

IN THE HIGH COURT OF NAMIBIA

Case Title: STANDARD BANK NAMIBIA V NELSON VERINAO MUUKUA	Case No: HC-MD-CIV-ACT-CON-2018/00746
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 15 JULY 2019
	Date of order: 15 JULY 2019
	Reasons delivered on: 18 JULY 2019
Neutral citation: <i>Standard Bank Namibia Limited v Muukua</i> (HC-MD-CIV-ACT-CON-2018/00746) [2019] NAHCMD 245 (15 July 2019)	
Results on merits: Application for leave to call the mediator to testify on the terms of the settlement reached during mediation. No decision on the merits	
The order: Having heard MS MU KUZEKO for the Plaintiff and MS L SHIKONGO , for the Defendant, and having read the documents filed of record: IT IS HEREBY ORDERED THAT: Ruling: <ol style="list-style-type: none"> 1. The plaintiff's application for leave to call the mediator to testify on the terms of the settlement reached during mediation is hereby dismissed. 2. Cost to stand over. Further conduct of the matter: <ol style="list-style-type: none"> 3. The matter is postponed to 22 July 2019 at 08:30 for Status Hearing: (Reason: To determine the further conduct of this matter. 	
Reasons for orders:	

Introduction

[1] This matter brought before me is quite unusual and rare in the sense that the issue for determination is whether or not a mediator who presided over a mediation session should be called upon to testify under oath in court on the terms of settlement and whether certain clauses form part of the settlement as agreed to between the parties at the mediation session.

Brief background

[2] The plaintiff instituted legal proceedings against the defendant on 1 March 2018. The plaintiff's claim is based on an instalment sale agreement relating to the purchase of a motor vehicle concluded between the parties, whereby the plaintiff claims that the defendant failed to comply with his obligation to pay the monthly instalments under the agreement on the due date. At the pre-trial conference hearing the matter was postponed for an initial mediation referral hearing and subsequent to that the matter was referred for alternative dispute resolution (mediation). The parties thereafter attended mediation which parties both agree that they engaged in a bona fide mediation session which was successful. The parties reached settlement during mediation and agreed that the settlement agreement will be reduced to writing and signed by both parties and further that the signed copy would be made an order of court. This is evident from the joint status report filed on 28 February 2019 as well as the mediator report filed on 29 March 2019.

[3] On 12 March 2019 plaintiff's legal practitioner prepared a draft settlement agreement and forwarded same to the defendant's legal practitioner to arrange for the signing thereof by the defendants. However upon perusal of the draft settlement agreement, defendant took issue with two clauses and requested that the said clauses be deleted as they were not part of the settlement reached at mediation. The two clauses reads as follows:

'That in the event of the defendant defaulting on his payment obligation in terms hereof for whatever reason, the defendant hereby consents to judgment as per rule 60 of the Rules of Court in favour of the plaintiff for an order in the following terms:

4.1 An order confirming the plaintiff's cancellation of the agreement.

4.2 An order directing the defendant to immediately restore the vehicle, to wit a 2016 Mercedes-Benz GLE 500 motor vehicle, with engine No. 27892830305579 and chassis No. WDC1660732A718476 to the plaintiff and failing compliance therewith, within such time as may be directed by the above Honourable Court, authorising and directing the Deputy Sheriff to take the said vehicle into his possession and to deliver same

to plaintiff.’

Submissions by the parties

Plaintiff

[4] Ms Kuzeeko, counsel for the plaintiff, submitted that in order for parties to enjoy protection under the without prejudice principle, the negotiations must constitute a bona fide attempt to resolve a dispute. Counsel referred the court to *KLD Residential CC v Empire Earth Investments* 17¹, which considered the findings in *Naidoo v Marine & Trade Insurance Co Ltd*². She submits that the rule applies to bona fide negotiations only and that where parties settle their dispute as a consequence of the negotiations, the rule is not applicable. She stated that the defendant’s behaviour and stance in the current matter places doubt on whether he was acting in good faith during mediation and whether the settlement agreement was concluded in good faith or whether he merely proposed the settlement in order to avoid the impending trial.

[5] She further submitted that the prohibition against calling the mediator as a witness in respect of any legal or administrative proceeding concerning a dispute as referred to in para 13 of annexure A refers to a matter that was referred for mediation and not the settlement reached at mediation.

[6] Counsel further submitted that there are compelling reasons of public policy to limit the protection afforded by the without prejudice rule so as to recognise an exception where a party to alternative dispute resolution proceedings agrees to terms of settlement and then seeks to resile from the agreement and claim privilege in order to prevent the mediator from attesting to the terms of the agreement. The plaintiff merely wishes to establish the terms of the settlement. On the best evidence rule, the mediator is the only other party who is best placed to attest to the terms of settlement, as a mediator and as an independent party with nothing to gain from the proceedings.

