[2014] JMSC Civ. 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 06982

BETWEEN	**CORDELL GREEN**	**APPLICANT**
AND	**KINGSLEY STEWART**	**RESPONDENT**

Ms. Shanique Scott instructed by Hylton Powell for the Claimant

Ms. Kashina Moore and Allison Lawrence instructed by Nigel Jones and Company for the Defendant

Heard: February, 12 and 24, 2014

CIVIL PROCEDURE-MANDATORY MEDIATION– MEDIATION AGREEMENT ENTERED INTO BY THE PARTIES-ONE PARTY IN BREACH OF AGREEMENT–NO NOTICE OF DISCONTINUANCE FILED–NO STAY OF PROCEEDINGS- VALIDITY OF AGREEMENT BEING QUESTIONED BY ONE PARTY-WHETHER ORIGINAL CLAIM CAN PROCEED DESPITE AGREEMENT–WHETHER MEDIATION AGREEMENT CAN ONLY BE ENFORCED IN FRESH PROCEEDINGS WHERE NO ORDER MADE IN TERMS- APPLICATION FOR DIRECTIONS-RULES 1.1; 26.1, 37, 42, AND 74, OF THE CIVIL PROCEDURE RULES (CPR) 2002.

Edwards J.

THE APPLICATION

[1] This is a case where the respondent's inaction could result in the applicant sailing up the proverbial stream without a paddle. It's a defamation suit. The parties went to mandatory mediation as per the Civil Procedure Rules (CPR) 2002. There was an agreement arrived at. It was an agreement on counsels brief. This simply means it

was confidential between the parties. No order from the court in terms of the agreement was sought by either side and none was ever made.

[2] Unfortunately for the applicant, the respondent failed to co-operate. The agreement was for the respondent to agree to do certain things by a certain time. The time has long past. He has failed to keep to his bargain.

[3] The applicant now comes before the court for directions on how to proceed in the circumstances. Counsel for the applicant asked the court to make one of two orders; either to order the parties back to mediation for them to re-enter into settlement discussions or the defaulting party risks his statement of case being struck out; or an order that the case proceed to case management conference and trial. Counsel for the respondent argued that neither order can validly be made since there is a binding agreement on "counsels brief" and there is no order for judgment in terms which can be enforced in the original proceedings. It was argued strenuously that the applicant was bound by the agreement and no order in terms having been made; he must institute fresh proceedings to enforce it.

ISSUES:

[4] In my view the main issues for the court to decide are;

(i) Whether there was a binding agreement made at mediation;

(ii) Whether the applicant is bound by the agreement regardless of its enforceability; and regardless

(iii) Whether the court is still seized of the claim so that it has jurisdiction to make the orders sought.

THE SUBMISSIONS

[5] The essence of the applicant's submission is that the agreement reached is not a binding agreement, because it requires the respondent to agree to do certain acts at a future time. This element of the bargain, it was argued, makes it uncertain and therefore unenforceable. Counsel for the applicant asked the court to exercise its powers under

rule 26 of the CPR and grant the orders sought. Rule 26.1 (2) (v) provides that the court has the power to take any step or give any direction or make any order for the purpose of managing the case and furthering the overriding objectives in rule 1.1.

[6] The parties went to mediation and agreed certain terms. Without setting out the precise terms which were disclosed to the court, suffice it to say it included a future agreement on the wording of an apology and the publishing of said apology in a manner to be determined. It is this and other terms that the respondent has reneged on.

[7] Counsel for the applicant argued that the agreement arrived at was not a binding contract. Citing Halsbury Laws of England vol 22 (2012), 5th ed, she submitted that there was no concluded bargain. In Halsbury Laws of England it was stated that there must be a concluded contract that settled everything necessary to be settled between the parties. The parties must finish reaching an agreement so that an intention to be immediately bound can be inferred. She also cited two cases in support of this proposition. So where price and dates of payment were to be agreed on from time to time the House of Lords in **May and Boucher v The King** [1934] 2KB 1, held that there was no binding agreement as nothing should be left to be settled by agreement between the parties. The court said that "it is not open to them to agree that they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined."

[8] Counsel also cited the case of **Western Broadcasting Services v Edward Seaga**, Privy Council Appeal No. 43 of 2005. That was a case of defamation brought by the then leader of the opposition, Edward Seaga, against five Defendants' relating to the contents of a radio programme known as the Breakfast Club. The facts of the case are not important for these purposes, what is important is the issue surrounding a purported settlement agreement between the parties.

[9] At the case management conference before the Supreme Court the attorneys for the respondent, Edward Seaga, informed the court that a settlement had been arrived at between themselves and the appellant Western Broadcasting Services. Counsel for

Western Broadcasting Services objected on the basis that negotiations were not complete. The learned Judge ordered the parties to file affidavits with regard to the issue and at the later conference, the learned Judge determined on the affidavit evidence that there was a binding agreement between the parties. A declaration was made to that effect but no stay of proceedings or dismissal of the proceedings as between the parties was ordered. The Court of Appeal upheld the decision. The appellant Western Broadcasting Services appealed to the Privy Council.

