



CONSTITUTIONAL COURT OF SOUTH AFRICA

Kevin John Eke v Charles Henry Parsons

CCT 214/14

Date of hearing: 26 May 2015

Date of judgment: 29 September 2015

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning the status of settlement agreements that are made orders of court and whether an undertaking not to oppose the enforcement of such orders is permissible under the Constitution.

The applicant, Mr Kevin Eke, agreed to purchase a member's interest in a close corporation from the respondent, Mr Charles Parsons. When Mr Eke failed to pay the full purchase price, Mr Parsons instituted an action against him in the Eastern Cape High Court, Port Elizabeth (High Court) for the balance of the purchase price in the sum of R5 million. After Mr Eke entered an appearance to defend, Mr Parsons applied for summary judgment, stating that Mr Eke had no valid defence to the action. Before the hearing, the parties reached a settlement agreement which was then made an order of court.

In terms of the order, Mr Eke agreed to pay R10.3 million to Mr Parsons. The order also stated that if Mr Eke breached any of his obligations, Mr Parsons would be entitled to apply to re-enrol and set down the summary judgment application (which had been postponed indefinitely) before court to claim the full outstanding amount. It was also recorded that Mr Eke would not be entitled to oppose the summary judgment application.

In consequence of a breach of the settlement agreement, Mr Parsons re-enrolled the summary judgment application in the High Court. The High Court held that when the settlement agreement was made an order of court, its terms were elevated and the contractual rights contained in the agreement were converted to an executable order and

that order was final. Therefore, no recourse could be had to defences against the original summons as liability would be determined from the settlement order itself. Mr Parsons was thus entitled to ask the Court to ensure compliance with the order. The Court also found that Mr Eke's undertaking not to oppose the summary judgment application was not contrary to public policy and therefore, enforceable. The High Court granted Mr Parsons summary judgment and, subsequently, the Supreme Court of Appeal dismissed Mr Eke's application for leave to appeal.

The Constitutional Court granted leave to appeal, but only in respect of three issues. These were: the determination of the status and effect of making a settlement agreement an order of court; whether the re-enrolment of the summary judgment application was in accord with the Uniform Rules of Court; and whether the provision in the settlement agreement that Mr Eke would not be entitled to oppose the second summary judgment application was unenforceable.

Before the Constitutional Court, Mr Eke argued that the High Court order incorporating the settlement agreement merely recorded the agreement, and did not constitute an executable court order. He contended that he had valid defences to the claim for summary judgment, which the High Court did not fully consider. Mr Eke contended that his undertaking not to oppose the summary judgment application was in conflict with his constitutional right of access to courts and was contrary to public policy.

Mr Parsons argued that making settlement agreements orders of court is a settled legal practice, which effectively converts the parties' contractual rights into an executable order and brings finality to the matter. He also argued that the alleged constitutional invalidity of the non-opposition provision in the settlement agreement was moot as Mr Eke had, in fact, opposed the application and exercised his right of access to courts.

In the main judgment, written by Madlanga J (with Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Molemela AJ and Tshiqi AJ concurring), the Constitutional Court held that an order made pursuant to a settlement agreement is an order like any other and the terms of that settlement agreement become an enforceable court order. The successful party under it is entitled to approach a court for enforcement. Addressing the argument whether the second summary judgment application was in accordance with the Uniform Rules of Court, the main judgment found that rules governing the court process should not be disregarded; even though courts may depart from a strict observance of the rules when it serves the interests of justice. That in this instance, justice dictated that the settlement agreement, which was made an order of Court, had to be given effect. Finally, the Court held that despite Mr Eke's concession not to oppose the second summary judgment application, he did in fact raise defences that the High Court considered and thus he was not denied access to court.

The separate but concurring judgment written by Jafta J (with Nkabinde J and Theron AJ concurring) differs from the main judgment on two issues. First, it found that the question of permissibility of re-enrolment of Mr Parsons summary judgment application did not arise because the respondent did not institute a second application but merely

sought to enforce the terms of an order of court granted earlier. The judgment held that because the clause in the settlement order that prohibited Mr Eke from opposing the second application was made an order of court, it did not offend public policy or infringe on his right of access to courts. Second, this separate judgment sets out the essential features of a court order, and declares that a court order must bring finality to the dispute, be framed in unambiguous terms and be capable of enforcement. It concludes that the settlement order in this case fell short of these requirements and therefore constituted an improper exercise of discretion by the High Court, but this did not excuse/justify Mr Eke's failure to honour the agreement.