

LESOTHO / JUDGMENT

Procurement Unit Ministry of Development Planning & 7 Others V Supper Solutions (PTY) Ltd & Ano. (C of A (CIV) No 29/2024) [2024] LSCA 26 (1 November 2024) [2024] LSCA 26

COURT

Court of Appeal

CASE / FILE NUMBER

C of A (CIV) No 29/2024

Source: lesotholii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru C OF A (CIV)29/2024

CCA/0003/2023

In the matter between:

PROCUREMENT UNIT FIRST APPELLANT
MINISTRY OF DEVELOPMENT
PLANNING
THE TENDER PANEL, SECOND APPELLANT
MINISTRY OF DEVELOPMENT
PLANNING
PRINCIPAL SECRETARY, THIRD APPELLANT
MINISTRY OF DEVELOPMENT
PLANNING
MINISTRY OF DEVELOPMENT
FOURTH APPELLANT
PLANNING
PROCUREMENT POLICY AND FIFTH APPELLANT
ADVICE DIVISION
PUBLIC PROCUREMENT TRIBUNAL SIXTH APPELLANT
MINISTRY OF FINANCE SEVENTH APPELLANT
ATTORNEY GENERAL EIGHTH APPELLANT
AND
SUPPER SOLUTIONS (PTY)LTD FIRST RESPONDENT
CABANA-ZANNOWETHU
SECOND RESPONDENT
JOINT VENTURE
CORAM
MOSITO P
SAKOANE CJ

DAMASEB AJA

HEARD:

11 OCTOBER 2024

DELIVERED: 1 NOVEMBER 2024

SUMMARY

Deed of settlement - Public policy – Court's authority to raise public policy concerns suo motu - Public procurement – Settlement agreement violating public procurement principles -sanctity of contracts – Pacta sunt servanda versus public policy - Iusta Causa – Lack of Lawful Cause in the Settlement Agreement.

Appeal upheld -The court a quo's order, which made the deed of settlement a court order, was set aside - The deed of settlement was declared null and void as it contravened public policy, violated procurement laws, and lacked iusta causa - Each party ordered to bear its own costs.

JUDGMENT

MOSITO P

Background

- [1] This is an appeal against the judgment of the High Court (Kopo J) of 20 May 2024. In the application before the High Court, the present appellants (as applicants), sought several reliefs. First, they sought a stay of execution of the court's order granted on 23 February 2023, based on a deed of settlement dated 22 February solely between the current respondents. Second, the appellants sought a declarator that the deed of settlement on which the order was based was irregular and unlawful because it was granted without the appellants' involvement.
- [2] Third, they also sought a declarator that a deed of settlement dated 27 February 2023 was irregular and unlawful (more about this later in this judgment). Fourth, the appellants sought rescission and variation of the court order granted on 23 February
2023. They also sought condonation for their delay in bringing the application and sought leave to file opposing papers in opposition to the granting of the order of 23 February 2023.
- [3] The High Court (Kopo J) heard the application on 21 May 2024. On 20 May 2024, he granted an order dismissing the application with costs. The basis for the dismissal of the application was that the appellants agreed with the deed of settlement. Even the error they sought to rely on under Rule 45 of the High Court Rules did not vitiate the fact that the appellants had agreed with the terms of the deed of settlement. It is against this judgment of 20 May 2024 that an appeal was noted to this Court.

Facts

[4] The

facts

that gave rise to the litigation are not complicated. The Ministry of Development Planning published an expression of interest for the National Manpower Development Secretariat (NMDS) debt collection 2021/2022, calling upon competent consultants and bidders to submit bids for collecting outstanding study loan bursaries from defaulters. The respondents were among those who responded to the request. The respondents were subsequently invited to proceed with the tendering process.

