REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 286/2009

In the matter between:

CHRISTOFFEL MARKUS **PLAINTIFF**

and

TELECOM NAMIBIA LTD **DEFENDANT**

Neutral citation: *Markus v Telecom Namibia Ltd* (I 286/2009) [2014] NAHCMD 51 (26 February 2014)

Coram: **UEITELE J**

Heard: **11 & 13 November 2013**

Delivered: **26 February 2014**

Flynote: Practice-The objectives of case management - Case management order– Whether an order of this Court made at a case management conference is final – and definitive of the rights of the parties.

Summary: The plaintiff was at one time employed by the defendant. During the year 2007, the plaintiff lodged a complaint of unfair dismissal with the now defunct District Labour Court. The defendant opposed the complaint. The parties however later referred the matter for arbitration. During the arbitration proceedings the parties agreed to settle their dispute. A settlement agreement was consequently signed by the parties during

October 2008. On 04 February 2009, the plaintiff alleging that the defendant was in breach of the settlement agreement, instituted action against the defendant in which action he claimed an amount of N$ 556 767-55 plus interest on that amount. The defendant entered a notice to defend the action. After the pleadings closed and the matter was ripe for trial, the matter was allocated to a Managing Judge for purpose of case managing the matter.

On 20 July 2011, the matter was called for a pre-trial conference, before Justice Schimming-Chase, Acting. On that day Acting Judge Schimming-Chase made an order that the matter has settled and is removed from the roll. Approximately two months later the legal practitioner acting for the plaintiff addressed a letter to the Registrar of this Court, requesting her to re-allocate the matter to a managing judge for purpose of case management and further advised her that the parties previously erroneously advised the presiding Judge that the matter had become settled.

The question which this court is called upon to determine is whether the order of this Court made on 20 July 2011 is final thus discharging the authority of the Court to hear the matter except if there was an application to rescind the order of 20 July 2011.

Held that the basis on which this court, on 20 July 2011, removed the matter from the roll was procedural in nature. Held further that not every decision made by the court in the course of judicial proceedings constitutes a judgment or order.

Held furthermore that the court order of 20 July 2011 was neither final nor was it definitive of the rights of the parties nor did it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

ORDER

(a) The objection by the defendant is dismissed with costs such costs to include the costs of one instructing counsel and one instructed counsel.

(b) The matter is postponed to the case management roll of 19 March 2014 for purposes of setting trial dates.

JUDGMENT

UEITELE J

[1] The plaintiff was at one time employed by the defendant. During the year 2007, the plaintiff lodged a complaint of unfair dismissal with the now defunct District Labour Court. The defendant opposed the complaint. The parties however later referred the matter for arbitration. During the arbitration proceedings the parties agreed to settle their dispute. A settlement agreement was consequently signed by the parties during October 2008.

[2] On 04 February 2009, the plaintiff alleging that the defendant was in breach of the settlement agreement, instituted action against the defendant in which action he claimed an amount of N$ 556 767 - 55 plus interest on that amount. The defendant entered a notice to defend the action. After the pleadings closed and the matter was ripe for trial, the matter was allocated to a Managing Judge for purpose of case managing the matter.

[3] The Managing Judge, in terms of Rule 37(11) of the rules of this court called a pre-trial conference for 6 July 2011. The documents on the court file do not disclose whether a pre-trial conference was or was not held on 6 July 2011 as scheduled. On 20 July 2011, the matter was called for a pre-trial conference, before Justice Schimming-Chase, Acting. On that day Acting Judge Schimming-Chase made the following order:

> '1. The matter has settled and is removed from the roll;
>
> 2. No order as to costs.'

[4] Approximately two months later, (i.e. on 26 September 2011) the legal practitioner acting for the plaintiff addressed a letter to the Registrar of this Court. The material terms of that letter are as follows:

> 'Kindly re-allocate the matter to a managing judge for purpose of case management. The parties previously erroneously advised the presiding Judge that the matter had become settled, whilst in fact only a portion thereof was settled. There are two remaining issues which require determination by the Court.'

[5] On 20 March 2012, the plaintiff's legal practitioner again addressed a letter to the Registrar, in that letter the legal practitioner again requested the Registrar to place the matter on the case management roll. On 10 July 2012, the Registrar issued a Notice in terms of Rule 37(9) of this court rules and in that notice the Registrar advised the parties that the matter was placed on a case management roll of 18 July 2012. On that day (i.e. on 18 July 2012) the matter was called before me and I made an order removing the matter form the case management roll.

