Memorandum or Agreement of Compromise, the Appellant argues that the Respondents worked on a plan to trick him into signing the Memorandum, particularly the fact that prior to signing same, Appellant was not given the opportunity to read it, was unrepresented and his full right were not explained to him. The Appellant avers that the only benefit derived out of the Agreement was his pension contributions. These contributions, Appellant argues, were in any event "his entitlement even if the Memorandum had not been entered into." Appellant further argues that the Respondents were in fact not compromising in anything as nothing was due from them in terms of the Agreement, reason being that the paying agent is the Public Service Pension Fund. This paying agent is not part of Respondents' administrative structure. Even what was paid as contributions by the pension fund was taxed and the effect of this taxation was to nullify the Agreement. Since the Appellant had served the Respondents for a period of about twenty seven (27) years, he was entitled to some form of compensation over and above his pension contributions.

[10] On the issue of signing the Memorandum under duress or under circumstances that suggest that there was undue influence, Appellant argues that on the date of signing of the Memorandum, he arrived at CMAC offices and found the Respondents' representative in a conversation with the Commissioner in charge of the matter in the Commissioner's office; and thereafter, he was called in to sign the Agreement. Appellant further argues that the intimidating and trickery conduct at CMAC is similar to the one Appellant experienced during his disciplinary hearing. In that instance, he was made to sign an Affidavit admitting guilt under duress and threat of arrest, and the Commissioner of Oaths not even enquiring whether Appellant knew contents of same. This kind of conduct is against the spirit of a valid and binding agreement and also against public policy.

[11] Appellant finally argues that he was treated unfairly during the audit report and his defence was not considered. He also pleaded not guilty when giving of evidence before the Teaching Service Commission, but only changed his plea on being threatened with arrest. He pleads with the court to uphold the Appeal with costs.

Respondent's Case

[12] The Respondents contend that the court *a quo* dealt extensively with the issue of the Appellant's allegations of being compelled to sign the Agreement. The court analysed the evidence before it and found no legal basis for the Appellant's case. The court therefore held that by signing the

Agreement settling the dispute in full and final settlement, the Appellant compromised his claim against the employer.

[13] It is Respondents' further contention that the court *a quo* was correct in coming to the conclusion that the Appellant was or is a person who can well be described as "an above average citizen" because he is educated, can read and write English. Therefore the allegation by the Appellant of being tricked into signing the Agreement of settlement is baseless.

[14] Respondents contend that the Appellant does not show how he was tricked or how the alleged undue influence was exerted on him. It is Respondents' case that the principles in the case of **Patrick Magongo Ngwenya V Swazi Bank No. 679/2009 (IC)** regarding the law of compromise, were well articulated; even though the case is a decision of a lower court than the Industrial Court of Appeal, it is highly persuasive in this respect.

[15] On the issue of Appellant's contention to the effect that his pension contributions were heavily taxed and this had the effect of nullifying the Agreement, the Respondents' position is that the Tax regime has nothing to do with them. The Taxing institution applies its own laws which are not subject to the control of the Respondents. The Appellant can take up this issue with Revenue Authority. The Respondents therefore pray that the Appeal be dismissed with costs.

The Applicable Law

[16] Before dealing with the Applicable law, it is again worth noting that there are basically two issues that must be determined by this court for purposes of this Appeal. The first one pertains to full and final settlement of a matter by means of a Memorandum or Agreement. The second one relates to the declaration of a Memorandum or Agreement a nullity if it is proven that a party to it signed it under compulsion, duress or that undue influence was exerted leading to the signing of it. This second aspect is a matter for public policy. The Applicable law will, with respect to these two cardinal issues, now be considered.

[17] It is trite that disputes between two contesting parties should be settled amicably between them even outside the four corners of the courtroom. This is part of the modern notion of Alternative Dispute Resolution Mechanism (ADR). In our jurisdiction, courts, have on numerous occasions, been called upon to make a determination on whether or not a party to a dispute signed a legally binding Memorandum or Agreement "in full and final settlement" of a matter. Some legal scholars have also contributed a lot in this field of law. For purposes of this judgment, let us start with these scholarly contributions before considering what courts have said and decided.

