REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA

NORTHERN LOCAL DIVISION, OSHAKATI

PRACTICE DIRECTION 61

Case Title:		**Case No:** HC-NLD-CIV-ACT-OTH-2021/00352
Namene Mikael	Applicant	
and		**Division of Court:** High Court, Northern Local Division
Martha Nalushiya	Respondent	**Heard on:** 09, 30 September 2024
		Delivered: 03 October 2024

Heard before: Honourable Mr. Justice Munsu

Neutral citation: *Mikael v Nalushiya* (HC-NLD-CIV-ACT-MOT-2021/00352) [2024] NAHCNLD 106 (03 October 2024)

ORDER

1. The settlement agreement concluded between the parties during the mediation conference on 09 February 2023 is declared valid and binding upon the parties.
2. The Respondent is ordered to pay the costs of the Applicant, in respect of the application and the counter-application, subject to rule 32(11).
3. The matter is postponed to 31 October 2024 at 08:30 for status hearing.
4. The Parties shall file a joint status report on or before 28 October 2024.

MUNSU J:

Introduction

[1] In this opposed interlocutory application, the applicant seeks an order declaring the settlement reached between the parties on 09 February 2023, valid and binding upon the parties. On 16 January 2004, the parties got married to each other out of community of property. During September 2020, the parties got divorced.

[2] On 07 December 2021, the applicant instituted eviction proceedings against the respondent, which proceedings the respondent defended.

The application

[3] The applicant avers that on 09 February 2023, the parties attended to court-connected mediation, through which an agreement was concluded.

[4] The applicant further states that during the settlement negotiations, the parties engaged in good faith, and that the applicant had every intention to meet his obligations in terms of the aforesaid settlement agreement.

[5] The applicant asserts that in terms of the settlement agreement, the parties were to request the court to make the settlement agreement an order of court.

[6] The applicant goes on to say that the day after the mediation conference, he was informed by his legal representative that the responded was not happy with the terms of the settlement agreement and that she proposed different terms, to which the applicant was not amenable. Additionally, the applicant avers that on the same date, the respondent's legal practitioner withdrew as counsel of record.

[7] Furthermore, the applicant claims that he enquired from his legal representative about the remedies that were available to him, to which he was advised that once the parties reach an agreement, same is legally binding upon the parties and can be enforced by a court of law, regardless of whether the agreement was reduced to writing or not.

[8] The applicant concludes by stating that he instructed his legal representative to bring this

interlocutory application to enforce the settlement agreement concluded between the parties.

The opposition

[9] In her answering affidavit, the respondent states that at the time of their marriage, she lived in a house she purchased with her government subsidy. She avers that during the year 2012, she sold the house in order to develop the plot from which the applicant wants to evict her. She claims that she bought the plot in question in 2007.

[10] The respondent goes on to say that the applicant has never had a job over the duration of their marriage and has not offered any financial support because he was unable to. She claims that although the applicant did not have a steady source of income, he would occasionally drive taxis when the opportunity arose.

[11] Additionally, the respondent claims that after Oniipa was declared a town, the inhabitants had to register their customary land rights with the council and then enter into lease agreements. She claims that the applicant took care of this.

[12] The respondent adds that she has been responsible with all the payments in respect of the property. She continues by saying that, because of the divorce and on the understanding that the applicant would have to move out of the common home, she donated another plot (E38) to him situated in the same area. She alleges that the applicant sold the said plot.

[13] The respondent goes on to say that she informed her legal representative at mediation that she was not comfortable with the proposals made by counsel for the applicant, however her legal practitioner informed her that she had to sign the agreement as the law was not on her side. She avers that these discussions were mainly in oshiwambo as all the parties understood the language. She adds that there was also an interpreter present.

[14] Furthermore, the respondent avers that she proceeded to sign the settlement agreement because she believed that she did not have an option. However, immediately after the mediation proceedings, she gathered the courage to inform her legal representative that she did not agree with the contents of the settlement agreement. She avers that at all relevant times, she had no desire to sign the said agreement because doing so would leave her and her children destitute. Regarding the aforementioned agreement, the respondent claims that there was no consensus and

that she merely signed it as a result of the advice from her erstwhile counsel.

The applicant's reply

[15] In reply, the applicant avers that sometime during 2007, he acquired customary land rights in respect of the property in question which he occupied with his family. He further claims that he sold his motor vehicle in order to build the house for his family on the said plot. He adds that he has been a businessman throughout the duration of the marriage, engaged in buying and selling of motor vehicles in order to generate income to sustain his family.

[16] The applicant asserts that he acquired the plot (E38) from the traditional authority and not from the respondent. He also states that the eviction proceedings are solely against the respondent. Additionally, he avers that the respondent signed the settlement agreement in the presence of the mediator, the parties and their legal representatives.

[17] The applicant further states that the respondent's attempt to resile from the agreement is an afterthought aimed at undermining the court process.

The counter application

[18] The respondent filed a counter-application in which she seeks an order setting aside the aforementioned settlement agreement. In her counter-application, the respondent relies on the same reasons put forth in her answering affidavit to the applicant's application.

[19] She merely adds that the applicant has no better title over the property than her who obtained the land from the traditional authority. She claims that the applicant has no right in law to eject her from the land owned by the Oniipa Town Council.

The opposition to the counter-application

[20] Briefly, the applicant opposes the relief sought by the respondent in her counter-application. He avers that the respondent did not make out a case for setting aside a valid settlement agreement.

[21] The applicant states that the respondent never owned the plot in question, but rather that it is him who acquired customary land rights over the said plot during 2007, and that he has a better

title to evict the respondent from the property by virtue of the lease agreement between him and the Oniipa Town Council.

