REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case NO: HC-MD-CIV-ACT-MAT-2016/02594

In the matter between:

AN **PLAINTIFF**

and

PN **DEFENDANT**

Neutral citation: *AN v PN* (HC-MD-CIV-ACT-MAT-2017/00135) [2017] NAHCMD 275 (27 September 2017)

CORAM: **MASUKU J**
Heard: 4 September 2017
Delivered: 27 September 2017

Flynote: LAW OF CONTRACT – Stated case and adjudication upon points of law and facts – Party challenging the binding nature of a verbal settlement agreement reached with respect to ancillary relief sought in matrimonial proceedings concluded at mediation on the basis that the agreement was not reduced to writing and signed by the parties – agreement not containing terms that the binding nature thereof be postponed to its reduction to writing and signature and further, no legal formality requiring the latter – mediation, its objectives and the overriding objectives of judicial case management and the trite principles of the law of holding parties to agreements

that are freely and voluntarily entered into. **CIVIL PROCEDURE –** Rule 63 discussed - Stated case – requirements to be met in stated case.

Summary: Plaintiff and defendant verbally settled their dispute at mediation. Subsequent to the mediation, defendant refused to sign the written agreement that was subsequently prepared and alleged that same was devoid of its binding nature given its non-reduction to writing and signature by the parties. In terms of Practice Directive 19(8) and rules 38(3) and 63 of Court, the plaintiff and defendant, approached the Court to determine whether the agreement is binding.

Held, that the binding nature of the agreement was not postponed to its reduction to writing and signature thereof by the parties and there are no legal formalities requiring the latter in this matter.

Held, the overriding objectives of judicial case management dictate that the Court holds parties settling their disputes freely and voluntarily at mediation to their agreements so as not to denude the institution of mediation of its efficacy and usefulness to speedy dispute resolution.

Held, costs awarded against defendant on the scale as between attorney and own client, given the unreasonable nature of these proceedings. The agreement concluded between plaintiff and defendant is binding.

ORDER

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1. The verbal settlement agreement concluded at mediation between the plaintiff and the defendant is declared to be binding on the parties.
2. The defendant shall pay the plaintiff's costs of these proceedings on the scale between attorney and own client.
3. This matter is postponed to 18 October 2017 at 15:15, for a status hearing for the parties to apprise the Court of the further conduct of this matter in light of paragraph 1 above.

4. The parties are directed to deliver a joint status report on or before three (3) days before the date stipulated in paragraph 3 above.

JUDGMENT

MASUKU J:

Introduction

[1] These interlocutory proceedings arise from a regrettable set of circumstances. The circumstances acuminate to the following: On 12 August 2017, AN ("plaintiff") instituted divorce proceedings against PN ("defendant"), who in turn counterclaimed against the plaintiff for similar and ancillary relief. The respective bases upon which the parties seek to be excused from the yoke of matrimony, is of no moment in the current proceedings.

[2] On 24 May 2017, in terms of rule 38(1)[1] of Court, the parties requested the referral of their dispute to alternative dispute resolution ("mediation"). The Court acceded to the parties' request and so ordered.[2] On 31 July 2017, the parties attended mediation. Thereat, the parties, duly represented, verbally concluded a settlement agreement ("the agreement").

[3] At the close of the mediation, it was agreed that Mr. Stolze, defendant's counsel, would reduce the terms of the agreement to writing, where after the parties would sign the written agreement.

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[1] Referral to alternative dispute resolution (ADR)
Rule 38(1) of the High Court: "The managing judge may, at any time in terms of practice directions issued by the Judge-President, either of his or her own initiative or at the request of a party refer any part of the proceeding or any issue to an alternative dispute resolution (ADR) process or in an attempt to resolve that part of the proceeding or issue by way of alternative dispute resolution…"

[2] Practice Directive: 19(5) Despite paragraph (3) and unless a managing judge directs otherwise, mediation is compulsory in the following cases – "(e) divorce, custody of, and access to minor children; (f) spousal and child maintenance;"

[4] On 01 August 2017, Ms. O'Malley, the plaintiff's counsel, requested the signed written settlement agreement from Mr. Stolze. On 04 August 2017, Mr. Stolze, however informed Ms O'Malley the defendant was no longer interested in settling the dispute as per the agreement.

