

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-LAB-APP-AAA-2020/00022

In the matter between:

CAPE ORCHARD COMPANY NAMIBIA (PTY) LTD

APPELLANT

and

**BENEDICTUS NDHOVU YIKOGHAHOHA
AND 57 OTHERS**

FIRST RESPONDENT

DIONYSIUS LOUW NO

SECOND RESPONDENT

THE LABOUR COMMISSIONER

THIRD RESPONDENT

Neutral citation: *Cape Orchard Company Namibia (Pty) Ltd v Yikoghahoha and 57 Others* (HC-MD-LAB-APP-AAA-2020/00022) [2020] NALCMD 06 (26 February 2021)

Coram: PRINSLOO J

Heard: 02 December 2020

Delivered: 26 February 2021

Flynote: **Labour law** – Appeal against part of arbitrator’s award – Award issued in favour of the first respondents – On appeal, the finding of the arbitrator set aside and appeal upheld.

Summary: This is an appeal noted in terms of s 89(1) (a) of the Labour Act. 11 of 2007 (the Act) against the arbitration award by Dionysius Louw, the second respondent on 6 March 2020. The first respondent is a group of 58 former employees of the appellant. On 31 January 2017 the employees were retrenched by the appellant in terms of s 34 of the Act. As a result thereof, the employees launched a dispute of unfair

labour practice with the office of the Labour Commissioner on 10 October 2017. This dispute was filed by Mr Rocco Nguvauva, the General Secretary of NAFWU (Namibia Farmworkers Union) on behalf of its members. The employees complained of the appellant's failure to comply with s 34 of the Act. The parties represented by Mr Nguvauva entered into a settlement agreement (compromise) wherein they agreed that the first respondents would withdraw their case against the appellant. On 18 November 2019 Mr Benedictus Yikoghahogha on behalf the employees made a sworn statement with the Namibian Police and attached a schedule signed by each of the employees stating that there was no agreement on the part of the employees to withdraw the complaint as set out in the notice of withdrawal and insisted that the matter must proceed. The arbitrator then ruled that Mr Nguvauva did in fact not have the necessary authority to enter into a compromise on behalf of the first respondents and set aside the settlement agreement. It is against this ruling that the appellants are appealing.

Held that in matters where the withdrawal of the complaint is part of the settlement there need to be a substantive application to rescind or set aside the settlement agreement and the withdrawal of the dispute is incorporated in the agreement as a salient term thereof. In order to withdraw the notice of withdrawal the settlement agreement first had to be set aside. The arbitrator had no jurisdiction to set aside a settlement agreement even if it was made in context of Labour Law.

Held that no reasonable arbitrator could have reached the conclusions regarding the notice of withdrawal (and effectively the settlement agreement) as was done by the second respondent.

ORDER

1. The appeal in terms of s 89(1)(a) of the Labour Act, 11 of 2007 against part of the decision and order of the second respondent made on 6 March 2020, wherein he ordered that:
'(1) The notice of withdrawal signed on 3rd day of September 2018 by Rocco Nguvauva for and on behalf of the applicants is hereby set aside.'

is upheld.

2. The aforementioned order is set aside.

3. No order as to costs.

JUDGMENT

PRINSLOO J

Introduction

[1] This is an appeal noted in terms of s 89(1) (a) of the Labour Act, 11 of 2007 (the Act) against the arbitration award by Dionysius Louw, the second respondent on 6 March 2020.

[2] The matter, however, has a long and extended history and to bring the matter in context it is necessary to consider the events leading up to appeal before me. The genesis of the matter is as far back as 31 January 2017, which is when the employees were retrenched by the appellant in terms of s 34 of the Labour Act, 11 of 2007 (the Act).

Background

[3] The first respondent is a group of 58 former employees of the appellant (hereinafter referred to as the employees or respondents interchangeably). On 31 January 2017 the employees were retrenched by the appellant in terms of s 34 of the Act. As a result thereof, the employees launched a dispute of unfair labour practice with the office of the Labour Commissioner on 10 October 2017. This dispute was filed by Mr Rocco Nguvauva, the General Secretary of NAFWU (Namibia Farmworkers Union) on behalf of its members. The employees complained of the appellant's failure to comply with s 34 of the Act.

[4] The Labour Commissioner registered the dispute in terms of the Act under case number SRLU 38-17 and designated an arbitrator, Ms Monica Nganjone, to determine the dispute in terms of s 85(5) of the Act. The matter was set down for an arbitration hearing on 7 December 2017 at Aussenkehr.

