
SOUTH AFRICA / JUDGMENT

Zondo and Others v St Martins School (J3020/12) [2014] ZALCJHB 457; (2015) 36 ILJ 1386 (LC) (20 November 2014) [2014] ZALCJHB 457

COURT

Labour Court Johannesburg

BEFORE

E Molahlehi

CASE / FILE NUMBER

J3020/12

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J3020/12

In the matter between:

ZONDO N AND OTHERS

Applicant

And

ST MARTINS SCHOOL

Respondent

Heard : 13 August 2014

Delivered : 20 November 2014

Summary : Application to declare the pre-trial minutes to be null and void. The Applicants contending their attorney had no mandate to sign the pre-trial minutes. The purpose and consequences of the signed pre-trial minute. Pre-trial minutes not different to any other signed contract.

Introduction

- [1] This is an application in terms of which the applicants seek an order declaring the pre-trial minutes signed by their erstwhile attorney, Mr Nkabinde on 04 February 2014 to be null and void. The pre-trial minutes were signed by the erstwhile attorney of the applicants subsequent to appearing before Van Niekerk J and being directed to finalise them in one of the board rooms at the Labour Court.

Background facts

- [2] Following the service and filing of the statement of opposition by the respondent to the applicants' statement of case the parties convened a number of meetings where they unsuccessfully attempted to formulate and finalize pre-trial minutes. The parties having failed to finalise the pre-trial minutes on their own the matter was set down for the pre-trial conference to be held in Court.
- [3] The pre-trial conference was set down on 04 February 2014, before Van Niekerk J. As indicated earlier the applicants were on that day represented by attorney Mr Nkabinde and the respondent by Advocate Bakker. On that day after the matter was called, the Court directed the legal representatives to convene a pre-trial conference in one of the board rooms to have the same finalised.
- [4] On their return in Court the parties presented the signed pre-trial minutes. Thereafter and on 11 February 2014, the applicants' attorney of record addressed a letter to respondent asking them to consent to having the pre-trial minutes signed on behalf of the applicants by Mr Nkabinde to be regarded as being null and void. The respondent rejected the proposal.
- [5] It was for the above reason that the applicants brought this application seeking a declaratory order declaring the pre-trial minutes signed by their erstwhile attorney, Mr Nkabinde to be null and void.
- [6] On 07 August 2014, Mr Nkabinde filed an affidavit confirming that he signed the pre-trial minutes prepared by the respondent's counsel because the respondent's counsel refused to sign the applicants' copy and that he was threatened with wasted costs if his refusal to sign the draft pre-trial minutes was to result in a postponement of the matter.

The case of the applicants

- [7] The case of the applicants is the following:
- a. They were excluded from the pre-trial conference which was held on the 04 February 2014. The pre-trial conference was held between their erstwhile attorney, Mr Nkabinde and the respondent's counsel who according to them, prevented them from attending the pre-trial conference.

- b. The pre-trial minutes are null and void because it does not “reflect a true and correct reflection of the facts contained in parties’ pleadings, nor do they reflect a true and correct reflection of the consensus reached between the parties during the pre-trial conferences preceding the one held on 04 February 2014.
 - c. The pre-trial minutes do not accord with the pleadings and also with the previously drafted pre-trial minutes.
 - d. That the “proper and adequate” pre-trial minutes were that which was prepared by the applicants and forwarded the respondents on 31 January 2014.
 - e. Mr Nkabinde did not have instructions to sign the pre-trial minutes as he is an “elderly man looking frailing.”
 - f. That the proceedings were not translated from English to African languages particularly at the stage when the judge inquired as to whether the parties were satisfied with the contents of the pre-trial minutes.
- [8] The applicants further states that after the signing of the pre-trial minutes they confronted Mr. Nkadimeng as to why he signed those minutes. The explanation they received was that he signed the pre-trial minutes because counsel for the respondent was refusing to sign their draft and was also threatening him with costs.