[7] Counsel further submitted that the clauses in dispute are irrelevant to the settlement negotiation and thus not protected by the rule and the mediator’s confirmation of the terms would be admissible in evidence. The clauses in dispute do not relate to the subject matter of the settlement negotiations and that the negotiations concerned the breach of contract and repayment of the outstanding debt owed by the defendant. With respect to the cause of action to which the dispute relates, defendant has admitted liability and that the defendant does not dispute this.

¹ 2017 (6) SA 55.

² 1978 (3) SA 666 (A).

[8] In concluding, counsel submitted that the defendant be ordered to sign the settlement agreement subject to the exclusion of the two disputed clauses and that the matter be set down for an application for judgment in terms of the settlement as provided for under rule 97 (6) .

Defendant

[9] Ms Shikongo, counsel for the defendant, referred the court to annexure A to the court-connected mediation referral order and submitted that a mediator is supposed to be viewed as impartial and calling a mediator to testify defeats the purpose of mediation as the mediator will be forced to choose sides even when the proceeding of mediation is intended to be without prejudice. When the courts require the mediator to testify, their appearances of impartiality weakens. Further, the mediator may not be called as a witness and counsel referred the court to paragraph 13 of annexure A.

[10] Counsel submitted that the position of the defendant is not correctly placed in context whereby the plaintiff alleges that the defendant did not or is not acting in good faith during negotiations. Counsel stated that the issue at hand is that the defendant is not agreeing to clause 4.1 and 4.2 of the draft settlement agreement. If the defendant's intention was not to negotiate in good faith surely the entire agreement would have been disputed, which is not the case. She further submitted that it's a general principle that mediation is without prejudice and calling a mediator to testify on what was not settled upon will defeat the purpose of a mediator's impartiality.

[11] Counsel further submitted that a court cannot force parties to agree to a settlement agreement when those disputed clauses were not part of the settlement negotiations at mediation. A settlement agreement is done on free will of the parties and the plaintiff should not mislead the court in requesting that the court orders the defendant to sign the settlement agreement.

[12] Ms Shikongo further argued that in terms of annexure A, para 18 'any written (or otherwise created) agreement made and signed or acknowledged by the parties as a result of mediation may be used in any relevant proceeding, unless the parties have agreed in writing not to do so.' She argued that that's the only available exception with regard to any privileged information communicated during mediation on a without prejudice basis. She submitted that in the instant matter, the agreement was not signed by both parties and the only acknowledgment in respect of the settlement agreement were the clauses that are not disputed. Therefore the exception is not applicable as the defendant does not acknowledge clauses 4.1 and 4.2 of the draft settlement agreement and thus the mediator should not be called to testify.

[13] In conclusion, counsel submits that parties be directed to negotiate on the terms of the settlement agreement subject to the exclusion of the disputed clauses or for the matter to proceed to trial.

Applicable law and application of the law to the facts

[14] Mediation is a form of dispute resolution and participants in mediation must be told, and have an expectation, that their discussions will be kept confidential. Parties are unlikely to participate in a meaningful and productive way without that assurance and expectation. In the long run, mediation may not flourish if reasonable expectations of confidentiality are not met.

[15] Rule 39 (9) of the High Court Rules provides that: ‘. . . anything discussed during a settlement conference are without prejudice and may not be used by any party in the proceedings to which the . . . conference relate or in any other proceedings.’ Further, Practice Directive 19 (6) and (7) in terms of the Rules of Court stipulates that ‘ADR sessions are conducted on a “without prejudice” basis and that . . . communications during or in respect of ADR sessions must not be disclosed in any court document or in any court proceeding.’ What mostly stands out in the Register’s Notes issued in terms of PD 65 in annexure A is para 13 which unequivocally states that ‘Neither party may at any time before, during, or after mediation, call the Mediator as a witness in any legal or administrative proceeding concerning this dispute.’

The common law privilege for settlement communications

[16] At common law any communications made by the parties in an attempt to settle a dispute that is the subject of pending or contemplated litigation are generally treated as inadmissible. One possible reasoning behind this is that the parties engaging in communications and negotiations made expressly or impliedly “without prejudice” do so subject to an implied agreement to preserve confidentiality. Another reasoning is that settlement communications are excluded on grounds of public policy, because there is a public interest in encouraging the settlement of disputes without involving the courts.

[17] Owen V. Gray in his article titled “Protecting the Confidentiality of Communications in Mediation”³ stated that:

‘In Ontario, the question of whether a privilege attached to communications between the disputants and the

³ Owen V. Gray “Protecting the Confidentiality of Communications in Mediation” *Osgoode Hall Law Journal* Vol. 36 No. 4 (1998): 667-702. Also available on <http://digitalcommons.osgoode.yorku.ca/ohlj/vol36/iss4/3>.

mediator was addressed in *Porter v. Porter*.⁴ There, the parties had retained a psychologist to assist them as mediator in resolving a custody and access dispute, agreeing that he was not to be called as a witness in the litigation of their dispute if the mediation did not result in agreement. When it did not, however, one spouse sought to introduce into evidence a report the mediator had written. The court refused to receive it, holding that it was privileged. It found that a privilege arose both because the parties were engaged in settlement discussions and because Wigmore's four conditions for a professional or relationship privilege⁵ were satisfied in the circumstances. That conclusion has been cited with approval in a decision in at least one non-matrimonial civil case⁶.