- [5] On 2 December 2021, the Ministry issued an advertisement for open tender. The first respondent was dissatisfied with this move and protested by letter. When all did not go well for the first respondent, it approached the High Court under case number CCA/0117/2021 to review the decision to re-run. The respondents settled the dispute between themselves.
- [6] On 10 February 2022, the Ministry issued ITT of 2021/2022, a tender for debt collection on behalf of NMDS. The invitation was issued to the respondents after both were selected as preferred bidders. Upon receipt of the tender document, the first respondent complained that the period provided was too short. This complaint was duly attended to. On 17 May 2022, the Ministry wrote to the second respondent, notifying it that it was prepared to award it the tender and calling upon it to enter into negotiations with the Ministry, leading to the signing of the contract. The first respondent was also notified that it was unsuccessful.
- [7] The first respondent was dissatisfied with the result. It unsuccessfully filed its objections under Regulation 54 of the Public Procurement Regulations 2007 and successfully appealed the decision to the sixth appellant. This time around, the fifth appellant found that there had been some irregularities and directed a re-run. However, the first respondent was not satisfied and unsuccessfully appealed to the sixth appellant. The Ministry proceeded with the contract process.
- [8] On 25 January 2023, the first respondent approached the High Court under case number CCA/0003/2023 to review the sixth appellant's decision to allow the Ministry to proceed with the contracting process.
- [9] The respondents entered into a deed of settlement to the exclusion of the appellants, in which they agreed that the Ministry should proceed with signing the contract. On 23 February 2023, the parties appeared before the court, and the respondents attempted to turn their deed of settlement into an order of the court. However, the appellants objected that they had not been served with the deed of settlement. However, it seems the parties' representatives discussed the issue and agreed to the deed of settlement.

- [10] It is on record that the learned judge had reservations about endorsing the deed of settlement as then presented because it contained confidentiality provisions. The respondents agreed to remove the offending clauses. The learned judge subsequently agreed to turn the deed of settlement (as amended) into an order of court. The court order reads in part as follows: “IT IS ORDERED THAT 1. The ninth respondent’s award of the tender contract for the provision of debt collection services on behalf of the National Manpower Development Secretariate 2021/2022 is no longer disputed, and the respondents are allowed and permitted to proceed with the signing, implementation and administration of the tender contract. The ninth respondent shall compensate and pay to 2. the applicant the sum of M13 000 000.00 (Thirteen Million Maloti) in settlement of this matter. The parties agree that the sum of money, namely 3. M13 000 000.00(Thirteen Million Maloti) shall be paid by the ninth respondent to the applicant in the following manner. 3.1 The sum of M2 000 000.00 (Two Million Maloti) shall be paid, once off, within five(5) calendar days of this settlement agreement being made an order of Court. 3.2 The sum of M3 000 000.00 (Three Million Maloti) shall be paid within thirty (30) days of the date of the first payment in clause 3.1 above. 3.3 The ninth respondent shall make payment of a further M3 000 000.00 (Three Million Maloti) at the end of the calendar year, 2023. 3.4 The ninth respondent shall pay to the applicant the sum of M92 592.59 (Ninety- Two Thousand Five Hundred and Ninety – Two Maloti and Fifty – Nine Lisente) per month as a monthly retainer fee. 3.5 The monthly retainer fee in clauses 3.4 above shall be paid at the end of the sixth month of operation of the debt collection tender contract and shall be paid monthly for the remaining fifty – four (54) months of the contract. 3.6 The M92 592.59 shall be applicable to this contract and the renewed contract, if any.
4. The parties agree that this settlement agreement shall be made an order of the above honourable Court.
5. The above terms constitute the entire settlement agreement between the parties and no further claims by either party shall be pursued in any court of law against the other in relation to the NMDS debt collection tender 2021/2022.
6. The parties, however, reserve their rights to review, by agreement between the parties, the terms of this settlement agreement on an annual basis. DATED AT MASERU THIS 23RD DAY OF FEBRUARY 2023”
- [11] The appellants sought to rescind the above order because they were not involved in its grant. The High Court dismissed their application, as mentioned above. The appellants have appealed the court's order dismissing the application for rescission and variation. Issues for the determination