Legal principles

- [9] In this matter applicants are seeking to resile from the pre-trial minutes signed for and on their behalf by their erstwhile attorney, essentially on two grounds being, lack of authority on the part of the erstwhile attorney to sign the pre-trial minutes for and on their behalf and that they were signed under duress.
- [10] The purpose of a pre-trial minute is to narrow down issues in dispute and to limit the scope of litigation.[1] The consequences of signed pre-trial minutes are that the positions taken by the parties in their respective pleadings may be reconciled or compromised. The contention of the applicants that the signed pre-trial minutes contradict what is stated in the pleadings has no merit in as far as the validity and enforceability of the pre-trial minutes. In my view, it is the natural consequence of the pre-trial minutes that certain aspects of the pre-trial minutes may contradict certain aspects of the pleadings. For instance the employer could in its statement of case dispute the employment contract but then concede the existence of the employment contract in the pre-trial minutes.
- [11] It is well established in our law that a pre-trial minute is no different to any other agreement concluded consequent to deliberations between the parties or those that they may have expressly or impliedly authorised to represent them. It follows therefore that a pre-trial minute constitutes a binding agreement between the parties. It is for that reason that the courts ordinarily hold the parties to the contents of their pre-trial minute.[2] A party can only resile from a pre-trial minute on condition special circumstances exist to do so.

[12] In the present instance the applicants are seeking to resile from their agreement on the basis that their erstwhile attorney did not have authority to sign the pre-trial minutes. The general principle is that counsel or an attorney has the authority to compromise a client's claim unless the client has instructed otherwise.[3] This principle is set out in *Dlamini v Minister of Law and Order*[4], in the following terms:

"At the outset of the hearing before me, Mr Farlam, who appeared on behalf of the applicant, indicated that the applicant contended that the matter had been settled, that the respondents were bound by the settlement and could not withdraw from the settlement and that accordingly, and if he was correct in this, those matters to which the oral evidence would otherwise relate would become academic, insofar as at any rate as the resolution of this particular application is concerned. He therefore asked me to decide in limine whether or not the respondents could withdraw from the settlement, admittedly concluded by counsel briefed on their behalf by the Deputy State Attorney in Durban." .

The court went further to say:

*"The settlement, which was arrived at, was arrived at by counsel and attorneys purporting to act on behalf of the respondents. It would seem to me reasonably clear that counsel, who had been properly instructed to appear on behalf of a litigant, has implied authority to conclude a settlement or compromise of the litigation on behalf of his client provided he acts bona fide in the interests of his client. This proposition appears to be well entrenched in England. Perhaps the earliest leading case on the subject is the decision of the Court of Appeal in the case of *Matthews and Another v Munster* (1887) 20 QB 141 (CA) ((1886 - 90) All ER Rep 251). In that case counsel, acting on behalf of the plaintiffs, had settled an action for malicious prosecution on behalf of his clients with counsel for the defendant. The defendant had not been present when the settlement was arrived at and, on coming to Court later, endeavoured to repudiate the settlement. It was held, however, that although the defendant was not present when the settlement was made he had not put an end to the relationship of advocate and client which existed between himself and his counsel, that his counsel had complete authority in the case and that he, the defendant, was bound by the settlement."*

[12] In the present instance there is no doubt, in my view, that the applicants had instructed their erstwhile attorney to represent them in the negotiations regarding the formulation and the finalization of the pre-trial minutes. There is no evidence that the mandate of the erstwhile attorney was limited only to negotiating the contents of the pre-trial minute but excluded the signing thereof. It has to be noted in this regard that they had prior to the signing of the pre-trial minute being a number of meetings where the parties engaged in discussions regarding the same. The applicants were in every one of those meetings represented by the erstwhile attorney. There is no evidence to suggest that the applicant had limited the authority of the erstwhile attorney only negotiating contents of the pre-trial minutes.

The issue of duress

[13] It is generally accepted that an agreement or contract may be vitiated by duress which may in most instances take the form of intimidation

or improper pressure on the other party. In order to succeed in seeking to have an agreement set aside on the grounds of duress, the applicant has in terms of *Arend and Another v Astra Furnishers (Pty) Ltd*,^[5] to show that he or she was induced by fear to conclude the agreement. The elements of duress that he or she has to establish are:

- ‘(i) The fear must be a reasonable one;
- (ii) It must be caused by the threat of some considerable evil to the person concerned or his family;
- (iii) It must be the threat of an imminent evil or inevitable evil;
- (iv) The threat or intimidation must be unlawful or contra bonos mores;
- (v) The moral pressure used must have caused damage.’

