

Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: SOPHIA NDESHIPANDA AMADHILA V HAROLD NDEVAMONA AKWENYE	Case No: HC-MD-CIV-ACT-CON-2017/02946
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 31 JULY 2019
	Date of order: 31 JULY 2019
	Reasons delivered on: 31 JULY 2019
Neutral citation: <i>Amadhila v Akwenye</i> (HC-MD-CIV-ACT-CON-2017/02946) [2019] NAHCMD 272 (31 July 2019)	
Results on merits: Merits not considered.	
The order: Having heard ANKIA DELPORT , for the Respondent and TUHAFENI MUHONGO , assisted by RIGAUD BEUKES , for the Applicant, and having read the documentation filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. The verbal settlement agreement concluded between the applicant and the respondent is declared to be binding on the parties. 2. The settlement agreement is hereby made an order of court. 3. The matter is regarded as finalized and removed from the roll. 	
Reasons for orders:	
<u>Background</u>	
[1] This is my further reasons following the <i>ex tempore</i> ruling on 31 July 2019.	

[2] The parties will be referred to as cited in the rescission application.

[3] The action in this matter was instituted as far back as August 2017. The respondent instituted action against the applicant for three different claims, which claims constituted the following: Claim 1 is based on a written agreement for fixed property situated in Windhoek. In terms of the agreement between the parties the applicant sold the property to the respondent, and the respondent purchased the property for the purchase consideration of N\$521 286.19. The respondent would be entitled to transfer of the property on the payment by the respondent of the purchase consideration and payment of the transfer cost on demand of the respondent's conveyancer. Possession of the property would then be provided to the respondent upon registration of transfer of the property. Claim 2 is based on an oral lease agreement relating to the property in issue. Claim 3 is based on a donation wherein the respondent donated a certain vehicle to the applicant, which donation the respondent revoked.

[4] This matter started out as any other matter and wound its way through the ordinary cause of judicial case management process until 26 April 2018 when the applicant's application for condonation for various non-compliance with court orders caused this court to refuse the applicant's application for condonation¹.

[5] Due to the unsuccessful application for condonation the applicant (defendant in the main action) was barred from pleading in this matter.

[6] Subsequent thereto the applicant on 17 May 2018 filed a Notice in terms of Rule 64, unconditionally tendering to settle the alternatives to claims 1, 2 and 3 of the particulars of claim. This tender was not accepted by the respondent and on 31 May 2018 the respondent filed a notice of application for default judgment.

[7] Pursuant to this notice the applicant's erstwhile legal practitioner filed a status report on 09 July 2018 wherein she submitted that the offer is reasonable in that it is based on the respondent's claim and that it would be in the interest of justice that the court compel the respondent to consider the offer. In turn the respondent filed a reply in terms of Rule 64 indicating that the respondent will not accept the tender as it is not regarded as reasonable.

¹ Akwenye v Amadhila (HC-MD-CIV-ACT-CON-2017-02946) [2018] NAHCMD 114 (27 April 2018).

[8] This then resulted in a further interlocutory hearing on the issue of whether the court can compel the respondent (plaintiff in the main action) to accept the offer in terms of Rule 64.

[9] After having heard the parties this court ruled on 21 August 2018 that the relief sought by the applicant to compel the respondent to accept her tender in terms of Rule 64 in respect of the claims was incompetent and leave was granted to the respondent to proceed with his application for default judgment². Said judgment was granted in favor of the respondent on 23 August 2018.

[10] On 20 September 2018 the respondent issued a writ of execution against the applicant. On 26 September 2018 the applicant's current legal practitioner brought an application on notice of motion for rescission in terms of Rule 103(1) (a) of the Rules of Court.

[11] Subsequent to this notice of motion the applicant also intended to move an urgent application to stay the writ of execution but the parties settled this issue amicably and the application was not argued.

[12] Hereafter yet another application was heard in this matter, but this time it was an application for condonation filed on behalf of the respondent for the late filing of the answering affidavit in the application for rescission, ie the current application. The condonation was granted as prayed for on 29 March 2019³.

The events on the date of hearing of the rescission application

[13] The matter came before me for argument of the rescission application on 31 July 2019. Prior to the commencement of the proceedings the parties informed the court in chambers that they are engaged in settlement negotiations and requested that the matter stands down for an hour in order to see if they could resolve the issues between the parties.

[14] When the court convened an hour later counsel informed the court, in the presence of the applicant, that the matter has become settled. By agreement between the respective counsels, Mrs Delpont proceeded to read the terms of the settlement into the record. Mr Muhongo confirmed the terms on record in the

² Akwenye v Amadhila (HC-MD-CIV-ACT-CON-2017-02946) [2018] NAHCMD 252 (21 August 2018).