- [12] In this appeal, the issue for determination is whether the court, on public policy grounds, should uphold a court order based on a deed of settlement that ostensibly lacks *justa causa*, particularly in light of apparent collusion between the respondents to cease hostilities in exchange for a payment of M13,000,000.00 (Thirteen Million Maluti) from the successful tenderer. The law
- [13] In the landmark case of *Sasfin (Pty) Ltd v Beukes*, the Appellate Division of South Africa (now the Supreme Court of Appeal) grappled with the tension between contractual freedom and public policy considerations. The court held that, '[n]o court should, ... shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.'¹ This decision underscores the delicate balance courts must strike between upholding the principle of *pacta sunt servanda* and intervening on public policy grounds.
- [14] The *justa causa* requirement in Roman-Dutch law, which demands a lawful basis for contractual obligations, is thus interwoven with broader public policy considerations.
- [15] The Zimbabwean Supreme Court, in *Econet Wireless (Pvt) Ltd v Trustco Mobile (Pty) Ltd*, adopted a similar stance, noting that², the courts will not readily interfere with contractual arrangements freely entered by consenting parties. To do so would be to undermine the very foundation of the law of contract. This decision reaffirms the importance of *justa causa* in the form of valid consent, while also recognizing the potential for public policy to override even freely concluded agreements in exceptional circumstances.
- [16] The principle of public policy is now well established in our law as the benchmark against which contracts or terms in contracts may be tested for validity. ³This emphasises the role of public policy as a litmus test for the validity of contractual terms, including those found in deeds of settlement. 1 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9. 2 *Econet Wireless (Pvt) Ltd v Trustco Mobile (Pty) Ltd* (SC 43/13) [2013] ZWSC 465 (18 September 2013) 8. 3 *Standard Bank Namibia Ltd v Maletzky and Others* (A 41/2014) [2015] NAHCMD 81 (10 April 2015) para 39.
- [17] Thus, with the preceding in mind, at the hearing of the present appeal, this Court, *mero motu sua*, raised the question with Counsel for the parties whether, in its terms, the deed of settlement turned into an order of court by the court a quo was not against public policy and/or unconscionable. This we did because, in our view, the judiciary bears a profound responsibility to safeguard the legal system's integrity and uphold our society's fundamental values. This duty transcends the immediate interests of the parties before the court and extends to protecting the broader public interest. Our role as the final arbiters of justice necessitates that we remain ever-vigilant, always on guard against any potential erosion of legal principles that form the bedrock of our judicial system.

- [18] The court's power to raise public policy issues on its own motion is a crucial safeguard in fulfilling this mandate. It serves as a crucial safeguard against the inadvertent sanctioning of agreements or practices that, while perhaps advantageous to the parties involved, may be detrimental to the wider societal good. This is particularly pertinent in cases where a deed of settlement has been turned into a court order, as such orders carry the full weight and authority of the court.
- [19] In the landmark case of *Barkhuizen v Napier*, the South African Constitutional Court eloquently articulated the importance of public policy considerations: "Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it."⁴
- [20] Moreover, the appellate stage often provides a more comprehensive view of the case, allowing for a deeper analysis of its potential ramifications. As Lord Toulson noted in the UK Supreme Court case of *Patel v Mirza*⁵, there is no doubt that a court, in an appropriate case, can raise the issue of illegality of its own motion, even if it has not been pleaded and even if the parties agree that their settlement should be enforced.
- [21] This power is particularly crucial at the appellate level, where the court's decisions often set precedents that guide lower courts and shape future legal discourse. However, this power must be exercised judiciously, with due regard for principles of finality and party autonomy. As cautioned by Lord Justice Rix in *Holman v Howes*⁶, the power to raise new points, certainly new points of law, and even more so new points of fact, is one to be exercised cautiously. However, this caution should not deter us from upholding the law and protecting the public interest. The potential for injustice or systemic harm resulting from enforcing an agreement contrary to public policy far outweighs the inconvenience of addressing such issues late in the proceedings.
- [22] Furthermore, as the final court of appeal, we are responsible for ensuring that the law develops coherently, justly, and aligned with our society's values. By raising public policy issues *sua sponte*, we contribute to the evolution of legal principles and ⁴ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [28]. ⁵ *Patel v Mirza* [2017] AC 467 [71]. ⁶ *Holman v Howes* [2008] 1 All ER 241 [35]. ensure that our jurisprudence remains responsive to changing societal needs and values.
- [23] The concept that a deed of settlement may be unconscionable is rooted in the equitable doctrine of unconscionable bargains. In the context of settlement deeds, applying unconscionability requires careful consideration of the circumstances surrounding the agreement's formation and substantive terms. Three elements are necessary to establish unconscionability, viz: firstly, one party must be at a serious disadvantage to the other; secondly, the stronger party must have exploited that disadvantage in a morally culpable manner; and thirdly, the resulting transaction must be overreaching and oppressive.