[5] In addition to the above, a statement of agreed facts ("the statement"), filed by the parties in terms rule 63(1)[3] of Court, contains the terms of the agreement, and concludes with the following:

> "… the parties now request this Honourable Court to decide on whether the Verbal Settlement Agreement incorporating the aforesaid terms is binding on both Parties."

[6] It is not necessary to restate the terms of the agreement. It bears mentioning that any perceived prejudice attaching to the terms of the agreement consequently does not arise for the reason that as will become obvious as the judgment unfolds, a binding agreement came into force.[4] Had the situation been different, namely, that there was no binding agreement reached by the parties, then I am of the considered view that it would have been out of order for the particulars of the settlement negotiations or the terms of the proposed settlement to have been disclosed in this application.

Issue

[7] Requiring a resolution of this impasse, the plaintiff and the defendant, moved for the court's determination on whether the agreement is binding on the parties.

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[3] "Special case and adjudication upon points of law and facts
Rule 63(1) of the High Court: "The parties to a dispute may, after institution of proceedings, agree on a written statement of facts in the form of a special case for adjudication by the managing judge."

[4] Rule 39(9) of the High Court: "… anything discussed during settlement conference are without prejudice and may not be used by any party in the proceedings to which the letters and the conference relate…"

Statement of facts in terms of rule 63 of Court

[8] The provisions of rule 63 of the rules of this court, governing the procedure for the adjudication of proceedings upon legal contentions and facts, (in so far as they are apply to these proceedings) provides that:

"(2) The statement referred to in subrule (1) must set out the facts the parties agree on and the questions of law in dispute between the parties and their individual contentions and the statement must be –

(a) divided into consecutively numbered paragraphs and accompanied by copies of documents necessary to enable the managing judge to decide on the questions; and

…

(5) At the hearing of a special case the managing judge and the parties may refer to the entire contents of the documents referred to in subrule (2) and the managing judge may draw any inference of fact or of law from the facts and documents as if proved at a trial.

…

(8) When considering a question in terms of this rule the court may give such decision as is appropriate and may give directions with regard to the hearing of other issues in the proceeding which may be necessary for the final disposal of the cause or matter.

(9) If the question in dispute is one of law and the parties are agreed on the facts, the facts may be admitted and recorded at the trial and the managing judge may give judgment without hearing evidence."

[9] In *Elizabeth Mbambus v Motor Vehicle Accident Fund*[5], the Supreme Court, had occasion to consider and comment on the import of the above provisions (as previously contained in the rule 33 of the Uniform Rules of Court). At paragraphs 13 to 16, the Supreme Court observed that:

'[13] … the parties must agree on the facts and the issues in dispute between them, including any issues of law arising therefrom. I agree with the submissions by the respondent that the intention is that the stated case will adjudicate the whole of the dispute as stated in the case that exists between the parties and that this is ideally done by setting out the facts agreed to, the questions of law in dispute and the contentions of the parties. The parties may also require a court to decide an issue of law on the basis of alleged facts, as if agreed.

[5] Case No. SA 4/2013 (Delivered on 11 February 2015).

[14] A stated case:

"… is a written statement of the facts in a litigation, agreed to by the parties, so that the court may decide these questions according to law… It is also known as a case stated." Strouds Judicial Dictionary, 4 Ed.

"… involves stating facts, that is, the ultimate facts, requiring only the certainty of some point of law applied to those facts to determine either the whole case or some particular stage of it." Australian Shipping Board v Federated Seamens Union of Australasia (1925), 36 CLR 442, 450.

[15] In the Irish case of Simon McGinley v The Deciding Officer Criminal Assets Bureau, [2001] IESC 49, the Irish Supreme Court (per Denham J) had the following to say on what is required in a stated case:

"4. Decisions relating to the form of cases stated to the High Court are helpful in considering the form of case stated to the Supreme Court. In Emerson v Hearty and Morgan [1946] N.I. 35 Murphy L.J. described the required form at pp. 36-7 of the report:

"We have thought that this may be a convenient opportunity to call attention to the principles which ought to be observed in drafting Cases Stated.

The Case should be stated in consecutively numbered paragraphs, each paragraph being confined, as far as possible, to a separate portion of the subject matter. After the paragraphs setting out the facts of the Case there should follow separate paragraphs setting out the contentions of the parties and the findings of the Judge.

The Case should set out clearly the Judge's findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings.

