IN THE LABOUR COURT OF SOUTH AFRICA

Case no: D 477-20
Reportable/Not Reportable

In the matter between:

MULTIQUIP (PTY) LTD	**First Applicant**
IAN O' BYRNE	**Second Applicant**

and

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA ("NUMSA")	**First Respondent**
XOLANI LUCKY BIYELA AND 45 OTHERS	**Second to Further Respondents**

Application heard: 2 June 2021 (via Zoom)
Delivered: Electronically: 17 August 2021

JUDGMENT

WHITCHER J

[1] The Applicants seek an order that this Court "*declare as a nullity"* (and set aside) the entire proceedings in this matter, dating back over a decade, namely the referral to the CCMA, the statement of claim; the settlement agreement in terms of which the trial proceedings before this Court were settled; the Court order in terms of which the settlement agreement was made an order of Court; and the contempt finding of this Court on 20 August 2018, flowing from the failure by the Applicants to honour the former court order.

[2] The basis of the application is an allegation that a defense which the Applicants contend would have been available to them in those proceedings is disclosed in

the Constitutional Court decision of *Lufil Packaging.*[1] Basically, if they could go back in time they would have pleaded that the First Respondent had a constitutional inability to admit the First Applicant's employees as members. As a result, they would have contended, the First Respondent did not have the necessary *locus standi* and/or representative authority to act on behalf of the Second and Further Respondents and refer their matter to the CCMA and the Labour Court, including not being able to enter into settlement agreements on behalf of the Second and Further Respondents.

Powers of the Labour Court

[3] It needs to be emphasized that the litigation between the parties ended with two court orders. The trial before this Court ended in a settlement agreement which was made an order of court. This was followed by a contempt of court order flowing from the failure by the Applicants to honour the former court order.

[4] In *Moraitis*,[2] the Supreme Court of Appeal held at paragraphs 9 and 10:

> "The focus of the original judgment by Windell J and those delivered in the full court fell on the issue of Mr Moraitis' authority to execute the settlement agreement on behalf of the Moraitis Trust and Moraitis Investments. That was not surprising, because the application and the argument was premised on the proposition that by virtue of the claimed lack of authority the settlement agreement itself was void and unenforceable. Building on that it was contended that it followed *a fortiori* that the consent order had to be set aside. The points raised in terms of the Companies Act were hardly addressed.
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> In my view that was not the correct starting point for the enquiry, because it ignored the existence of the order making the agreement an order of court. Whilst terse the order was clear. It read: 'The Agreement of

[1] *NUMSA v Lufil Packaging* [2020] BLLR 645 CC.
[2] *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* (799/2016) [2017] ZASCA 54 (18 May 2017)

Settlement signed and dated 05 September 2013 is made an order of court.'

For so long as that order stood it could not be disregarded. The fact that it was a consent order is neither here nor there. Such an order has exactly the same standing and qualities as any other court order. It is *res judicata* as between the parties in regard to the matters covered thereby. The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with s 165(5) of the Constitution, which provides that an order issued by a court binds all people to whom it applies.[3] The necessary starting point in this case was therefore whether the grounds advanced by the applicants justified the rescission of the consent judgment. If they did not then it had to stand and questions of the enforceability of the settlement agreement became academic.

[5] *In casu*, the necessary starting point is therefore whether and under what circumstances this Court has the power to declare its own orders "a nullity" and set them aside.

[6] Section 165 of the LRA grants the Labour Court powers of rescission, which, as contended by the Respondents, are fundamentally different to the relief the Applicants seek in these proceedings.

[7] Even if the Applicants contend that it was their intention to rely on Section 165, they do not identify which aspect of the Section they rely on, or plead and make out any case as to why the provisions may be applicable to the current circumstances.

[3] There is a narrow exception where a court makes an order that is on its face beyond its powers, as with the order to appoint a specific individual as a provisional liquidator that was in issue in *Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA). That order was invalid as the power to appoint a provisional liquidator was exclusively vested in the Master and accordingly the Master could not be held to be in contempt by declining to make the appointment. See *Tasima* para 197 and *Provincial Government North West v Tsoga Developers CC and Others* [2016] ZACC 9; 2016 (5) BCLR 687 (CC) para 50.

[8] In *Moraitis (supra)* the Supreme Court of Appeal held as follows (at paragraphs 12 to 13):

> "…The approach differs depending on whether the judgment is a default judgment or one given in the course of contested proceedings. In the former case it may be rescinded in terms of either rule 31(2)(*b*) or rule 42 of the Uniform Rules, or under the common law on good cause shown. In contested proceedings the test is more stringent. A judgment can be rescinded at the instance of an innocent party if it was induced by fraud on the part of the successful litigant, or fraud to which the successful litigant was party. As the cases show, it is only where the fraud – usually in the form of perjured evidence or concealed documents – can be brought home to the successful party that *restitutio in integrum* is granted and the judgment is set aside. The mere fact that a wrong judgment has been given on the basis of perjured evidence is not a sufficient basis for setting aside the judgment. That is a clear indication that once a judgment has been given it is not lightly set aside, and De Villiers JA said as much in *Schierhout*.
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> Apart from fraud the only other basis recognised in our case law as empowering a court to set aside its own order is *justus* error. In *Childerley*, where this was discussed in detail, De Villiers JP said that 'non-fraudulent misrepresentation is not a ground for setting aside a judgment' and that its only relevance might be to explain how an alleged error came about. Although a non-fraudulent misrepresentation, if material, might provide a ground for avoiding a contract, it does not provide a ground for rescission of a judgment. The scope for error as a ground for vitiating a contract is narrow and the position is the same in regard to setting aside a court order. Cases of *justus* error were said to be 'relatively rare and exceptional'. *Childerley* was considered and discussed by this court in *De Wet* without any suggestion that the principles it laid down were incorrect.