[5] On 30 October 2017 the appellant brought an application for the summary dismissal of the dispute on the basis that the dispute prescribed in terms of s 86(2) (i) of the Act. This application's preliminary relief was filed under case number CRWK 1344/2016.

[6] The application to dismiss was opposed by the employees and it would appear that the arbitrator heard the application on 13 November 2017 and committed herself to a ruling on 14 December 2017. This date was however extended and on 13 March 2018 by way of ruling Ms Nganjone, dismissed the application for summary dismissal of the dispute and found that the dispute filed under case no SRLU 38-17 had not prescribed. On 19 March 2018 the appellant filed its notice of appeal against the ruling of the arbitrator given on 13 March 2018.

[7] The appeal was enrolled in the Labour Court under case no HC-MD-LAB-APP-AAA-2018/00016 and set-down for hearing on 14 September 2018 before the Honorable Masuku J. However, on 7 September 2018 the appellant withdrew the appeal and the matter was removed from the roll as a result thereof. The withdrawal of the appeal was as a result of a settlement agreement reached between the appellant and Mr Nguvauva, in his representative capacity.

[8] During May 2019 the employees wrote a letter to the Labour Commissioner with a request to proceed to determine the dispute between the parties as the appeal against the order of 13 March 2018 was withdrawn. The Labour Commissioner complied and designated an arbitrator to adjudicate the matter which was set down for hearing on 18 November 2021.

[9] Mr Conradie, the Senior H.R. Manager of the appellant, directed an e-mail to the arbitrator indicating that the dispute set down was withdrawn on 3 September 2018 and referred the arbitrator to the withdrawal notice filed by Mr Nguvauva.

[10] From the settlement agreement filed of record dated 3 September 2018 it appears that the salient terms of the settlement agreement were that:

- a) The appellant undertook to withdraw the appeal filed against the ruling of the Arbitrator dated 13 March 2018;

- b) The respondents undertook to abandon and withdraw their complaint under case SRLU 38-17;
- c) The respondents will pursue the referral proceedings instituted on 15 March 2017 against the appellant for the unfair dismissal of the respondents under case SRKE 17-17 and that each party will take the appropriate steps in that regard.
- d) The parties agreed that a settlement of the appeal is the most effective and appropriate way of disposing of the appeal proceedings brought as a result of the award issued under case SRLU 38-17.
- e) That the agreement would be a final settlement and that no party shall have any claim of whatsoever nature against the other party except to fulfil their obligations arising from the agreement to each other.

[11] On 18 November 2019 Mr Benedictus Yikoghahogha on behalf the employees made a sworn statement with the Namibian Police and attached a schedule signed by each of the employees stating that there was no agreement on the part of the employees to withdraw the complaint as set out in the notice of withdrawal and insisted that the matter must proceed. On 26 November 2019 Mr Nguvauva directed a letter to the Ministry of Labour: Social Welfare and Job Creation indicating that the withdrawal of the complaint was not procedural and that it was resolved by the employees that the matter must be re-enrolled and proceed to finalization.

[12] On 5 December 2019 Mr Nguvauva then proceeded to file an application in terms of rule 28 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner ('the Conciliation and Arbitration rules') with the offices of the Labour Commissioner wherein he applied that the Labour Commissioner permits the withdrawal of the notice of withdrawal filed erroneously and reinstate the matter before the Labour Commissioner.

[13] This matter served before the arbitrator and on 6 March 2020 in conclusion of comprehensive reasons the arbitrator gave the following order:

'60. Having regard to all the foregoing, I come to the conclusion that this is a proper case in which the following order suffices and is condign:

(1) The *notice of withdrawal* signed on 3rd day of September 2018 by Rocco Nguvauva for and on behalf of the Applicants is hereby set aside.

(2) The matter of the Applicants under case number SRKE 17-2017 will be heard on a date that will be communicated to both parties in due course.

(3) In the circumstances, I make no order as to costs.'

The appeal

[14] The appellants filed its notice to appeal on 15 May 2020 wherein it specifically appealed against para (1) of the arbitrator's order dated 6 March 2020 which ordered that the notice of withdrawal signed on 3 September 2018 by Mr Nguvauva be set aside.