[18] The legal position regarding the signing of a contract is well articulated by **KERR AJ: THE PRINCIPLES OF THE LAW OF CONTRACT,** 2002 at pages 102-103 as follows:

"The effect of appending a signature is, in general, that the party in question is bound: It is a sound principle of law that a man when he signs a contract, is taken to be bound by the <u>ordinary meaning and effect</u> of the words which appear over his signature. The rule is applied not only when the person signing studies the document but also when he appends his signature carelessly or recklessly and when he fails to avail himself of an opportunity to study provisions incorporated by reference. In such circumstances the person signing can be considered as taking the risk."

[19] The Learned Author, **Kerr**, (**Supra)**, goes on to mention about five instances where the general rule on being bound by the signing of contract does not hold. These are (1) if the person who signs does not understand the terms of the document and is neither careless nor reckless; (2) if there is a disagreement about the nature of the legal relationship, an error in *negotio*; (3) if the purported party who understood the words in the document in their ordinary meaning knew, or had reason to know, that the other purported party, misapprehended the terms of the contract, but left him under such apprehension; (4) if there is an unusual provision, or one that would not be expected in the content in which it is found, to which attention has not been drawn; (5) if the person signing was misled as to the purport of the words to which he was thus signifying his assent (fault is not a requirement), misled, that is by the other party's words or action. The principles alluded to and expounded upon by **Kerr AJ** (**supra)** also apply to a contract or agreement of compromise.

[20] On settlement offers and agreement, The Learned Author, **John Grogan, WORKPLACE LAW, 11th Edition**, JUTA, has this to say at pages 206 to 207 of his book:-

> ***"If an employer realises that it has botched a dismissal, nothing precludes an offer of settlement before the matter comes to court or before an arbitrator. Employees who have accepted settlements cannot normally proceed to litigate against their employer, because acceptance of the offer constitutes a waiver of their rights against the employer. However, the offer must be made and accepted in good faith and the employee must be aware of the consequences of his acceptance."*** (The underlined words are my own emphasis).

[21] In the matter between **Patrick Magongo Ngwenya V Swazi Bank Appeal Case No. 4/2014**, in dealing with a settlement "in full and final settlement" of all issues between the parties that culminate into a compromise, the Industrial Court of Appeal observed at paragraph 18 that-

> ***"18 It remains for us to say something on the concept of payment "in full and final settlement" by a creditor in so far as the law of compromise is concerned. But, first, it is necessary to bear in mind that a compromise itself is generally an agreement in terms of which the parties settle their disputes. This is usually an out – of – court settlement. A compromise creates new obligations and existing ones are extinguished. In effect, a compromise is a form of waiver or estoppel. Where payment is made in full and final settlement***

following a firm offer to compromise, then existing obligations fall away. In such a situation, the creditor is precluded from suing."

[22] In determining the issue of interpreting a full and final settlement Agreement, His Lordship Parker J, in the case of **Job Matsebula and Others vs Intercon Construction (Pty) Ltd Case No. 16/94** stated as follows -

"In my view in cases where the full and final settlement argument is set up, the court must ascertain whether there has been a settlement which led to the settlement that can stand up in law."

[23] On the issue of the declaration the Agreement on the basis that it is contrary to public policy because same was signed under duress or that undue influence was exerted, courts have also expressed themselves on this one as well.

[24] In the case of **Price Waterhouse Coopers Inc. and Others V National Potato Co-operative Ltd Supreme Court Constitutional Case of 2004 (6) SA 66 (SCA)** at paragraphs 23 and 24, their Lordships made this profound statement-

"At common law agreements that are contrary to public policy are void and not enforceable. While public policy generally favors the

utmost freedom of contract it does take into account the necessity for doing simple justice between man and man."