³ Amadhila v Akwenye (HC-MD-CIV-ACT-CON-2017-02946) [2019] NAHCMD 81 (29 March 2019).

presence of the applicant, who was sitting in court.

[15] Hereafter counsel requested that the matter stands down until 14h15 to enable them to type the said settlement agreement and have it signed before uploading it on e-justice. Upon their return at 14h15 the instructed counsel acting on behalf of the applicant informed the court that he could no longer act on behalf of the applicant as the applicant, in spite of the earlier settlement agreement which was confirmed on record, refuses to sign the said agreement.

[16] From this point onwards the instructing counsel, Mr Beukes took over the matter on behalf of the applicant.

[17] Mrs Delport then requested the court to hear the parties on the issue of the settlement agreement and Mrs Delport argued that in her opinion the matter was settled and further requested the court to declare the verbal settlement agreement, which was read into the record, as binding on the parties. In this regard Mrs Delport referred the court to *AN v PN*⁴ where the court found that the terms of an agreement reflected in a statement are devoid of a *caveat* postponing the binding nature of the agreement to its reduction into writing and signature by the parties⁵.

[18] Mrs Delport further referred me to *Jin Casings & Tyre Supplies CC v Hambabi*⁶ wherein the court held as follows:

[19] Agreeing with Lord Denning Salmon LJ stated the law even more succinctly thus at 937E:

'No doubt a statement made by counsel, just like a statement made by the other side to their prejudice, cannot be withdrawn. This is because an estoppel would then arise. Further, counsel is the ostensible agent of his client to make an agreement during the course of a trial settling the case. If he does so, his client is bound by the agreement, just as anyone is bound by an agreement made on his behalf by another who is ostensibly his agent to make the agreement.'

[19] Mr Beukes was invited to reply to the submission by Mrs Delport. Mr Beukes elect to abstain from

⁴ (HC-MD-CIV-ACT-MAT-2017/00135) [2017] NAHCMD 275 (27 September 2017).

⁵ Supra para 19.

⁶ I (1522) 2008 [2013] NAHCMD 215 (25 July 2013).

making any submissions but stated that the applicant apparently had second thoughts about the settlement agreement as she was fearful that she will default on the payment. Apart for that Mr Beukes did not wish to make any further submissions.

Applicable legal position

[20] It is a well excepted fact that settlement shortly before trial or at the door of the court is commonplace in civil litigation.

[21] The settlement in the *AN v PN*⁷ matter was concluded at mediation as opposed to the matter before me. Masuku J discussed the question in his judgment whether the agreement concluded at mediation is binding. In this regard the court referred to *The Erongo Regional Council & Others v Wlotzsbaken Home Owners Association and Another*⁸, wherein 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 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).’

[22] Applying these principles to the facts before me there can be no doubt in my mind that there was consensus reached regarding the settlement of the dispute. The applicant was sitting in court throughout the proceedings when the terms of the agreement were placed on record. She was undoubtedly privy to the discussions prior to settlement and the instructed counsel acted on the applicant’s instructions. From this

⁷ Supra at Footnote 4.

⁸ Case No.: SA 6/2008.

courts observation of the applicant in court the applicant was in clear agreement with the terms of the settlement. After the terms of the settlement agreement was read into the record in open court the defendant nodded her head in agreement with the said terms. Mrs Delpont, acting on behalf of the respondent indicated that the parties would like the agreement reduced to writing due to the unfortunate history in this matter. There is not a question that the legal validity of this agreement would be postponed due to the execution of the written settlement agreement. The written settlement agreement would merely represent the memorial of the agreement already reached between the parties.

[23] The parties chose to limit the ambit of their case when they settled this matter and they are bound by this election. As a result the applicant is not entitled to resile from this agreement deliberately reached between the parties unless special circumstance are present. In the matter at hand it would appear that the applicant got cold feet during the time that the matter stood down which resulted in her refusal to sign the agreement.

[24] Unlike in the *AN v PN* where the settlement agreement was reached during mediation, in the current case the settlement agreement was reached on the morning of the hearing and very importantly confirmed by counsel in open court and it would make the principles set out by Masuku J apply with even more force.

[25] I fully associate myself with the conclusion reached by the court in *AN v PN* where the Honourable Masuku J stated as follows:

[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 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.'

[26] My order is therefor as set out above.	
Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
Ms A Delport Of Delport Legal Practitioners	T Muhongo Instructed by Henry Shimutwikeneni & Co Inc