[15] The appeal against the ruling of the arbitrator is based on various grounds, and the questions of law appealed against can be summarized as follows¹:

- a) The arbitrator erred when he found that the application is one provided for under Rule 28(1)² of the Rules relating to the Conduct of Conciliation and Arbitration³.
- b) The arbitrator acted outside the powers contemplated in rule 28 of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner⁴.
- c) The arbitrator acted ultra vires section 86(15) because the award was not 'an appropriate award'⁵.
- d) That the arbitrator erred in finding that no answering affidavit was filed⁶.

¹ As summarized in the Respondent's Heads of Argument.

² 28. (1) This rule applies to –

(a) an application for postponement, condonation, substitution, variation or rescission;

(b) an application for class certification; and

(c) any other application for preliminary or interlocutory relief, such as an application for consolidation or joinder.

³ Para 1.1 of the notice of appeal.

⁴ Para 1.2 of the notice of appeal.

⁵ Para 1.3 of the notice of appeal.

⁶ Para 1.4 of the notice of appeal.

- e) The arbitrator erred in finding that it was permissible “in circumstances where a compromise was reached between the parties” the respondents were entitled to withdraw of the appeal⁷.
- f) The arbitrator should have found that the withdrawal of the dispute was with “express knowledge and consent” of the employees.
- g) The arbitrator erred in law in that no reasonable arbitrator could have, on the facts before him, concluded that the merits of case SRLU 38-17 and the continuation of that cause did not form part of the terms and conditions of the compromise reached between the parties⁸.
- h) The arbitrator erred in not finding that the respondents were estopped from raising and relying on Nguvauva’s lack of authority⁹.

[16] The appellant’s grounds of appeal are as follows:

- a) Mr Nguvauva at all material time acted on behalf of the respondents and entered into the agreement on their behalf on 5 September 2019.
- b) The respondents do not say, nor does the arbitrator find, that Mr Nguvauva was not authorised to enter into the settlement agreement on behalf of the applicants as their authorised representative.
- c) The arbitrator appreciated the settlement agreement was in full and final settlement of the complaint under case no SRLU 38-17 at the office of the Labour Commissioner as well as the appeal under HC-MD-LAB-APP-AAA-2018/00016 against ruling of the arbitrator (dated 13 March 2018).
- d) The arbitrator appreciated that in terms of the settlement agreement (a compromise) and as part of their obligations the respondents expressly agreed to withdraw case SRLU 38-17 and that the arbitrator was alive to the binding nature of the compromise reached between the parties (with reference to para 2 of the arbitrator’s order), which was a term agreed upon in the compromise.

⁷ Para 1.8 of the notice of appeal.

⁸ Para 1.9 of the notice of appeal.

⁹ Para1.11 of the notice of appeal.

- e) With reference to the affidavits deposed to be Mr Nguvauva in support of his application are in conflict with one another wherein the deponent on the one hand indicates that he is the representative of the respondents and is duly authorised to act on behalf of the respondents and on the other hand states that the notice of withdrawal was filed without the consent of the respondents.

Appellant's arguments

[17] The main thrust of Mr van Greunen's argument is about the turn by Mr Nguvauva in respect of the withdrawal of case SRLU 38-17 and the allegation that Mr Nguvauva acted without the applicants' authority have no merit as it is clear from all the documents filed of record that Mr Nguvauva acted on behalf of the first respondents and had the necessary authority to do so. Mr van Greunen contended that on the strength of the facts the first respondents (through their representative) are estopped from alleging that Mr Nguvauva was not authorized to represent them.

[18] Mr van Greunen argued that a compromise was reached between the parties which finally settled the matter and therefore the arbitrator could not consider the application to 'withdraw the withdrawal' as it did not fall within the ambit of rule 28(1)(a) of the Conciliation and Arbitration rules. Mr van Greunen argued that rule 28(1)(a) relates to interlocutory applications as set out in rules 29 to 33 of the Conciliation and Arbitration rules, which would stem from an arbitration which is or was pending before the arbitrator.

[19] Mr van Greunen submitted that the application before the second respondent did not relate to a labour matter as it relates to the unilateral setting aside of a compromise in terms of which the right of all parties there had already vested.

[20] Mr van Greunen contended that it was improper for the application to have been brought the way it was and the second respondent did not have the jurisdiction to decide a substantive application which was neither a dispute nor a dispute of interest as defined in s 1 of the Act¹⁰.