What is required in the Case Stated is a finding by the Judge of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact it will rarely be necessary to set out any evidence in the Case Stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the Judge which would justify him in deciding as he did.

The point of law upon which this Court's decision is sought should of course be set out clearly in the Case. But we think the Judge is certainly entitled to expect the party applying for the Case Stated to indicate the precise point of law upon which he wishes to have the decision of the appellate Court. It would be convenient practice that this should ordinarily be done in the written application for the Case Stated."

5. This decision was applied by Blayney J. in Mitchelstown Co-Operative Society v Commissioner for Valuation [1989] I.R. 210 and in Department of the Environment v Fair Employment Agency [1989] N.I. 149.

In Mitchelstown Co-Operative Society v Commissioner for Valuation [1989] I.R. 210 at pp. 212-3 Blayney J., agreeing with and adopting the principles set out by Murphy L.J. in Emerson v Hearty & Morgan [1946] N.I. 35, stated:

"I am in complete agreement with, and I respectfully adopt, this statement of the principles to

be observed, but an examination of the case stated by the Tribunal shows that is has not been drafted in accordance with those principles.

The case does not contain any clear statement of the facts found by the Tribunal.

… This court should not be required to go outside the case stated to some other document in order to discover them.

The same principle applies to the contentions of the parties; the inferences to be drawn from the primary facts, and the Tribunal's determination. All these must be found within the case, not in documents annexed . . .

...

For all the foregoing reasons I am satisfied that I must return the case to the Tribunal for amendment and, if necessary, for re-statement."

[16] Whilst the above remarks were made in the context of s 16 of the Courts of Justice Act, 1947 of Ireland, the principles enunciated therein apply equally to the present proceedings. A court can only deal with a stated case where the facts are agreed upon and the court is asked to make a determination of the inferences or the law to be drawn from those facts.'"

[10] I am satisfied, having regard to the principles enunciated in the above matter that the statement filed by the parties in this matter complies with the requisites set out therein and also with the requirements of rule 63.

Scope of these proceedings

[11] The following common cause and undisputed aspects are observed from the statement:

(a) the plaintiff asserts the binding nature of the agreement;
(b) the defendant acknowledges the conclusion of the agreement;
(c) the defendant does not assert not intending to conclude the agreement during mediation;

(d) the defendant does not dispute or contest the correctness of the terms of the agreement;
(e) the defendant asserts that the agreement is not binding for the reason that it was not reduced to writing and signed by the parties; and

(f) it is not a term of the agreement that its binding nature be postponed to its reduction to writing and signature thereof by the parties; and

(g) no prejudice is claimable with respect to the terms of the agreement.[6]

It is with reference to these observations that this matter is considered.

Plaintiff's contention

[12] Ms. O'Malley, on behalf of the plaintiff, principally contends that the agreement is binding. She referred the court to *Palastus v Palastus*[7], wherein this court, held that a verbal agreement concluded at mediation is binding, and further restated that, in the event that legal formalities are not required in the execution of an agreement, verbal agreements are as binding as much as written agreements, as long as it could be demonstrated that the parties thereto reached consensus and merely desired the reduction of the verbal agreement in writing as a memorial. Ms O'Malley further referred to *Markus v Telecom Namibia Limited*[8], wherein this court, elucidating the principles of the law of contract, quoted the following extract:

'[18] In the English case of *Printing Registering Company v Sampson* Jessel, J said:

"If there is one thing which, more than another, public policy requires, it is that a man of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice.'"

[13] On account of the above authorities, Ms O'Malley therefor submits that a finding that the agreement is binding, must naturally follow as day follows night, particularly given the defendant's non-contention of the oral agreement.

Defendant's contention

[6] Footnote 4.

[7] (I 194-2014) [2015] NAHCNLD 29 (08 July 2015)

[8] (I 286/2009) [2014] NAHCMD 207 (23 June) 2014, paragraph 18.