[25] It therefore follows that when a court finds that an agreement is contrary to public policy it should not hesitate to say so and refuse to enforce it. This power can only be exercised by the court in cases where the impropriety of the transaction and the element of public harm are manifest. The interests of the community or the public are accordingly of the utmost importance in relation to the concept of public policy. An agreement will be regarded as contrary to public policy when it is clearly inimical to the interests of the community, whether it be contrary to law or morality or runs contrary to social or economic expedience. **See Sasfin (Pty) Ltd V Beukes 1989 (1) SA 1 (A) 71J and 9A.**

[26] In the local case of **NUR & SAM Pty Ltd t/a Big Tree Filling Station and Others V Galp Swaziland Civil Appeal Case No. 13/2015**, Her Ladyship M. Dlamini AJA, after making a thorough analysis of South African authorities on the issue of freedom to contract VIS-AVIS public policy, quoted, with approval, an extract by Ngcobo J. in the case of **Barend Petrus Barkhuizen V Ronald Stuart Napier (72) (2007) ZACC 5,** paragraphs 28 and 73 as follows -

"[28] ***Public policy represents the legal convictions of the community; it represents those values that are held most clear by the society."***

In paragraph 73, the Learned Judge continued to observe that-

> "[**73]** ***Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled is the general sense of justice of the community, the bonis mores, manifest in the public opinion.***"

[27] The abovementioned authorities help establish what public policy is and when can courts declare *null and void* an agreement that is contrary to public policy. We must be mindful of the fact what public policy is and when an agreement that are contrary to public policy should be declared *null and void* are often difficult and contentious questions in our jurisdiction. South Africa has somehow managed to overcome this hurdle by ensuring that public policy is rooted in its Constitution and the fundamental values it enshrines. In our scenario, the Common Law position still prevails.

Court's Analysis and Conclusion

[28] On the issue of compromise arising from the parties having signed the "full and final settlement" Agreement before CMAC, it is this Court's considered view that the Appellant seems to be on a fishing expedition as its cause of action seems not clear. This becomes abundantly clear when one compares the Appellant's Notice of Appeal and its Heads of Argument. In terms of the Notice of Appeal dated 10 November, 2015, Appellant's first ground of Appeal says that "The court *a quo* erred both in fact and in law by holding that the Appellant compromised his claim by signing the Agreement of full

and final settlement, in the face of evidence that he was not fully aware of all his rights with regard to the matter, The Appellant being unrepresented at the time." This ground suggests that this court is being called upon to give interpretation to the Agreement that was signed at CMAC and which later became the subject of litigation in the court *a quo*. It is worth noting that the court *a quo* had given interpretation to same and had concluded that it was a compromise, basing such conclusion on the **Patrick Magongo Ngwenya V Swazi Bank Case No. 679/2009** (Industrial Court). In the Appellant's Heads of Argument dated 14th March, 2016, the Appellant states in paragraph 9 that "It is submitted that agreement such as one obtained in *casu* are for all intents and purposes a compromise between the parties." The Appellant goes further to submit that "The Respondents herein were in fact not compromising in anything as nothing was due from them in terms of the Agreement. It is common cause that in *casu* the pension benefit referred to are paid by a different entity all together, the Public Services Pensions Fund, who has never been a party in this matter."

[29] In the interest of justice, this court will briefly deal with both instances as with respect to Appellant's contentions before it makes its finding. On the issue that the court *a quo* erred in fact and in law by holding that the Appellant compromised his position when signing the full and final settlement agreement because of the fact that Appellant was "not fully aware of his rights," there is nothing in the papers before this court that supports Appellant's contention. The court *a quo* rightly observed that the Appellant was not just an ordinary member of society, but is a Teacher by profession. He understood the language that was used during the mediation

process. The other consideration that that court took into account is the fact a third and neutral party (in the form of the CMAC Commissioner) was the middleman during conciliation of the dispute up to the signing of same. The question one asks himself is "what rights was Appellant not fully aware of as a result of him not being represented at CMAC?" After all, he is the one who initiated the dispute at CMAC. After becoming suspicious of the meeting between Respondents' representative and the CMAC official, he had every right not to continue with the process and immediately seek legal assistance or other forms of redress like, for an example, seek a replacement of the allegedly tainted Commissioner. This court therefore finds no misdirection by the court *a quo* on this point. It is common cause that in terms of Section 81 (2) and (3) of the Industrial Relations Act, 2000, the issue of representation is addressed when a matter is still at conciliation stage. The process is conciliatory in nature.