¹⁰ "dispute" means any disagreement between an employer or an employers' organisation on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter;

[21] On the issue of the compromise Mr van Greunen referred the court to *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others*¹¹ and the principles regarding compromise, which I will discuss further in due course. Mr van Greunen argued that what is clear from the *Gollach* judgment is that a compromise cannot be rescinded on any grounds relating to the motive for entering into it, or to the merits of the dispute which it was for the very purpose of the parties to compromise.

[22] Mr van Greunen submitted that the appellant complied with the terms of the compromise and the first respondent enjoys the 'fruits' of the appellant's compliance and has essentially been put back in the position that it was prior to it complying with the settlement agreement to the prejudice of the appellant's performance in terms of the very agreement. It is Mr van Greunen's position that the arbitrator essentially set aside the compromise notwithstanding of irregularities associated with the decision.

[23] In conclusion Mr van Greunen submitted that no reasonable arbitrator could have, on the facts before him, concluded that the merits of case SRLU 38-17 and the continuation of that cause did not form part of the terms and conditions of the compromise reached between the parties.

Respondents' Arguments

[24] Mr Nekwaya arguing on behalf of the first respondents that rule 28(1)(c) of the Conciliation and Arbitration rules provide that 'any other application for preliminary or interlocutory relief' implies a broad and expansive meaning should be attributed to the unspecified 'application for preliminary or interlocutory relief' not specifically envisaged in this rule. Mr Nekwaya referred the court to *R v Hugo* 1926 AD 271 wherein the court held that the word 'any' on the face of it is a word of wide and unqualified generality.

[25] Mr Nekwaya argued that considering the ordinary grammatical meaning of the rule and having regard to the *Hugo* matter, the current application would fall within the ambit of rule 28(1)(c) and the arbitrator was within his right to hear the application and rule as he did. Mr Nekwaya argued that there is no merit in the proposition that if the "dispute of interest" means any dispute concerning a proposal for new or changed conditions of employment but does not include a dispute that this Act or any other Act requires to be resolved by - (a) adjudication in the Labour Court or other court of law; or (b) arbitration;

¹¹ *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A).

application is not one of postponement, substitution, variation or rescission then the arbitrator acted outside the powers of rule 28.

[26] Adding on to that argument Mr Nekwaya argued that the arbitrator did not act *ultra vires* rule 28 of the Conciliation and Arbitration rules as he was seized with the matter designated to him by the Labour Commissioner and the matter would only become *res judicata* once the arbitrator issues a certificate of resolved dispute in terms of s 82(15) or issue an arbitration award on the merits of the dispute.

[27] Mr Nekwaya argued that, assuming the union representative was authorized to withdraw the dispute, the arbitrator would on re-enrollment of the dispute enquire as to whether the withdrawal preclude the employees/applicants from proceeding further with the dispute. In this current instance the arbitrator did enquire whether the notice of withdrawal was part of the settlement agreement and found that it was not authorized by the employees.

[28] Mr Nekwaya submitted that nothing precluded that employees from proceeding further with the dispute and the decision reached by the arbitrator in this regard cannot be upset on appeal.

[29] On the issue whether the notice of withdrawal could be withdrawn Mr Nekwaya argued with reference to *Shibodge v Minister of Safety and Security and Others*¹² wherein the court held that the fact that a matter is withdrawn is not necessarily a bar to reinstating proceedings and that it remains open for the applicant to reinstitute the proceedings as the merits of the claim have not been adjudged and *Kgobokoe v Commissioner for Conciliation, Mediation and Arbitration and Others*¹³ wherein the court held that 'a withdrawal of a matter may be withdrawn' that the arbitrator was correct in rejecting the point raised by the appellant that the withdrawal application is outside his power and the applicants were entitled to re-refer the matter.

[30] Mr Nekwaya contended that the compromise relied on by the appellant was not properly concluded as it was not authorized. The respondents rely on the sworn

¹² *Shibodge v Minister of Safety and Security and Others* (LC) (unreported case no JR 3307/09, 11/07/2012) La Grange J at para 26.

¹³ *Kgobokoe v Commissioner for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 235 (LC).

statement filed with the Namibian Police in this regard. Mr Nekwaya in his oral argument submitted that the settlement agreement is a nullity and can be ignored and need not be set aside and therefore there need not be an application to set the settlement agreement aside.

[31] Mr Nekwaya pointed out that for an agreement to be binding, the compromise agreement must have been properly concluded and that the compromise can only be binding if so authorized. The court was referred to *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd*¹⁴ followed by our Supreme Court in *Metals Australia Ltd and Another v Amakutuwa and Others*¹⁵. In the *Georgias* case the court held that:

‘But a compromise induced by fraud, duress, *justus* error, misrepresentation, or some other ground for rescission is voidable at the instance of the aggrieved party, even if made an order of court.’