[14] On the other hand, Mr. Stolze, on behalf of the defendant, contends that the agreement is not binding as it was not reduced to writing. As authority for this proposition, Mr. Stolze, referred the court to *National Cold Storage v Namibia Poultry Industries (Pty) Ltd.*[9]

[15] In the above matter, this court was confronted with the question whether it could declare a tacit agreement concluded between the representatives of the applicant and the respondent binding. The brief facts of the matter were: the representatives of the applicant and the respondent concluded a verbal agreement. The applicant thereafter furnished the respondent with a written agreement for signature. The respondent did not sign the written agreement. The parties, however, performed in terms of the verbal agreement. The respondent thereafter purported to withdraw the written agreement, on account of the fact that it had not been signed. The court found in favour of the applicant, holding that by conduct, the respondent's offer was accepted by the applicant.

[16] Mr. Stolze submits that this court's finding in *National Cold Storage*, finds no application in this matter, as the defendant rendered no performance in terms of the agreement and therefore, the agreement cannot be held to be binding. Mr. Stolze further argues that the defendant, duly withdrew his assent to the agreement before its reduction to writing and signature thereof and therefor, there was absence of an unequivocal offer and acceptance in the circumstances.

Is the agreement concluded at mediation binding?

[17] In *The Erongo Regional Council & Others v Wlotzsbaken Home Owners Association and Another*[10], the Supreme Court, approved the following exposition of the law, dealing with the coming into existence and validity of agreements:

'[50] As far back as 1919 the South African Appeal Court held in the case of *Conradie v Rossouw,* 1919 AD 279 at 320:

"According to our law if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid agreement arises between them enforceable by action. The agreement may be for the benefit of the one of them or of both (Grotius 3.6.2). The

[9] (A 286/2014) [2014] NAHCMD 40.
[10] Case No.: SA 6/2008.

promise must have been made with the intention that it should be accepted (Grotius 3.1.48); according to Voet the agreement must have been entered into *serio ac deliberato animo*. And this is what is meant by saying that the only element that our law requires for a valid contract is *consensus*, naturally within proper limits – it should be *in* or *de re licita ac honesta.*"

(See further *Bank of Lisbon and South Africa Ltd v De Ornelas and Another,* 1988(3) SA 580 (AD) at 599B and *Meyer v Iscor Pension Fund,* 2003 (2) SA 715 (SCA) at 733E).'"

[18] Applying the above principles to this matter, it undoubtedly appears from the statement, that the plaintiff and the defendant, being adult persons, capable of and with the intention of contracting, reached consensus regarding the settlement of their dispute. This is inescapably so, given the defendant's non-contention of the coming into effect of the agreement nor the terms thereof.

[19] Further, the terms of the agreement reflected in the statement are devoid of a caveat postponing the binding nature of the agreement to its reduction into writing and signature by the parties. To this end, I agree with Innes CJ, in *Goldblatt v Fremantle*[11], when he stated that:

'[I] if during negotiations mention is made of a written contract, the court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (Grotius 3.14.26 etc.) … where the parties are shown to have been *ad idem* as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed with the due execution of a written document, has upon the party who alleges it." (Emphasis added).'

[20] The statement before court contains no term postponing the binding nature of the agreement to its eventual reduction to writing and signature by the parties. Furthermore, there are no contentions, sustainable or otherwise, on behalf of the defendant, as to why the binding nature of the agreement should be so postponed.

[21] I accordingly agree with Ms. O'Malley's referral to *Palastus*, the facts whereof are similar to this matter. Therein this court granted the plaintiff a final order

[11] 1920 AD 123 at 128-129.

incorporating the verbal terms of an agreement concluded at mediation given the defendant's refusal to sign the written settlement agreement.

[22] Earlier, Mr. Stolze, correctly conceded that *National Cold Storage* is distinguishable from this matter as appears from the facts thereof.[12] Given the latter, this court's ruling in *Palastus* and the authorities regarding the coming into force of agreements referred to above, the defendant's non-disputation or non-contestation regarding the agreement or the postponement of its binding nature upon its reduction to writing and signature by the parties, I am of the view that *National Cold Storage* does not advance the defendant's case one centimetre. Accordingly, I find and hold that the defendant's contentions should fail and that the agreement concluded at mediation must be held to be binding upon the parties.

[23] The circumstances of this matter compel me to have regard to the mediator's report dated 04 August 2017, even though extrinsic to the statement. The mediator's report emphatically records that:

> '[T]he mediation between the abovementioned parties, conducted by mediator… on 31st of July was successful. A settlement agreement was reached. The originally signed settlement agreement is in possession of … of Shikongo Law Chambers, legal representative acting on behalf of the defendant. I annex hereto a copy of the signed settlement agreement.'

