REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 44591/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

9 MAY 2018 **FHD VAN OOSTEN**

In the matter between

BAGPORT (PTY) LTD **APPLICANT**

and

SOUTH AFRICAN EXPRESS AIRWAYS SOC LTD **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This application concerns the validity of an agreement of settlement concluded *in pendente lite*. The applicant, in terms of rule 41(4), seeks an order that the settlement agreement be made an order of court and payment in accordance therewith. The respondent, in a counter-application, seeks a declarator that the settlement agreement is invalid and unenforceable.

[2] For a better understanding of the dispute concerning the validity of the settlement agreement, it is necessary to briefly refer to the background circumstances that lead to its conclusion, which are common cause between the parties.

[3] On 14 December 2016 the applicant (also referred to as Bagport) issued summons against the respondent (also referred to as SA Express) for payment of the sum of R4 748 373.60, being in respect of baggage wrapping services performed during September and October 2014, pursuant to a written agreement concluded between the parties. The respondent filed a notice of intention to defend and the applicant in response filed an application of summary judgment. The parties however became engaged in settlement negotiations, SA Express having set up a task team, which culminated into the settlement agreement which was concluded on 1 March 2017, prior to the date of hearing of the summary judgment application. The settlement agreement was prepared by the respondent's attorneys assisted by the legal service department of SA Express. The settlement agreement was signed by the then Chief Executive Officer of SA Express (the former CEO), who warranted his authority thereto. In essence the settlement agreement provided for payment by SA Express to Bagport of the sum of R4 784 373.60 by no later than 3 March 2017, 'in full and final settlement of Bagport's claim against [SA Express]' and further 'in full and final settlement between Bagport and [SA Express] of any claims and disputes of whatever kind or nature...'.

[4] In consequence the application for summary judgment was removed from the roll. SA Express failed to pay the amount as agreed upon. In a letter dated 23 March 2017, SA Express's Chief Financial Officer (CFO) undertook to pay the amount in three instalments, but that was also not honoured. Upon further demand Bagport was informed by the CFO, on 23 May 2017, that SA Express had appointed a new Chief Executive Officer, who was required to approve the payment. On 30 June 2017 Bagport launched the present application.

Respondent's grounds for disputing the validity of the settlement agreement

[5] Prior to dealing with the grounds in support of the counter-application, the deponent on behalf of the respondent sets out what she refers to as the 'protracted legal history' of the matter. I do not consider it necessary to deal with the

negotiations prior to conclusion of the settlement agreement save to remark that an attempt was made by the deponent to question the rationale for concluding the settlement agreement in the face of Bagport's claim that was based on incorrect billing, resulting in overpayments the tune of some R17m having been made and Bagport's concessions that it in fact owed SA Express large sums of money. The 'personnel' of SA Express, she states, 'did not agree' with the settlement of the matter, nor did 'legal' and 'finance', indeed SA Express's attorneys expressly advised against the settlement. In the applicant's answering affidavit to the counter-application, the nature, contents, true purport and outcome of the negotiations are extensively dealt with and put in perspective. The upshot thereof is that discrepancies in the billing had indeed occurred, but that those were all duly accounted for in the final calculation and settlement of the amount due to Bagport. Not unsurprisingly, and in my view wisely so, counsel for SA Express did not rely on the history of the matter as a ground for attacking the validity of the settlement agreement.

[6] The first ground relied upon in support of the counter-application is the 'flagrant disregard for internal processes, in particular failure to obtain the relevant authorising signatures from relevant role players as envisaged in both the Contract Compliance and expense authorisation forms' by the former CEO, who left the employ of SA Express on 30 March 2017. Second, it is alleged that the settlement agreement was signed 'under dubious circumstances' third, that the former CEO 'was not authorised or did not acquire the required approval and/or authority to bind the respondent by concluding the settlement agreement' and, fourth, that the settlement agreement was concluded in breach of the provisions of ss 38(2) and 68 of the Public Finance Management Act 1 of 1999 (the PFMA).

Discussion

[7] The reference to 'dubious circumstances', in which the settlement agreement was concluded, is nothing but a misnomer. On the totality of the facts SA Express, its officials and attorneys were all acutely aware of the pending action and the requirement under pressure to disclose a bona defence in the application for summary judgment. A task team was set up to and indeed did investigate Bagport's claim and negotiations ensued concerning the amount owing to Bagport: this is not in

dispute. I accordingly agree with the submission advanced by counsel for Bagport: the respondent's contention, which notably has been made *ex post facto*, is unsupported and factually incorrect.

[8] The respondent's reliance on internal procedures not having been followed, as a ground for invalidating the settlement agreement, is misplaced. Sections 20(7) and (8) of the Companies Act 71 of 2008, expressly provide that an outsider dealing with a company, is entitled to 'presume that the company in making any decision in the exercise of its powers, has complied with all the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company...'. Moreover, the well-entrenched *Turquand*-rule expounded in *Royal British Bank v Turquand* (1856) 6 E&B 327; 119 ER 886, safeguards persons contracting with a company in good faith, against the company resiling from an agreement on the ground of non-compliance with internal management rules and requirements.

[9] There is nothing before me nor was anything advanced to justify any doubt as to Bagport's bona fides. The former CEO, whose version the respondent has not placed before this court, clearly had the authority, whether express, implied, or ostensible to sign the agreement of settlement (see *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC); *South African Broadcasting Corporation v Coop and Others* 2006 (2) SA 217 (SCA) paras [64] – [66]). Bagport was entitled to and in fact did accept and rely upon the façade of approval by the former CEO, who after all, *par excellence*, was the person authorised and required to sign all contracts on SA Express's behalf.

[10] Lastly, SA Express's reliance on the PFMA is likewise misconceived. The original agreement concluded between it and Bagport is not in dispute, from which it flows as a matter of plain logic that funds were duly appropriated in respect thereof. In short: the PFMA does not apply to an acknowledgement of an already existing indebtedness, as is the case here.

[11] In closing, the settlement agreement provides for punitive costs as well as that it may be made an order of court.

[12] In the result I make the following order:

1. The settlement agreement entered into between the parties on 1 March 2017 is made an order of court.
2. The respondent is ordered to pay to the applicant:
   2.1 The amount of R4 748 373.60.
   2.2 Interest on the amount in 2.1 at the rate of 10.25% pa to date of final payment.
   2.3 Costs of the action instituted under case number 44591/2016 on the scale as between attorney and client.
3. The respondent's counter-application is dismissed.
4. The respondent is ordered to pay the costs of this application including the costs of the respondent's counter-application, on the scale as between attorney and client.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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DATE OF HEARING	***7 MAY 2018***
DATE OF JUDGMENT	***9 MAY 2018***