[32] The court was also referred to *Ncaphayi v Commissioner for Conciliation Mediation and Arbitration and Others*¹⁶ wherein the court made a distinction between a withdrawal on the applicant’s own accord and where the withdrawal is an intrinsic part of a settlement agreement. Mr Nekwaya pointed out that the court held that the withdrawal of a dispute in labour matters is similar to an order for absolution from the instance in civil procedure. The court in this instance also held that the mere fact that the applicant withdrew a referral did not bar CCMA to enroll the arbitration on a second referral.

[33] Mr Nekwaya submitted that the arbitrator correctly found in his ruling that Mr Nguvauva concluded the settlement agreement to withdraw the complaint without the authorization of the employees/applicants. Mr Nekwaya further submitted that there is no evidence on record or placed before the arbitrator that the notice of withdrawal was done on behalf of the applicants with their express knowledge and consent and that the respondents are not estopped from impugning Mr Nguvauva’s authority.

[34] Mr Nekwaya in conclusion argued that the findings made by the arbitrator were correct and the appellant’s argument that no reasonable arbitrator would reach the decision reached by the arbitrator is without merit and the appeal must therefore fail.

¹⁴ *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 138I to 139 D.

¹⁵ *Metals Australia Ltd and Another v Amakutuwa and Others* 2011 (1) NR 262 (SC) at 268 para 21.

¹⁶ *Ncaphayi v Commissioner for Conciliation Mediation and Arbitration and Others* (2011) 32 ILJ 402 (LC).

The law applicable to appeals

[35] S 89(1) (a) of the Act provides as follows:

(1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 –

(a) on any question of law alone; or

(b)...

[36] In *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another*¹⁷ the Supreme Court considered the question of what a 'question of law alone' is and what would be the test.

[37] Damaseb DCJ discussed the position as follows:

[30] This court has recently revisited the test to be applied in determining whether or not a finding by an arbitrator is an appealable question of law under s 89(1)(a): *Van Rensburg v Wilderness Air Namibia (Pty) Ltd* Case No. SA 33/2013 delivered on 11 April 2016. O'Regan AJA held that s 89(1)(a) reserves determination of facts to the arbitration process and an appeal relating to decisions on fact will therefore only be entertained where the arbitrator has made a factual finding on the record that is arbitrary or perverse. An arbitrator's conclusion on disputed facts which a reasonable arbitrator could have reached on the record is not perverse and thus not subject to appeal to the Labour Court¹⁸. The corollary is that an interpretation of facts by an arbitrator that is perverse in the sense that no reasonable arbitrator could have done so is appealable as a question of law. When a decision of an arbitrator is impugned on the ground that it is perverse, the Labour Court 'should be assiduous to avoid interfering with the decision for the reasons that on the facts it would have reached a different decision on the record'. It may only interfere if the decision reached by the arbitrator is 'one that no reasonable decision-maker could have reached'¹⁹.

[31] In so far as it is relevant to the present appeal, O'Regan AJA added (at para 48) that:

'Finally, when the arbitrator makes a decision as to the proper formulation of a legal test or rule, and a party considers that decision to be wrong in law, then an appeal against that decision will constitute an appeal on a question of law, and the Labour Court must determine whether the decision of the arbitrator was correct or not.'²⁰

¹⁷ *Swart v Tube-O-Flex Namibia (Pty) Ltd and Another* (SA 70/2013) [2016] NASC 15 (25 July 2016).

¹⁸ *Van Rensburg* at p 21, para 34.

¹⁹ *Ibid* at 22 para 45.

²⁰ Compare *Platt v Commissioner for Inland Revenue* 1922 AD 42 at 50: 'Where all the material facts are fully found, and the only question whether the facts are such as to bring the case within the provisions

[38] Having considered the grounds of appeal I am satisfied that the issues raised as grounds of appeal, are indeed questions of law.

Issues for determination

[39] The main issues before me relate to the authority of Mr Nguvauva to enter into a settlement on behalf of the respondents and subsequently withdraw the complaint. The next issue for determination is whether the application that served before the arbitrator regarding the withdrawal of the notice of withdrawal falls within the ambit of rule 28 of the Conciliation and Arbitration rules and lastly whether the arbitrator had the jurisdiction to hear the matter and set the notice to withdraw aside, in the context of the compromise reached.