Conclusion

[24] It would be perverse, in the circumstances, to hold that the withdrawal of the defendant's signature to the agreement denuded the agreement of its binding nature. Parties should not be allowed to approbate and reprobate at the same time; blowing hot and cold, on the binding nature of oral agreements on them. A party, of full legal capacity, and who is duly represented at mediation, thus meeting the requirement of the equality of arms, should not lightly escape the consequences of an agreement reached thereat by belatedly having undisclosed compunctions, discomforts or nightmares about the agreement and then stating that the agreement is not binding

[12] Paragraph 15.

for no other reason than that it had not been reduced to writing. As long as the parties are of age and were in full possession of their mental faculties when the agreement was made, public policy calls upon the courts to hold them to their verbal undertakings.

[25] It bears mentioning that the Court will not be party to and shall not permit the erosion of the institution of mediation, which is geared towards achieving the overriding objectives[13] of judicial case management as articulated in the rules of court by allowing spurious reasons to result in the dismantling of what is otherwise a genuine settlement agreement *inter partes*. It would be irresponsible of this court to allow parties to easily go back on their word merely because it turns out that the verbal agreement is no longer palatable, particularly for reasons that do not affect the reality of consent that accompanied the making of the oral agreement.

Costs

[26] These proceedings, it is common cause, have been determined in favour of the plaintiff. Ms. O'Malley submits that the defendant's conduct in persisting with these proceedings, in the face of the mediation report and the agreement, was objectionable, unreasonable, unjustifiable and oppressive to the plaintiff and therefore the defendant should be mulcted with the costs on the scale of attorney and own client.

[27] In *Namibia Breweries Limited v Serrao*[14], this court expressed the following in respect of the circumstances in which a court may grant costs on the punitive scale:

'[15] … in *South African Bureau of Standards v GGS/AU (Pty) Ltd*, Patel, J stated:

Clearly there must be grounds for the exercise of the Court's discretion to award costs on an attorney and client scale. Some of the factors which have been held to warrant such an order of costs are: that unnecessary litigation shows total disregard for the opponent's rights (*Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd (II)* 1946 TPD 226 at 236); that the opponent has been put into unnecessary trouble and expense by the initiation of an abortive application (In *re Alluvial Creek Ltd* 1929 CPD 532 at 535; *Mahomed Adam (Pty) Ltd v Barrett* 1958 (4) SA 507 (T) at 509B-C; *Lemore v African Mutual Credit Association and another* 1961 (1) SA 195 (c) at 199; *Floridar Construction Co (SWA) (Pty) Ltd v Kries* (*supra*

[13] Ibid.

[14](TI3131/2005) [2006] NAHC 37 (23 June 2006), paragraph 15.

at 878); *ABSA Bank Ltd (Voklskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (c) at 268D-E); that the application is foredoomed to failure since it is fatally defective (*Bodemer v Hechter* (*supra* at 245D-F)) or that the litigant's conduct is objectionable; unreasonable, unjustifiable or oppressive.'

[28] I am inclined to agree with the plaintiff's argument that the defendant's pursuit in these proceedings is consistent with the general tenor of the immediately preceding exposition of the law. The defendant demonstrated a disregard of the agreement reached and threw the parties back to square one, as it were, doing the overriding objectives of judicial case management a serious and unacceptable assault in the process. Furthermore, this conduct has contemporaneously immersed the plaintiff in the pools of an avoidable and unnecessary expense. I therefor accordingly order the defendant to pay the costs of this proceeding on the scale between attorney and client, as proposed by Ms. O'Malley.

Order

[29] In the result, the following order is made:

1. The verbal settlement agreement concluded at mediation between the plaintiff and the defendant is declared to be binding on the parties.
2. The defendant shall pay the plaintiff's costs of these proceedings on the scale between attorney and own client.
3. This matter is postponed to 18 October 2017 for a status hearing to enable the parties to apprise the court of the further conduct of this matter in light of paragraph 1 above.
4. The parties are directed to deliver a joint status report at least three (3) days before the date stipulated in paragraph 3 above.

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T. S. Masuku

Judge

APPEARANCES:

PLAINTIFF:	V. O'Malley Kangueehi & Kavendjii Inc, Windhoek
DEFENDANT:	H. Stolze Shikongo Law Chambers, Windhoek