

DISPUTES

Where The Courts Draw The Line On Making Settlement Agreements Orders Of Court

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In the recent Constitutional Court judgment between Buffalo City Metropolitan Municipality (“BCM”) and Asla Construction (Pty) Ltd (“Asla”), both in the main and minority judgments, the rulings of Theron J on the one hand and Cameron and Froneman J on the other were particularly scathing concerning the manner in which the parties to review proceedings had approached the Courts. At a late stage in proceedings with a settlement agreement in the hope that in resolution of their respective [disputes](#) with one another, the Court would sanction same, and the matter would be concluded on that basis.

Some factual background is useful:

The Buffalo City Metropolitan Municipality (“BCM”), having approved the appropriate residential spatial framework, set about issuing notices of tender for the construction of certain housing projects in the greater East London area.

Asla Construction (Pty) Limited (“Asla”), the respondent in these proceedings, was successfully awarded a tender for certain of the construction works.

Separately from the awarded tenders to Asla, and as a result of a failed tender process in relation to a separate construction project in Reeston, Asla was approached by the Municipality’s Chief Financial Officer, Mr Pillay, and “awarded” the Reeston contract without any due process or procedure being followed. Asla then proceeded to undertake and complete the construction works in question, but was never paid, precipitating an application to Court for an order for payment of the sums payable to it.

BCM defended the action on the basis that the agreement in question was invalid and separately brought review proceedings to have the agreement declared invalid. BCM initially succeeded in its contentions as to invalidity in the court a quo, Asla succeeded in quashing the review and BCM ultimately brought the matter to the Constitutional Court.

Some two months after submissions were made by the parties to the court, BCM belatedly filed an application in which it sought to have its application for leave to appeal to the Constitutional Court withdrawn and for a settlement agreement entered into the parties to be made an order of Court.

On consideration of the contents of the agreement, and the circumstances in which it was delivered, the Court declined to entertain the appeal to withdraw, and more particularly to sanction the terms of the settlement agreement by making same an order of Court.

The settlement agreement essentially contemplated the ex post facto ratification of the invalid agreement that formed the subject matter of the litigation, thereby seeking to validate an invalid act with the Court’s sanction.

The agreement in question purported to extend to the settlement of other extraneous litigation between the same parties to which this Court was not privy.

The court held that whilst the tradition of making settlement agreements orders of Court was strong in our legal system^[1], a Court should not be mechanical in its approach in making a settlement agreement an order of Court. A Court can only make an order that is “competent and proper” and in accordance with the Constitution and the law and as such it must, in the first instance relate directly or indirectly to the

issues in dispute between the parties and must furthermore not be objectionable – both from a legal and practical point of view – its terms must accord with both the Constitution and the law^[2].

It was further pointed out that the effect of a settlement order would be to change the status of the rights and obligations between the parties. Such an order would bring finality to the issues in dispute between the parties and is not appealable.

The reasons for the Court refusing to sanction the terms of the agreement were thus as follows:

- the purported settlement agreement would contemplate the endorsement of an ostensibly invalid agreement, which was both unconscionable and unconstitutional;
- the terms of the agreement extended to the settlement of other litigation into which the Court had no insights and was not competent to judge;
- the settlement acknowledged impropriety on the part of public office bearers, but made no explanation as to how the settlement agreement would cure the defects in the identified misconduct; and
- despite knowledge of impropriety, the Court noted that the Municipality still sought to conclude a settlement agreement, which sought to endorse that invalidity, which was both inexplicable and contrary to the Municipality's public accountability duty.

Cameron and Froneman J in their dissenting judgement were particularly scathing in their assessment of the settlement agreement:

“As the first judgment notes, its play, now, to have its resolution of its disputes with the respondent clothed with judicial authority in a settlement agreement is even more conspicuously gross.”

One can be left in no doubt that the Court will play no part in attempting to settle matters between parties, which are either not before it, and/or which appear on the face of it to purport to validate ostensibly invalid acts.

[1] Eke Parsons 2016 (2) SA37 (CC)

[2] See Eke paras 25 to 26



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