Case numbers

[40] From the onset it is important to note that there are two different case numbers in the matter i.e. SRLU 38-17 and SRKE 17-17 which have been used interchangeably throughout the proceedings and it is important to note that the relevant matter before me relates to SRLU 38-17 and not SRKE 17-17. It seems that respondents and the arbitrator got these cases mixed up during the course of considering the disputes between the parties.

Discussion

[41] From my reading of the South African authority to which this court was referred to by Mr Nekwaya it is indeed so that the courts are all in agreement that withdrawal of the complaint will not deprive the CCMA (in the South African context) of jurisdiction to receive and deal with a fresh referral and therefore the withdrawal can be withdrawn as held in the *Shibodge, Kgobokoe and Ncaphayi* matters and other matters of a similar nature. The reasoning is that the withdrawal of a dispute referral to the CCMA is not an act of any functionary, but the action of an employee party to a dispute. The commissioner plays no role in that decision.

[42] I take no issue with the authority referred to. I also take no issue that under those circumstance nothing would prevent the arbitrator from having jurisdiction to

properly construed of some statutory enactment, the question is one of law.'

entertain the matter once re-instated or upon the filing of fresh complaint. I cannot fault Mr Nekwaya's argument in this regard. However, the matter before me must be distinguished from those matters where the claimant withdraws the complaint on its own volition. In the current matter the withdrawal of the complaint forms part and parcel of a final settlement.

[43] Mr Nekwaya also referred me to *South African Municipal Workers Union and Others v Zenzeleni Cleaning and Transport Services CC and Others*²¹ and specifically to para 15 of the judgment and submitted that it is settled law with regards to withdrawal of a withdrawal. Molahlehi, J held that:

'[15] There is no automatic legal consequence that a withdrawal of a dispute means that the withdrawal cannot be withdrawn and the dispute be re-enrolled. Once the applicants' application to have the matter re-enrolled was made it was incumbent on the Commissioner to enquire as to whether the withdrawal precluded the applicants from proceeding further with the dispute. It is only where the withdrawal is consequent to the compromise of the dispute, that it cannot be withdrawn. It appears from the papers, that had the Commissioner enquired into the nature of the withdrawal, he would have found that the withdrawal did not compromise the applicant's claim.' (my underlining)

[44] The underlined portion of the judgment is in line with the authorities referred to above but what is critical and has a direct bearing on the matter before me, and wherein the distinction lies in the very next sentence of the said para 15 and that is '**It is only where the withdrawal is consequent to the compromise of the dispute, that it cannot be withdrawn**'.

[45] Support for this contention can also be found in *SAMWU et al v the CCMA and Zenzeleni Cleaning and Transport Services CC*²² wherein Steenkamp J, agreed with the decision in *Ncapahyi* and drew a distinction between a withdrawal at the applicant's own instance and where the withdrawal is an intrinsic part of a settlement agreement.

[46] In matters where the withdrawal of the complaint is part of the settlement there need to be a substantive application to rescind or set aside the settlement agreement

²¹ *South African Municipal Workers Union and Others v Zenzeleni Cleaning and Transport Services CC and Others* (JR852/13) [2015] ZALCJHB 47 (23 February 2015).

²² *SAMWU et al v the CCMA and Zenzeleni Cleaning and Transport Services CC* [2013] ZALCJHB 303 (21 November 2013).

and in the current matter the withdrawal of the dispute is incorporated in the agreement as a salient term thereof. In order to withdraw the notice of withdrawal the settlement agreement first had to be set aside first. The arbitrator had no jurisdiction to set aside a settlement agreement even if it was made in context of Labour Law.

[47] A compromise is relevant to all fields of the law. Policy favours the effecting of compromises bringing, as they do, an end to litigation. It should be noted that a compromise or settlement of a dispute is a contractual agreement. Any general ground upon which ordinary contracts may be attacked and consequently set aside or declared a nullity is thus relevant.

[48] In *Golin t/a Golin Engineering v Cloete*²³ O'Linn J held as follows:

'When a party claims that there has been a full and final settlement, the Court should recognise the settlement as a termination of the issues on the merits once the Court has, upon investigation of the settlement issue, been satisfied that there indeed was a settlement and that the settlement was voluntary, i.e. without duress or coercion, unequivocal and with full knowledge of its terms and implications as a full and final settlement of all the issues.'