[18] Mediation is aimed at establishing a safe environment where the parties and the mediator can critically examine the dispute. The confidentiality of information shared with the mediator is guaranteed allowing for the exchange of information with and through the mediator without fear that the information can be damaging to the parties if the mediation is not successful and litigation or arbitration ensues. In the present matter before me it is clear that the parties settled during mediation, this is evident from the joint status report filed by the parties after the mediation session as well as the mediators report. As alluded to above, communications during mediation are private and may not be divulged and that neither party may at any time before, during, or after mediation, call the mediator as a witness in any legal or administrative proceeding concerning this dispute. There is no substantive argument raised before me to deviate from the common norm of the "without prejudice" basis of mediation. If I were to allow the mediator to testify as to the content of the mediation session and more specifically the terms of the agreement reached between the parties, I will do injustice to the common law privilege for settlement communications. If the mediator were to be compelled to testify there is no doubt that much of her testimony, if not all her testimony, will originate in the confidence of the parties that the content of the conversations themselves will not later be disclosed during legal proceedings.

[19] Courts in the United States have similarly also addressed a similar issue. In *NLRB v Joseph Macaluso, Inc.*,⁷ for example, one of the issues in unfair labour practice proceedings before the National Labor Relations Board (NLRB) had been whether the respondent employer and the union representing its workers had come to an oral agreement on the terms of a collective agreement, which the employer later refused to execute in writing. On a motion by the Federal Mediation and Conciliation Service (FMCS), the NLRB quashed a summons directed to a mediator from the FMCS who had been involved in the meetings that the union claimed had resulted in agreement. The Ninth Circuit Court of Appeals upheld that decision. It

⁴ (1983), 40 O.R. (2d) 417 (Unif. Fain. Ct.) [hereinafter *Porter*].

⁵ See J.H. Wigmore, *Evidence in Trials at Common Law*, rev. by J.T. McNaughton (Boston: Little Brown, 1961) vol. 8 at para. 2285.

⁶ See *Marchand (Litigation Guardian of) v. Public General Hospital of Chatham* [1997] O.J. No. 1805 (Ont. Ct. (Gen. Div.)) (QL).

⁷ 104 L.R.R.M. 2097 (9th Cir. 1980).

acknowledged that the mediator's "tie-breaking" testimony would have been relevant and, indeed, probably determinative of the conflict in the testimony given by employer and union witnesses about what had taken place during negotiations. The court nevertheless accepted the view expressed by the NLRB in an earlier case, that :

'[T]o execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of the [FMCS] in the settlement of future disputes would be seriously impaired, if not destroyed. The resultant injury to the public interest would clearly outweigh the benefit to be derived from making their testimony available in particular cases.'

[20] The element of confidentiality is indispensable to the inception and maintenance of any satisfactory or effective mediation proceeding and the relationship between the mediator and the parties. It is not unreasonable to expect, therefore, subject to any exceptional and compelling reasons to the contrary which may exist in the particular case that the mandatory and indiscriminate disclosure of these private and confidential communications would probably result in seriously undermining and damaging the relationship and the mediation process as a whole. The resultant detriment to allow a mediator to testify will cast doubt to the mediation proceedings by the public and people will lose confidence in the alternative dispute resolution.

[21] The only exception to the privilege of mediation proceeding is the written (or otherwise created) agreement made and signed or acknowledged by the parties as a result of mediation, which may be used in any relevant proceeding, unless the parties have agreed in writing not to do so. In the present matter it suffices that the parties had reached a settlement however the defendant disputes certain clauses that he alleges were not part of the settlement negotiations. Since the defendant disputes the said clauses it cannot be held to say that an agreement was signed nor acknowledged by the parties, firstly because there is no signed agreement before this court and secondly the defendant does not acknowledge the disputed clauses and only acknowledges the clauses not in dispute.

[22] The plaintiff's doubt and argument advanced with regard to bona fide negotiations does not hold water. This I say so because both parties agreed in their written submission that the parties engaged in a bona fide mediation.⁸

[23] Furthermore, to order parties or a party to sign a settlement agreement against his or her will is an incompetent order in law and none that a Court will direct, which order is different from one were a party or parties are ordered to be bound by a settlement they have both reached without any dispute to the terms thereof.

[24] This court must make an order that meets the justice of the case and having regard to the submissions made by both parties, the Rules of this court and the practice directives as well as the principles as enunciate above, the court is not inclined to allow the mediator to testify in court as to what transpired during mediation and more specifically the terms thereof due to the confidentially aspect attached to mediation proceedings.

[25] My order is therefor as set out above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
Ms MU Kuzeeko Of Dr Weder, Kauta & Hoveka Inc.	Ms L Shikongo Of Metcalf Attorneys

⁸ Para 7 of plaintiff's written submissions and para 6 of defendant's written submissions.