[14] The approach to adopt when dealing with an application of a party seeking to resile from an agreement on the basis of duress is set out in the *Astra Furnishers* matter in the following terms:

“..A party seeking to raise duress, like the applicant before me, must allege and prove a threat of considerable evil to the person or his family which induced fear, that the fear was reasonable, that the threat was imminent or inevitable, that the threat was unlawful and that the contract was concluded as a result of a threat.”

[15] In my view, in the present matter the applicants have failed to satisfy the elements of duress. If assuming that the erstwhile attorney was indeed intimidated into signing the pre-trial minutes by the respondent’s counsel, the question is why did he not raise the issue when he appeared in court.

[16] If for whatever reason there may have been anything that inhibited the applicants’ erstwhile attorney from raising the issue of intimidation with the court when the opportunity availed itself before the pre-trial minutes were handed in and more particularly when the Learned Judge inquired specifically from the applicants’ erstwhile attorney as to whether he was satisfied with the pre-trial minutes. In this respect the transcript shows the erstwhile attorney of the applicants’ response to be as follows:

“ Court: “I am going to ask you once more.”

Mr Nkabinde: “Yes”.

Court: “For the last time”.

Mr Nkabinde: “Yes My Lord”.

Court: You have signed this minute as representative of the Applicant.”

Mr Nkabinde: Yes my Lord, yes”.

Court: Are you happy with the content of the minute?

Mr Nkabinde: Ja, My Lord . . .”

- [17] The other complaint raised by the applicants is that the counsel for the respondents excluded them from attending the pre-trial conference. In my view this complaint has no merits more particularly when regard is had to the fact that there is no evidence that they instructed their attorney to raise the issue in Court. If that was the case then it would have been expected for their attorney to have raised it when the Learned Judge enquired from their attorney whether he was satisfied with the pre-trial minutes.
- [18] I am similarly not persuaded that the pre-trial minutes can be vitiated by the complaint that the proceedings in court were not translated from English to other African languages for the benefit of the applicants. There is no evidence that the applicant’s erstwhile attorney ever raised with the court the need for translation. There is also no evidence that there was any arrangement made by the applicants or their attorney with the registrar, as is the common practice, that an interpreter be made available. If assuming, that for some reason there was an oversight on the part of the applicants’ erstwhile attorney to make arrangements for an interpreter, then the question is why did he not indicate that when he returned to court before the presentation of the pre-trial minutes.
- [19] The argument of Mr Sebola for the applicants that the pre-trial minutes are also vitiated by the fact that the counsel for the respondent complained about intimidation bears no merit. The complaint of intimidation by the counsel for the respondent as I understand it relates mainly to the processes of the pre-trial conference and does not have any bearing on the decision of the respondent to sign the document in question. It is not because of the alleged harassment and intimidation by the applicants that the respondent signed the pre-trial minutes.
- [20] In my view this application was unnecessary and thus the respondent was made to incur costs unnecessarily. It for this reason that I find that in law and fairness the costs should be made to follow the results.

Order

- [21] In the premises the applicants’ application is dismissed with costs.

E Molahlehi

Judge of the Labour Court

Appearances:

For the Applicants: Advocate M.S. Sebola

Instructed by: S Chauke Attorneys

For the Respondent: Advocate P. Bekker

Instructed by: Nothnagel Attorneys

[1] See File-Matrix (Pty) Ltd v Feudenberg and Others,

[1997] ZASCA 110; 1998 (1) SA 606 (SCA) at 614.

[2] See NUMSA v Driveline Technologies (Pty) Ltd and Another

(2000) 21 ILJ 142 LAC at paragraph [93].

[3] See Hlongwane v Cisco Systems (2011) 32 ILJ 625 (LC) at paragraph [28] and the authorities cited therein.

[4] 1986 (4) SA 342 (D) at 346-347

[5] 1974 (1) 299 (CPD).at 306A-B.

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