[49] Dealing with the very issue of compromise, Van Niekerk J, in *Elizabeth Mbambus v Motor Vehicle Accident Fund*²⁴, referred to *Georgias v Standard Chartered Finance Zimbabwe Limited*²⁵, where the following is recorded:

'The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved . . . As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise the original defences to the original cause of action. . . But a compromise induced by fraud, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court.'

[50] On behalf of the respondents it was argued that Mr Nguvauva did not have the authority to enter into the compromise on behalf of the employees and therefore the settlement agreement may be ignored as it is void. I respectfully disagree with Mr

²³ *Golin t/a Golin Engineering v Cloete* NLLP (1) 1998 121 NLC, 13 December 1995, p 123.

²⁴ *Elizabeth Mbambus v Motor Vehicle Accident Fund* (Case No. I 3299/2007) [2013] NAHCMD 2 14 January 2013.

²⁵ *Georgias v Standard Chartered Finance Zimbabwe Limited* 2000 (1) SA 126 (ZSC) 138I-140D.

Nekwaya on that score as the issue of lack of authority in respect of the settlement agreement is not born out by the papers. The settlement agreement is therefore not void but indeed voidable.

[51] Mr Nguvauva at all material times acted on behalf of the respondent employees, that much is clear from the papers. Mr Nguvauva filed the dispute on behalf of the employees and from thereon was the driving force behind the matter. Mr Nguvauva made all the appearances before arbitrator and deposed to all the relevant affidavits on behalf of the employees. Throughout Mr Nguvauva declared for example:

- a) In the answering affidavit in respect of the initial application to dismiss the appellant's claim that the dispute prescribed:

'Generally

The facts I depose to fall within my personal knowledge unless the contrary appears from context. I have been duly authorized to oppose this application on behalf of the applicants and depose to this affidavit on their behalf....'

- b) In the affidavit made in terms of rule 28 to with the withdrawal application dated 3 September 2018:

'I am duly authorised to bring this application on behalf of the applicants and I depose to this affidavit for that purpose.'

[52] What is interesting from the affidavits by Mr Nguvauva, as well as his letter dated 26 November 2019 to the Labour Commissioner, is that he never states that he had no authority to enter into the settlement agreement. In the letter Mr Nguvauva refers to the withdrawal of the dispute as 'un-procedural' and further states in para 9 of his founding affidavit in support of the application in terms of rule 28 that²⁶:

'9. Acting upon the settlement agreement, in my capacity as Secretary-General of the Namibian Farm Workers Union filed a Notice of Withdrawal dated 3 September 2018 without the consent of the Applicants.'

[53] Mr Nguvauva however then contradicts himself in the very next affidavit (replying affidavit on behalf of the respondents) that he made on 2 March 2020, wherein he states²⁷:

²⁶ Page 142 of the record.

²⁷ Page 193 of the record.

'4. It is admitted that the matter between the parties under case number HC-MD-LAB-APP-AAA-2018/00016 was withdrawn by the appellant and that the dispute lodged under case number SRLU 38-17 was withdrawn by the applicants/respondents. The matter is settled between the parties as encapsulated by the settlement agreement attached hereto as annexure "A". It was an error made of the case numbers.'

[54] And then to exacerbate this contradictory versions of Mr Nguvauva he concluded the replying affidavit by stating as follows in para 8 thereof:

'7. The application was made in error as the instruction to the legal practitioner to have the award by the arbitrator Ms Nganjone enforced in the High Court. The application was intended to bring the matter under case SRKE 17-17 to renegotiate the dismissal of the applicant by the respondent. A letter to the respondent's legal practitioner was addressed to this effect as per annexure "B" attached hereto.

8. I submit that the matter under case number SRKE 17-17 be the matter that is to be heard before the Labour Commissioner and condone the erroneous filing of the application dated 5 December 2019 and that each party pay their own legal costs as agreed in the settlement agreement.' (my underlining)

[55] This last paragraph is with reference to the rule 28 application to withdraw notice of withdrawal dated 3 September 2018, which was apparently filed in error. In this paragraph Mr Nguvauva however yet again confirms the settlement agreement and the validity thereof.

[56] It is actually difficult to grasp what Mr Nguvauva is getting at but it appears that the application to withdraw the withdrawal was incorrectly filed yet the arbitrator seems not to consider these glaring contradictions but focuses on the consent issue only, as I will illustrate.