[9] Here again, to the extent that such common law may be applicable when dealing with matters under the LRA, no case demonstrating the above rescission requirements has been pleaded and made out by the Applicants.

[10] Basically, the Applicants have not told this Court what right in terms of the LRA (or common law, if applicable), can be invoked to sustain their claim, and the application stands to be dismissed on this basis alone.

[11] There are two further considerations, policy and compromise that justifies the dismissal of this application out of hand, despite whatever defences may have been available to the Applicants during the trial.

Policy Considerations

[12] In my view, the importance of finality, quickly resolving labour disputes and accountability of counsel for decisions regarding the prosecution of their cases militates against essentially permitting the Applicants to essentially re-open a case dating back over a decade. On the last point, if counsel for the company in *Lufil* had the foresight to think of the point in issue, why couldn't counsel for the Applicants, applying reasonable diligence, have done so? The point was always there for the taking, so to speak.

[13] The Labour Appeal Court in *SAB v Louw*[4] held as follows:

> "…Making up one's case as you go along is an anathema to orderly litigation and cannot be tolerated by a court. Counsel's duty of diligence demands an approach to litigation which best assists a court to decide questions and no compromise is appropriate."

Compromise of the initial rights at the original labour court trial

[4] (2018) .39 ILJ 189 LAC at paragraph 4

[14] The Applicants concluded a settlement agreement and in the result a potential defence which may have been raised at trial became irrelevant.

[15] The Supreme Court of Appeal in *Road Accident Fund v Ngubane*[5] held as follows:-

> "Consistent with waiver the parties have, by entering into a compromise, terminated whatever rights and obligations they may have had including the Fund's right to demand compliance with Reg 2(3). In other words, the Plaintiff is not entitled to recover full compensation for damages she has suffered and the Fund is precluded from raising any defense it had against the original claim. The agreement of compromise gave rise to new rights and obligations upon which the Plaintiff has rooted her cause of action…" (Emphasis added)
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> and
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> "An agreement of compromise, in the absence of an express or implied reservation of the right to proceed on the original cause of action, bars the bringing of proceedings based on such original cause of action… Not only can the original cause of action no longer be relied upon, but a Defendant is not entitled to go behind the compromise and raise defenses to the original cause of action when sued on the compromise." [6]

[16] The Second and Further Respondents are parties to the settlement agreement and to the subsequent contempt proceedings in their own right, and the involvement of NUMSA is largely irrelevant. The subsequent contempt proceedings flowed from the enforcement of the settlement agreement which was made an order of Court.

[17] Even if the Applicants were entitled to and had pleaded *justus error* to set aside a compromise, they would have had to prove mutual error and that such error

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[5] 2008 (1) SA 432 SCA, at paragraph 12
[6] As per *Hamilton v Van Zyl* 1983 (4) SA 379 E at 383 E to H cited in the *Ngubane* judgment.

vitiated true consent and did not merely relate to the merits of a dispute which it was the very purpose of the parties to compromise.[7] They failed to do so.

Lufil/McDonalds Transport

[18] Finally, the entire basis on which the Applicants contend a challenge to the Second and Further Respondent's representation by the First Respondent can be made is misconstrued. I agree with the interpretation of the case law as succinctly set out by Counsel for the Respondents, and summarized below.

[19] In *McDonald's Transport*[8] the Labour Appeal Court held that an employer could not challenge the right of an employee to be represented by a trade union at CCMA proceedings based on reliance on the trade union's constitution. The right to representation which is being exercised when a union represents an employee is the right of the employee and not the trade union. Such right is not one that arises from the provisions of Section 200 of the LRA.[9]

[20] The issue in the Constitutional Court judgment in *Lufil* was materially different in that the trade union sought to establish organizational rights on its own behalf which went significantly further than simple representation at the CCMA.

[21] The position in *McDonald's* was specifically dealt with in the Constitutional Court judgment in *Lufil* and the Court was careful to distinguish the situation it was dealing with from the judgment of the LAC in *McDonald's.* In footnote 68 to the *Lufil* judgment the position in *McDonald's* is set out at length and the ConCourt endorses the sentiments expressed by Sutherland JA in McDonald's.

[22] The crisp principle relates not to the basis on which the constitution of the trade union might exclude employees from being members but that the contents of the constitution are irrelevant when the union is doing nothing more than

[7] See: *Slabbert v MEC for Health and Social Development of Gauteng* [2016] ZASCA 157 (3 October 2016).
[8] *McDonalds Transport Upington (Pty) Limited v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 2593 LAC.
[9] Paragraph 36 of the Judgment in *McDonald's*.

providing representation in furtherance of the employee's right to be represented.

[23] This is further evident from the decision in *Mabote*[10] which is specifically dealt with at paragraph 44 of the *McDonalds* judgment. The objection to the union representation in *Mabote* was the same as that raised by the Applicants in these proceedings, namely, "*that the union's constitution limited it to organising in a sector other than in which the employer operated."*[11] Steenkamp JA decided *Mabote* in favour of the employee on the same basis as Sutherland JA decided *McDonalds* and Sutherland JA expressly approved the judgment in *Mabote.*

Order

[24] The application is dismissed, with costs.

Benita Whitcher
Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANTS: MacGregor Erasmus Attorneys
RESPONDENTS: P Schumann, instructed by Brett Purdon Attorneys

[10] *NUM obo Mabote v CCMA and Others* (2013) 34 ILJ 3296 LC.
[11] As expressed in paragraph 44 of *McDonald's*.