[30] The other point relates to the concession that the Agreement is a compromise, but its effect is such that the Appellant benefitted nothing out of it because pension payments were effected by the Public Service Pension Fund. The Appellant goes on to state that what was paid out by the Pension was taxed and therefore the taxation part of it had the effect of nullifying the Agreement. I want to believe that this argument stems from the Appellant's lack of understanding of the law of compromise as propounded by our courts. In the case of the Industrial Court case of **Patrick Magongo Ngwenya V Swazi Bank (supra),** (which judgment was confirmed by the Industrial Court of Appeal in Appeal Case No. 4/2014), His Lordship

Mazibuko J, pointed out the essential elements in a compromise at pages 16 to 17 as follows:-

> ***"19.1 A compromise is an agreement that is concluded by parties who have an existing dispute or lawsuit.***
>
> ***19.2 The purpose of a compromise is to settle the dispute or lawsuit.***
>
> ***19.3 When settling their dispute the parties will abate some of their demands.***
>
> ***19.4 Once the parties have concluded the compromise, their relationship is governed by the new agreement viz, the compromise itself, and the original contract falls away. A compromise therefore, has the same effect as a plea of res judicata in respect to the parties' previous claims, demands or law suit."***

[31] This court respectfully aligns itself with the principles laid down by Mazibuko J. Compromise is about shifting positions with a view to agreeing on a new contract that is based on the compromise made by the parties. The evidence presented before this court establishes that after the dismissal of the Appellant, he lodged a dispute with CMAC. Following that process, there was conciliation which culminated into the final settlement agreement. At page 44 of the Book of Pleadings (which is the Report of Dispute Notice), the Appellant made it clear that he wanted reinstatement alternatively, that he be paid severance, notice pay, additional notice pay, leave pay,

contribution to pension, compensation and unfair dismissal. At page 69 (which is the Memorandum of Agreement) it is reflected that-

> ***"The undersigned parties agreed that the <u>Respondent will pay Applicant his contributions to the pension fund as full and final settlement of the</u> dispute. The payment will be based on the calculations of the Pension Fund."***

[32] This court fails to understand Appellant's contention that "he benefitted nothing out of the compromise because the payment of contributions were not effected by the Respondents, but by the Pension Fund. The Memorandum or Agreement covers this aspect that the agreed pension contributions payment will be computed and effected by the Pension Fund. Appellant's case is therefore reminiscent of a case where the employee's acceptance of the compromise constitutes a waiver of its rights against the employer. See **Grogan J, WORKPLACE LAW** (**Supra**). The Appellant further complains that even the little contributions that he received were taxed and therefore, the taxing of same had the effect of invalidating the Agreement. It is this court's considered view that there is no merit in this argument. The Agreement the Appellant and the Respondents entered into has no provision for any tax concessions by the Respondents. Respondents' counsel is correct in submitting that the taxation of pension contributions has nothing to do with the Respondents since the Tax regime is governed by its own laws. This Court therefore finds no ground upon which the court *a quo* misdirected itself in as far the first ground of Appeal is concerned. This ground is therefore accordingly dismissed.

[33] The second ground of Appeal relates to the fact that the Appellant signed the Memorandum or Agreement under duress or that undue influence was exerted on him which influence led to him signing same. It is on this basis that, the Appellant alleges, the Agreement be invalidated by this court as it is against public policy.

[34] We have already indicated that courts can refuse to enforce an Agreement that is contrary to public policy in instances where the impropriety of the transaction and the element of public harm are manifest. See **Sasfin (Pty) Ltd V Beukes** (**Supra**). Put simply, courts should not enforce an unfair, unjust and unreasonable transaction as these are the pillars of public policy.

[35] Applying the principles of public policy with respect to the present Appeal, it is Appellant's contention that "on the date of signing of the Agreement, he arrived at CMAC offices and found the Respondents' representative in conversation with the Commissioner in charge of the matter in the latter's office and thereafter he was called in to sign a document he had not fully scrutinised or familiarised himself with. See paragraph 11 of Appellant's Heads dated 14/03/16. As to what they were conversing about is only known to the Appellant; He does not disclose the contents of the conversation to this court. The Appellant's point is that he suspected undue influence when he entered into the office of the CMAC representative. When one peruses the Record of Proceedings of the court *a quo*, The

Appellant was asked by a member of the court *a quo*, inter alia, the following question -

"Q. "MBA 9" It says full and final settlement, did you sign

at the end?