- [24] One of the requirements for a settlement agreement to be an order of court is that its terms must accord with both the Constitution, the law and not be at odds with public policy (*Airports Company South Africa vs Big Five Duty Free (Pty) Ltd and others* 2019 (2) BCLR 165 (CC)).⁷ Consideration of the appeal
- [25] In deliberating upon this matter, we must scrutinise the intersection of contractual freedom and the overarching public policy principles underpinning our legal system. The deed of settlement at issue, which the court a quo saw fit to enshrine as a court order, presents a most vexing conundrum. *7 Airports Company South Africa v Big Five Free (Pty) Ltd and Others* 2019(2) BCLR 165 (CC) , paras 4, 13.
- [26] At first blush, one might be inclined to uphold the sanctity of contract, as enshrined in the venerable principle of *pacta sunt servanda*. Indeed, the freedom of parties to order their affairs as they see fit is a cornerstone of our jurisprudence. However, upon closer examination, this Court should find that this seemingly innocuous agreement between the respondents is fraught with implications that strike at the heart of our public procurement system and, by extension, the rule of law itself.
- [27] The agreement, whereby the successful tenderer agrees to remunerate the unsuccessful one 13 million Maluti in exchange for the cessation of legal hostilities, bears all the hallmarks of a collusive arrangement. Such an accord flies in the face of the fundamental tenets of fair competition and transparency, which are the lifeblood of public procurement.
- [28] This Court is particularly troubled by the potential ramifications of sanctioning such an agreement. To do so would open the floodgates to a torrent of similar arrangements, effectively transforming our public procurement system into a bazaar where justice is bartered, and public interest is relegated to a mere afterthought.
- [29] Moreover, the Court cannot be blind to the glaring absence of *justa causa* in this settlement. The Roman-Dutch legal tradition, which forms the bedrock of our jurisprudence, demands that a lawful cause underpin all contracts. In the case at hand, we find ourselves hard-pressed to discern any legitimate basis for this pecuniary exchange. Instead, it reeks of an attempt to circumvent the proper dispute resolution channels in public procurement matters.
- [30] In our considered opinion, the court a quo erred in failing to recognise the broader implications of its decision. While the settlement may have appeared to resolve the immediate dispute before it, the court overlooked its duty to safeguard the integrity of our legal system and the public interest at large.
- [31] In light of these considerations, we find ourselves compelled to intervene. We exercise the power to declare agreements contrary to public policy with the utmost caution, cognisant of the potential to introduce uncertainty into contractual relations. However, in the case at bar, we are faced with what can only be described as the clearest of cases warranting such intervention.

- [32] The deed of settlement, in its essence, represents an unconscionable bargain. It exploits the machinery of justice to further private interests at the expense of public good. To allow such an agreement to stand would be to abdicate our responsibility as the final arbiters of justice and guardians of the public interest.
- [33] While this Court acknowledges the importance of finality in litigation and the general desirability of upholding settlement agreements, these considerations must yield when confronted with an agreement that so flagrantly contravenes public policy and lacks *justa causa*. The potential harm to the integrity of our public procurement system and, by extension, to the rule of law itself far outweighs any benefit derived from upholding this particular deed of settlement.
- [34] Therefore, this Court is inexorably drawn to the conclusion that the appeal must be upheld, not on the appellants' complaints, but on the basis that the deed of settlement as presently cast is not only contrary to public policy but also unconscionable. The order of the court *a quo*, which elevated this deed of settlement to the status of a court order cannot stand. It falls to us to declare this deed of settlement null and void and unenforceable as well, affirming the supremacy of public policy and the indispensable requirement of *justa causa* in our contract law. Disposal
- [35] This Court finds it necessary to uphold the appeal, set aside the order of the court *a quo*, and declare the deed of settlement null and void. In doing so, we reaffirm the supremacy of public policy and the indispensable requirement of *justa causa* in our contract law, particularly concerning public procurement. Order:
- [36] In the result:
1. The appeal is upheld.
 2. The court *a quo*'s order, which made the deed of settlement a court order, is hereby set aside.
 3. The deed of settlement between the respondents is declared null and void on the grounds of being contrary to public policy.
 4. Each party is to bear its own costs for this appeal.

K E MOSITO PRESIDENT OF THE COURT OF APPEAL I agree I agree S P SAKOANE CHIEF JUSTICE

P T DAMASEB ACTING JUSTICE OF APPEAL FOR THE APPELLANTS: ADV. T. P. MPAKA FOR THE 1ST RESPONDENT: ADV. S. S. TS'ABEHA FOR THE 2ND RESPONDENT: MR T. FIEE 15

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://lesotholii.org/judgments/all/2024/?alphabet=p>

CASE PAGE <https://chat.esheria.ai/case-law/lesotho/deedsofsettlement-court-of-appeal-2024>

Prepared on 29 October 2026 · Esheria