REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **06982/2016**

In the matter between

National Youth Development Agency	**Applicant**
And	
Dual Point Consulting (Pty) Ltd	**First Respondent**
Ndwandwe, Ezra	**Second Respondent**

Judgment

Van der Linde, J

[1] This is an application to make a written settlement agreement between the applicant and the first respondent dated 17 August 2015, annexure NF1 to the founding affidavit, an order of court. When the matter was called, I raised with counsel for the applicant whether the court has the power under rule 41 of the uniform rules of court to make the order sought, because there had been no prior litigation between the parties.

[2] Counsel asked that the matter stood down; when it was called again counsel said that the application is not brought in terms of rule 41 of the uniform rules of court, but in terms of rule 6. In view of the conceptual difficulty I have with this court making an agreement an order of court where the court was never formally engaged in an underlying dispute between the contracting parties, I reserved judgment till 19 May 2016. It has since become clear that apart from the issue that I raised with counsel, there is also an issue of lack of service on the first respondent. I deal with that issue first.

[3] The application was brought on the long form notice of motion. It was not served on the first respondent, but was served on the second respondent on what was said to be a *domicilium citandi et executandi.* The second respondent is not a party to the settlement agreement; and in any event, the settlement agreement does not provide for a *domicilium citandi et executandi.*

[4] The cause of action against the second respondent relies on a written guarantee, also dated 17 August 2015, in terms of which the second respondent guarantees to the applicant the liabilities of the first respondent in terms of the settlement agreement. There is no application to make the guarantee an order of court. The guarantee provides for a *domicilium citandi et executandi,* and that justifies the service on the second respondent.

[5] The first prayer, to make the settlement agreement an order of court, plainly implicates the first respondent. Although the second respondent is not a party to the settlement agreement, if the settlement agreement were made an order of court under the first prayer, the second respondent will be taken to guarantee an obligation that will have become strengthened and reinforced.[1] The second prayer, a money judgment, is sought against both

[1] Swadif(Pty) Ltd v Dyke, NO 1978 (1) SA 928 (AD) at 944, per Trengove, AJA (then): *"I respectfully agree with the views expressed by FANNIN, J., in Trust Bank of Africa Ltd. v Dhooma, supra, in the passage quoted above. In a case like the present, where the only purpose of taking judgment was to enable the judgment creditor to enforce his right to payment of the debt under the mortgage bond, by means of execution, if need be, it seems realistic, and in accordance with the views of the Roman-Dutch writers, to regard the judgment not as novating*

respondents. In view of these considerations, service on the first respondent is essential, and the application will have to be postponed *sine die* for that reason.

[6] It is therefore strictly unnecessary to say anything about the issue whether the court has jurisdiction to make any order on the first prayer, since my remarks will be *obiter*. However, in deference to the applicant, since I intimated my *prima facie* view, and since I explained that I have before refused this type of relief,[2] I state my views shortly.

[7] As indicated, I intimated when the matter was called that I was not convinced that this court has the power to make a settlement agreement an order of court where there was no prior litigation. In Eke v Parsons[3] the Constitutional Court said that it was important for courts to make settlement agreements orders of court, but that was not in the context of settlement agreements that had not been preceded by litigation.

[8] Against the view that I adopt, is the unreported judgment in the Gauteng High Court, Pretoria, in Growthpoint Properties Ltd v Makhonya Technologies (Pty) Ltd and Others[4] for the proposition that a settlement agreement is itself a sufficient cause for a court to make an order in terms of such an agreement.

[9] Growthpoint is binding on this court unless this court finds that it is clearly wrong. However, in view of the attitude I take as regards the discretion of this court, it is not necessary now to embark on the philosophical issue which underlies the notion that a court can make an order in terms of an agreement simply because parties requested it to do so.

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the obligation under the bond, but rather as strengthening or reinforcing it. The right of action, as FANNIN, J., puts it, is replaced by the right to execute, but the enforceable right remains the same."

[2] In Lodestone Investments (Pty) Ltd v Muhammed Ebrahim t/a Ndimoyo Transport, case no. 5716/16, in this division, judgment handed down on 29 April, 2016.

[3] 2015 JDR 2064 (CC).

[4] Case no 67029/2011, dd 12/2/13, per Van der Byl, AJ.

[10]Even if this court had that power, it seems incontestable that it has a discretion whether to exercise it.[5] And I would have declined to exercise it in this case for the following reasons. First, the detail provided in the founding affidavit concerning the dispute which preceded the settlement agreement, is sparse. There are only two paragraphs,[6] and what they convey of present relevance is two-fold. The dispute is said to have centred principally on the repayment of monies paid to the first respondent by the applicant; and the settlement of the dispute is said to have been reached through a mediation process.

[11]These aspects are relevant, because the impression is rather left that the real issue was not whether or not the monies were repayable, but the manner or terms of repayment. I revert to this issue below. The second aspect is that there was a dispute resolution process available, that of mediation, to the parties; and that process appeared to have served them well. In other words, the dispute determination facilities and resources of this court were not tapped into; rather, what is being sought to be tapped into now is the execution mechanisms that this court avails.

[12]That brings me to the second reason why in this case I would not exercise a discretion in favour of making the settlement agreement an order of court. There is legislation specifically designed to the availing of the enforcement mechanisms of this court, to extra-judicial processes. That occurs under and in terms of s.31 of the Arbitration Act 42 of 1965.

[13]That Act sets out in some considerable detail the prerequisites that would have to be followed before an award made under it would be made an order of court. For instance, there is required to be an arbitrator who has to conduct him/herself in accordance with a minimum standard, and the like.

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[5] Since the making of a settlement agreement a court order is, apart from the procedural device of rule 41 (which it is said does not apply here), not a cause of action at common or statue law.
[6] Founding affidavit, paragraphs 7 and 8, page 7.

[14]The point made here is that the legislature has expressly acknowledged the value of extra-judicial dispute resolution; and has respected to a significant degree party autonomy in the parties' running of that process. And it has, under those prescribed conditions, aided by the machinery of the Law in other respects, for instance the subpoenaing of witnesses, lent also the enforcement arm of the Law to the process.

[15]If the legislature were prepared to lend the enforcement arm of the Law no matter what the underlying process; no matter how the settlement came about; no matter whether there was a fair underlying process; one would have expected explicit litigation to that effect. There is no such.

[16]The third reason why I would have exercised my discretion against granting the relief sought in the first prayer, is that in my view the primary function of the courts is to determine disputes between parties, whether vertically between state and individual, or whether horizontally between person and person.[7] The notion of contempt of court for non-compliance with a court order is more compatible with a court order where the parties had first engaged the dispute-resolution facilities of the courts, even if not to their final pronouncement, than where there was no attempt at all to engage them.

[17]Take the case of an arbitration, discussed earlier. Assume the parties run an arbitration, then settle it; and enter into a settlement agreement. They put in a clause saying they agree that the settlement agreement can be made an order of court. If the notion were accepted that the agreement is *per se* sufficient for the court to exercise a discretion to make an order of court, the judicial oversight over the arbitral process would be lost; worse, circumvented.

[18]Finally, in my view, the settlement agreement is sought to be made an order of court principally to have the sword of Damocles hang over the debtor's head. It seeks thus to

[7] Compare ss.165, 166 of the Constitution of the RSA, 1996.

engage the court as debt collector, and that in respect of a debt collection that did not first come to this court.

[19]In the premises I make the following order: The application is postponed sine die.

WHG van der Linde
Judge, High Court
Johannesburg

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Date moved: 13 May 2016

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