Disposal

[22] There was no appearance on behalf of the respondent at the hearing of the matter. Nevertheless, the parties filed all the necessary papers, and the court will determine the matter accordingly.

[23] It is common cause that the parties, assisted by their legal practitioners attended to mediation. The mediator's report states that the mediation between the parties conducted on 09 February 2023 was successful. A settlement agreement was signed by the parties.

[24] The respondent is attempting to resile from the said agreement contending that there was no consensus reached between the parties, and that she merely signed the agreement on the advice of her legal representative.

[25] In her endeavour to bolster her case, the respondent placed reliance on the status report filed by her erstwhile legal practitioner, Nicky Ngula Attorneys. Her former legal representative states in the aforementioned status report that the respondent informed him after the mediation that she wanted to cancel the signed agreement and that she was terminating his mandate. Nowhere does her former legal practitioner state that there was no consensus reached between the parties.

[26] It is not clear to the court why the respondent contends that there was no consensus reached between the parties. She acknowledged having signed the settlement agreement. Furthermore, she does not say that she did not understand the terms of the agreement or the purpose and import of signing the agreement. Additionally, nowhere does she say that she was forced or unduly influenced or pressured to sign the agreement.

[27] In fact clause 2.2 of the agreement confirms that the parties signed the agreement freely and voluntarily without being forced and/or coerced by anyone to sign same. All that the respondent says is that she was uncomfortable with the proposals made by the applicant, and that she merely signed on the advice of her former legal practitioner.

[28] Even if the respondent's justification for signing the agreement was to be accepted by the

court, it does not follow that there was no consensus. The respondent did what was required to manifest the meeting of the minds. In *casu,* it was for the respondent to make out a case and demonstrate how consensus was absent. Although the respondent claims that she signed the settlement agreement because she believed that she did not have an option, she is silent on how this changed after the mediation. She simply states that immediately after the mediation proceedings, she gathered the courage to inform her legal practitioner that she did not agree with the contents of the settlement agreement. It was not her case that the reason she signed the settlement agreement was because she did not have the courage to engage her legal representative. The respondent is a professional, a teacher by profession, as opposed to the applicant, whom she says has never been employed.

[29] Despite the respondent's assertion that the parties and their legal practitioners, the interpreter, and the mediator were present when she informed her former legal practitioner that she was uncomfortable with the proposals made by the applicant, there was no confirmatory affidavit filed. There is nothing to gainsay the applicant's case that the allegations by the respondent are merely an afterthought or a change of mind after mediation.

[30] In essence, the respondent was supposed to demonstrate that no agreement was reached at mediation, but instead she spent a great deal of time reliving the events related to the parties' marriage. The issue at hand is largely related to what happened at mediation, and not at Oniipa.

[31] I am reminded of what was said in *AN v PN*[1]*,* thus:

'[24] … 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…'.

[32] The main pillar of the respondent's opposition to the application and the foundation of her counter-application is the allegation made against her former legal practitioner.

[33] The respondent acknowledged in her answering affidavit that as courtesy in the profession, she ought to have sent her affidavit to her erstwhile legal practitioner for his comment. There is no proof that this was done, and given that there was no appearance on her behalf at the hearing of the matter, this issue remained unclarified.

[34] In *Joseph v Ministry of Education, Arts and Culture*[2] this court held that legal practitioners

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

owe an ethical duty to bring to the attention of their colleagues, adverse allegations made by client, in order to enable such legal practitioner to comment thereto. The court went on to refer to the decision in *Maestro Design v Microlending Association of Namibia*[3], wherein the court had the following to say:

> '[60] It accordingly appears to me that where a legal practitioner acts for a person like the applicant in this matter, and a client makes prejudicial remarks about a previous legal practitioner, it would be ethical for the new legal practitioner, to bring the allegations and criticism levelled against the erstwhile legal practitioner, to the latter's attention, say under cover of a letter.
>
> [61] This would enable the affected legal practitioner to decide whether or not to respond to the allegations, as Ms. Samuel did. That in my view, is the least that a legal practitioner owes to a colleague, who is *(sic)* learned brother or sister, especially where these allegations will be in the public domain, on a platform like eJustice, where they will be readily available for the whole world to ingest.'

[35] Accordingly, the court is not persuaded that the respondent made out a case in opposition and in the counter-application.

Costs

[36] Counsel for the applicant made submissions justifying the award of costs in the event of the application succeeding. Section 17 of the Legal Aid Act, 1990 provides that costs awarded to a legally aided person shall be payable to the Director of Legal Aid.

The order:

[37] Consequently, I make the following order.

1. The settlement agreement concluded between the parties during the mediation conference on 09 February 2023 is declared valid and binding upon the parties.
2. The Respondent is ordered to pay the costs of the Applicant, in respect of the application and the counter-application, subject to rule 32(11).
3. The matter is postponed to 31 October 2024 at 08:30 for status hearing.

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[2] *Joseph v Ministry of Education, Arts and Culture* (HC-NLD-LAB-APP-AAA-2021/00005) [2021] NALCNLD 4 (17 December 2021).

[3] *Maestro Design v Microlending Association of Namibia* (HC-MD-CIV-MOT-GEN-2018/00414) [2020] NAHCMD 140 (7 May 2020).

4. The Parties shall file a joint status report on or before 28 October 2024.	
	Note to the parties:
D MUNSU Judge	None
Counsel:	
Applicant:	**Respondent:**
S. Mwahafa Of The Directorate of Legal Aid Oshakati.	M. Amupolo Of Jacobs Amupolo Lawyers & Conveyancers Ongwediva.