A: I did not read Clause 3 and I did sign."

See page 24 of the Record of Proceedings

[36] It is clear that the Appellant was simply asked if he signed "MBA 9," which was a full and final settlement agreement, to which he responded by saying that he did sign although he did not read clause 3. It is trite that he who alleges must prove. Even if Appellant's argument was to hold that he signed without having read, this court takes the view that the words expressed by **Kerr AJ, The Law of Contract (supra)** that *"the sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. This rule applies not only when the person signing studies the document, but also when he appends his signature carelessly and recklessly ……."*, should apply with respect to the case at hand.

[37] The Record of Proceedings also reveals serious flaws in Appellant's evidence especially when he was crossed examined by Respondents' Attorney. A few examples will do to demonstrate this point. On the issue of his plea, Appellant states that he pleaded not guilty to the charge put to him

by the Respondents when he appeared before the disciplinary hearing committee. He later changes his story that he changed his plea because there was a threat of him being arrested. At the same time, he was hoping that he would be forgiven by the 1st Respondent and pay back the money he alleged misappropriated. When asked about the misappropriation of the school funds, he admitted same, but alleged that he was not trained in accounting. Appellant admitted forging the signature of the Chairperson of the school committee, notwithstanding his plea of not guilty. All these instances having a serious bearing on the Appellant's credibility.

[38] It is this court's considered view that the Appellant has failed to make a case for this Court's intervention to nullify the Agreement on public policy grounds. An analysis of Appellant's case is simply that he thought the pension contributions payable to him would also add some other undertakings including payment of compensation over and above his pension contributions. He also thought that his pension contributions would also be exempt from tax. Unfortunately, that never happened. See paragraph 10 of Appellant's Heads dated 14/03/16. In Appellant's Supplementary Heads dated 09/08/2016, Appellant makes a list of allegations of impropriety without substantiating them by way of evidence.

[39] It is also this Court's considered view that Appellant's case is not at all different from that of **Patrick Magongo Ngwenya** (Supra), who after entering into a full and final settlement Agreement, realised that the Respondent would deduct its dues from the payout. He successfully tried to

resile from what he had signed for earlier. The Industrial Court and the Industrial Court of Appeal held that Mr. Ngwenya could not approbate and reprobate. The same holds true with respect to the present Appeal.

[40] As indicated earlier when this court was dealing with the applicable law, courts should not easily invalidate an Agreement entered into between two parties "in full and final settlement" if there is no evidence of impropriety, injustice, unfairness and unreasonableness. In other words, public policy should not over ride and over shadow the intention of the parties to settle if there is nothing that suggests any impropriety. Public policy respects the parties' freedom to contract. On a parting note, when dealing with issues of public policy, courts should always be mindful of the words of Nicholas AJA in **Longman Distillers Ltd V Drop Inn Group 1990 (2) SA 906 (AD) at 913G**, where His Lordship said that -

"***Public policy is an imprecise and elusive concept***."

At 813 H-J, His Lordship continued to observe that -

"***When a court is asked to hold that something is against public policy, it does well to remind itself of the much – quoted passage in the judgment of Burrough J in Richardson V Mellish (1824) 2 Bing (130 ER 2294 at 303):-***

"I for one protest…….against arguing too strongly upon public policy; it is a very unruly horse, and once you get astride it you

never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

[41] It is this court's finding that the Agreement entered into between the Appellant and the Respondents "in full and final settlement" does not offend public policy and therefore Appellant's second ground of Appeal is dismissed as well.

[42] In the circumstances, this Appeal is dismissed and each party shall bear its own costs.

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M.R. FAKUDZE

ACTING JUSTICE OF APPEAL

I agree

_____

M.C.B. MAPHALALA,

CHIEF JUSTICE

I agree

_____

M. DLAMINI

ACTING JUSTICE OF APPEAL

FOR APPELLANT: S. JELE

FOR RESPONDENT: T. DLAMINI