[57] Further to that if one considers the statement made under oath by Mr Yikoghahogha on 18 November 2019, the complaint was not that Mr Nguvauva had no authority to enter into a settlement agreement with the appellant, the complaint is regarding the withdrawal of the complaint/dispute. It is thus interesting that respondents' representative had the apparent authority to enter into a compromise with the appellant but not the consent to execute the terms of the agreement. This makes no sense.

[58] In his reasons the arbitrator appreciated that the settlement agreement was in full and final settlement of the complaint registered under case SRLU 38-17 in the Office of the Labour Commissioner as well as the appeal against the ruling of Ms Nganjone and as part of the respondent's obligations case SRLU 38-17 had to be withdrawn. This much is clear from the fact that the arbitrator directs in his order that case SRKE 17-17 proceed in due course and this was in fact a term of the settlement agreement.

[59] On this point I must express my confusion with the ruling of the arbitrator when he sets the notice of withdrawal of case SRLU 38-17 aside but does not direct that case SRLU 38-17 will receive dates for hearing in due course, but indeed case SRKE 17-17, which I need to point out yet again, is two different matters.

[60] By setting aside the notice of withdrawal the arbitrator in effect also set aside the settlement agreement, which he could not do.

[61] Under any other circumstances the arbitrator would have been able to deal with the withdrawal of a notice of withdrawal and direct that the matter proceed but not in the current instance as the respondents had to apply to a court with the necessary jurisdiction to set aside the settlement agreement, or in the instance where as alleged Mr Nguvauva had no authority to conclude the settlement agreement, to declare the agreement void *ab initio*. The route opted for by the respondents, via the arbitrator, was the incorrect one as the arbitrator had no jurisdiction to set aside the notice of withdrawal and effectively the settlement agreement.

[62] It is interesting to note the arbitrator's reasoning in order to come to the conclusion that the withdrawal could be withdrawn. The arbitrator based his reasoning on para 2.3 of the settlement agreement and para 9 of the founding affidavit of Mr Nguvauva (referred to above at para 52) and concluded that 'a logical inference can be drawn that the withdrawal was not part of the final settlement²⁸'.

[63] Para 2.3 of the settlement agreement reads as follows:

'2.3 The Respondents will herewith pursue the referral proceedings instituted on 15 March 2017 by the Respondents against the Appellants for unfair dismissal wherein the Respondents sought for their dismissal to be renegotiated through the Office of the Labour

²⁸ Page 215 of the record at para 40.

Commissioner under case number **SRKE 17-17** and in this respect either party shall take any appropriate steps it deems necessary and appropriate there towards'

[64] Para 2.3 has absolutely no bearing on the current matter, SRLU 38-17, as it relates to a dispute registered under a different case number, i.e. SRKE 17-17.

[65] What is of relevant is para 2.1 of the settlement agreement which reads as follows:

'2.1 The Appellant undertakes, on the effective date, to withdraw its Appeal against the Respondents. The Respondents similarly undertakes to abandon and withdraw their Complaint /dispute referral lodged under case number **SRLU 38-17**²⁹ before the office of the Labour Commissioner against the Appellant on the effective date.'

[66] Contrary to the findings of the arbitrator the withdrawal formed an intrinsic part of the compromise. It is therefore clear from reading the authority referred to above and the facts in this matter that the withdrawal could not have been withdrawn and surely not in terms of rule 28 of the Conciliation and Arbitration rules, regardless how wide one wishes to interpret the word 'any' application in the reading of this sub-rule. An application to set aside a settlement agreement is not an interlocutory application that the arbitrator could deal with and one cannot deal with the issue of withdrawal without dealing with the settlement agreement.

[67] I am therefore of the view that no reasonable arbitrator could have reached the conclusions regarding the notice of withdrawal (and effectively the settlement agreement) as was done by the second respondent.

Order

1. The appeal in terms of s 89(1)(a) of the Labour Act, 11 of 2007 against part of the decision and order of the second respondent made on 6 March 2020, wherein he ordered that:

"(1) The notice of withdrawal signed on 3rd day of September 2018 by Rocco Nguvauva for and on behalf of the applicants is hereby set aside."

is upheld.

2. The aforementioned order is set aside.
3. No order as to costs.

²⁹ The current matter.

JS Prinsloo

Judge

APPEARANCES:

For the Appellant:

Mr van Greunen
Köpplinger Boltman Legal Practitioners

For the Respondents:

Adv Nekwaya
On instruction of Angula Co.