[6] On 19 March 2013, the Registrar again issued a notice in terms of Rule 37(9), giving the parties notice that the matter is placed on the case management roll of 10 April

2013 for a status hearing. The parties were directed to file a detailed status report. The parties filed a status report as directed. In the status report the parties gave a history of the matter and in paragraph 11 of the status report made the following request:

> '11. The parties request that a date be allocated for the hearing of the evidence or argument on the issues of:
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> 11.1 Whether the matter indeed became settled on or before 20 July 2011?
>
> 11.2 If so, what were the terms of settlement and have same been executed?
>
> 11.3 If not, whether the plaintiff subsequently accepted payment in an amount of N$438 133.49 in full and final settlement of the action instituted by him against defendant?
>
> 11.3.1. If not:
>
> 11.3.1.1 Whether plaintiff is entitled to interest on the capital amount and if so, for which period and at what rate of interest?
>
> 11.3.1.2 whether plaintiff is entitled to costs of suit?'

[7] During the status hearing I asked the parties whether the matter could not be expeditiously disposed off as contemplated in Rule 33 of this court's rules. The parties agreed that a stated case as contemplated by Rule 33 may be the most expeditious manner to dispose of the case. I, in terms of Rule 37 (9), accordingly made the order that:

> '(1) … the matter is postponed to 22 July 2013 @ 10h00 for hearing a special case as contemplated in rule 33.

(2) the parties must file the statement of agreed facts (as contemplated in rule 33) on or before 12 July 2013.'

[8] On 22 July 2013 the parties informed me that they could not agree as to the facts which are in dispute and the facts which are not in dispute. I then decided to hear the matter as trial, and I made the following order:

'1. That this matter is postponed to 30 October 2013 at 08h30 for pre-trial conference;

2. That the matter is further provisionally set down for hearing on 11-15 November 2013 at 10h00.'

[9] At the pre-trial hearing on 30 October 2013, I made the following order:

'1. That the trial dates of 11-15 November 2013 at 10h00 hereby confirmed;

2. That the parties must file detailed witness statement on or before 08 November 2013.

3. That the court file must be indexed, paginated and properly bound on or before 8 November 2013.'

[10] When the matter was called on 11 November 2013 Mr Phatella who appeared for the defendant objected to the matter proceeding to trial. Mr Phatella's objection was basically that, when the court made the order on 20 July 2011 the matter was settled, removed from the court roll and the court was accordingly discharged of its office and could not revisit the matter except in terms of rule 44 of this court's rules. He further submitted that the matter was improperly before the court and the court should refuse to hear it.

[11] Counsel for the plaintiff was taken by surprise by Mr Phatella's objection, just as the court was, and requested time to consider the legal import of Mr Phatella's objection. I granted the request for adjournment, and I stood the matter down to 13 November 2013 to enable the plaintiff to prepare heads of arguments.

[12] The plaintiff prepared its heads of arguments and argued that the reason why the matter was removed from the roll was because the legal practitioners were under the impression, erroneously so, that the matter was settled. It was further submitted on behalf of the plaintiff that the court did not make the settlement agreement an order court, the court simply removed the matter from the roll on the request of the parties and that the removal was simply a procedural step.

[13] On behalf of the defendant, it was submitted that the order of 20 July 2011 was final in nature and effect not susceptible to alteration by this court except in terms of Rule 44 or under the common law. It was further submitted that the order of 20 July 2011 in respect of the claim instituted by the plaintiff on 04 February 2009 granted a definite and distinct relief in respect of that claim. He furthermore argued that the order of 20 July 2011 has the effect of disposing of the relief claimed in the main proceedings. Mr Phatella submitted that:

> 'The effect of the judgment order of the Court has to be gleaned from the wording used in the order so as to determine the intention of the Court that made the order construed according to the usual, well known rules of interpretation. Importantly once a court has duly pronounced a final order, it has itself no authority to correct, alter supplement it. The reason is that the Court becomes *functus officio*, its jurisdiction in the case having fully and finally executed. Its authority over the matter has ceased.'

[14] In view of the above submissions, I am of the view that the question which I am called upon to determine is whether; the order of this Court made on 20 July 2011 is final

thus discharging the authority of the Court to hear the matter except if there was an application to rescind the order of 20 July 2011.

[15] Before I deal with the question that is confronting me, I want to make some comments as regard the manner in which the defendant raised its objections at the date set for hearing the dispute between the parties. It is now common cause that since April 2011 when the case management rules of this Court came into operation those rules marked a radical departure from the civil process of old. The objectives of case management and obligations of parties and their lawyers under the new rules, are so clearly set out in the Rules. Amended Rule 1 of the High Court Rules amongst others reads as follows:

> 'OBJECTIVES OF CASE MANAGEMENT
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> 1A. (1) The objectives of case management of an action or application in these rules are –
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> (a) to ensure the speedy disposal of any action or application;
> (b) to promote the prompt and economic disposal of any action or application;
> (c) to use efficiently the available judicial, legal and administrative resources;
> (d) to provide for a court-controlled process in litigation;
> (e) to identify issues in dispute at an early stage;
> (f) to determine the course of the proceedings so that the parties are aware of succeeding events and stages and the likely time and costs involved;
> (g) to curtail proceedings;
> (h) to reduce the delay and expense of interlocutory processes;
> (i) to separate the adjudication or interlocutory motions from that of the merits to be heard at the trial;
> (j) to provide for the better and more practical and more timely production of evidence by expert witnesses;
> (k) to provide for the production or discovery of documents at a more convenient, practical and earlier time;

(l) to ensure the involvement of the parties before the initial case management conference by the preparation of a case management report; and

(m) to identify as soon as practicable firm dates for particular steps as well as for the trial of an action or hearing of an opposed motion.'

[16] In the matter of *De Waal v De Waal*[1] Damaseb, JP remarked that the resolution of disputes is now as much the business of the judges of this Court as it is of the parties. In the matter of *Farmer and Another v Kriessbach and Others*[2] Parker, J held that an order made by this Court pursuant to an agreement between the parties as contemplated in Rule 37(5) is a compromise and has the effect of *res judicata.*

[17] I have pointed out above that during the case management conference the parties agreed to request the court to adjudicate on the question of whether or not the parties reached an agreement and settled the dispute between them on 20 July 2011. It follows that when the parties reached that agreement (namely that this Court must adjudicate the dispute as to whether a settlement agreement was reached or not) they reached a compromise and the effect of that compromise is that the matter was *res judicta*. It thus follows that the parties could not after the orders made by the court re-open the debate as to what is to be determined by the Court.

[18] The agreement reached by the parties that this court has to adjudicate whether the parties reached an agreement on 20 July 2011 cannot be reneged. To overlook that agreement and the subsequent orders (i.e. the orders of 13 April 2013, 22 July 2013 and 30 October 2013) this court made, would be tantamount to render the objectives set by the case management rules meaningless and that would not conduce to due administration of justice. The defendant had an opportunity to object to the matter being re-enrolled at the first case management conference on 10 April 2013 it did not do so. I

[1] 2011 (2) NR 645 (HC).
[2] An unreported judgment of this Court Case Number (I 1408/2010, I 1539/2010) [2013] NAHCMD 128 (delivered on 16 May 2013).

am therefore of the view that the objection of Mr Phatella cannot be entertained at the stage where the parties had penned an agreement and where the court has issued orders regarding trial of the matter.

[19] Mr Phatella's objection can be rejected on another ground. In the case of *Andreas Vaatz and Another v Ruth Klotzsch and Others*[3], the Supreme Court, with approval, referred to the meaning ascribed to the words 'judgment' or 'order' as set out by Erasmus[4]. With reference to various judgments of the South African Court of Appeal, the learned authors argue that not every decision made by the court in the course of judicial proceedings constitutes a judgment or order, they concluded that to be an appealable judgment or order it had to have the following three attributes, namely:

> '(i) the decision must be final in effect and not susceptible to alteration by the Court of first instance;
> (ii) it must be definitive of the rights of the parties, ie it must grant definite and distinct relief; and
> (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'

[20] Mr Phatella submitted that the order of 20 July 2011 meets the above requirements because the order is final in effect, is definitive of the rights of the parties and disposes of a substantial portion of the relief claimed. I do not agree with Mr Phatella's submission. The reason why I do not agree with Mr Phatella is that, in the matter of *Knouwds NO (in his capacity as Provisional Liquidator of Avid Investment Corporation (Pty) Ltd) v Josea and Another*[5] Strydom, CJ who wrote the Court's judgment said 'that it is the reasons of the court which contain the *ratio decidendi* of that court and which explain and motivate an order of that court. In order to decide the appealability (I will add the finality of the court's order) of the court's order, this court must

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3 An unreported judgment of the Supreme Court of Namibia, delivered on 11 October 2002.
4 In his work Superior Court Practice para A1-43.
5 2010 (2) NR 754 (SC).

determine what the order is about and to do that it is necessary to look at the reasons for the order.'

[21] In the present matter the reason why the presiding judge made the order which she made on 20 July 2011 is because she was informed by the legal practitioners representing the parties that they have settled the matter. The court did not hear any evidence and consequently could make no findings, let alone a finding which bound both the parties and the Court itself. The court made no finding about a dispute of fact. The basis on which this court, on 20 July 2011, removed the matter from the roll was procedural in nature. Any party, who can prove that no agreement was reached, could simply apply to the Registrar or request the Registrar to re-enroll the matter. I am therefore of the opinion that the decision by the court was neither final nor was it definitive of the rights of the parties nor did it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[22] In the result I make the following order:

(a) The objection by the defendant is dismissed with costs such costs to include the costs of one instructing counsel and one instructed counsel.
(b) The matter is postponed to the case management roll of 19 March 2014 for purposes of setting trial dates.

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Judge

APPEARANCES

PLAINTIFF:	R Heathcote Instructed by Francois Erasmus & Partners
DEFENDANT:	T Phatella Instructed by Shikongo Law Chambers