[10] The Privy Council averted to the well known principle that even though parties may reach agreement on essential matters of principle, if important points are left unsettled their agreement will be incomplete. They cited **Chitty on Contracts**, 29th ed. [2004] para 2-110. The Privy Council also noted that in some cases it may be said, and properly so, that the parties reached an enforceable agreement on part of the matters in issue, leaving the rest to be determined by further agreement or the process of litigation. In other cases the remaining details can be supplied by the operation of law or by involving the standard of reasonableness.

[11] In the case **Western Broadcasting Service v Seaga**, a term of the settlement provided for an apology to be published by the applicant acceptable to the Claimant to be drafted by the Claimant's attorney-at-law for broadcast, the attorneys to decide on the number of times the apology would be published on each medium. Their Lordships considered that the content and publication of the apology "remain incapable of resolution". The question of the content of the draft apology and who was to decide on the number of times of publication was considered by their lordships to be a lacuna which was impossible to fill. They considered the content and publication of the apology crucial to the agreement and a failure to settle that essential term caused the agreement to be incomplete for uncertainly.

[12] Counsel for the applicant described that case as similar to the instant case. In the instant case it was agreed there should be an apology but a meeting was to be held with the respondent, on a defined date, to determine the contents of and frequency of the publication of the apology. The respondent failed to meet up to that part of the

bargain and has refused to meet. It is this that caused the applicant to state that, the apology being an essential term, its non-resolution leaves the agreement uncertain and therefore no binding or valid agreement had been reached. There is therefore, no enforceable contract.

[13] Counsel for the respondent argued that the parties having gone to mediation and having arrived at a settlement on counsels brief, that is the end of it; there is a binding agreement, which there being no order of the court in respect of it, cannot be enforced in these proceedings and must be enforced in new proceedings on the contract. Counsel cited several cases in support of her argument. First of these was **Green v Rozen** [1955] 1 W.L.R. 741, where the parties settled, on counsels brief, a claim for moneys lent. When the case was called up for hearing the court was informed that there was a settlement and its terms were disclosed but no order was sought in terms. A subsequent order for taxation was made. The settlement was "by consent with all proceedings stayed on terms endorsed on counsels brief". The back of the brief contained the terms which in essence was for instalment payments over a specific period. The Defendant breached the agreement and the Claimant sought judgment for the balance outstanding under the agreement. It was held that the court lacked the jurisdiction to grant the order as the settlement had superseded the original cause of action. The Claimant's remedy was held to be in a fresh action upon the new agreement.

[14] Counsel for the respondent also cited **John Atkinson and Jean Phyllis Maud Atkinson v Rosario Castan and Carmen Segura** [1991] WL 83945, CA. That Appeal raised two issues. The first (and only relevant issue to this discussion) was the ability of a court to enforce an undoubted compromise between the parties without requiring the party wishing to rely on it to commence fresh proceedings. The bone of contention in this case was a forty year old tree bordering neighbouring properties. It was advised by experts that the tree had to be removed. The Defendants, being tree lovers, were reluctant. The Claimants sued for nuisance. Again, on expert advice that the only solution was to remove the tree, the Defendants filed defence admitting the particulars

of claim but reserving on damages. A draft consent order was done, signed and submitted to the court. Its terms are not in issue save to say it was a binding agreement with the final clause stating “there be no order save the Defendants do pay the Plaintiffs costs....” An order was drawn up by the courts in accordance with the draft consent order. The Defendants failed to carry out their bargain to remove the tree and the Claimants sought to have the compromise agreement enforced in the existing action. In this case the appellate court outlined three possible situations when there was a compromise agreement between parties. The first, is where the court is not involved, in the sense that no steps are taken to incorporate the settlement into the decision of the court (Green v Rozen situation). In that case there can be no doubt that fresh proceedings have to be taken to enforce the terms. The second possibility is where a positive order is made by the court as a result of the compromise; in that case the agreement can be enforced directly by the court in the normal way. The third possibility is where there is a compromise which is made part of the decision of the court but is one in which neither party is required to do any act or abstain from doing any act. In such a case the decision of the court will not be directly enforceable as it would contain no order for any party to take any step or abstain from taking any step. In such a case however, the court may be able, within the existing action, to make an order, consequent upon its previous order, which further order would be enforceable by the court.

[15] The appellate court found that in the case before it, the compromise was set out in full recital; that it was intended to be part of the decision of the court with all its attendant status of such an order, the purpose of that was to give the claimant the added advantage of going back to court in the existing claim to have the compromise enforced; and that implicit in the compromise was the liberty to apply to have it enforced by the court. The principle of law here is that the court has jurisdiction where there has been non-compliance with something which is to be treated as being an order of the court and in an appropriate case, application may be made in the same action to enforce those terms.

[16] Counsel for the respondent argued against the court placing any reliance on **Western Broadcasting v Seaga**. She noted that the cases differed in several respects. The first difference pointed to was the setting for the negotiations. In one it was an informal setting in the respondent's office, in the other it was at the court appointed mediation. She argued that this was a determinative factor in whether the agreement concluded was binding. The second distinction pointed to was the fact that there was no common ground as to the exact terms agreed in **Western Broadcasting v Seaga.** There was no such dispute as to the exact terms in the instant case. She asserted that the agreement in the instant case was certain and that even though the wording of the apology was to be agreed, the time to do so was specified along with the time to decide the manner of publication. The additional term of the agreement was also certain.

[17] Counsel further argued that since the agreement reached was certain it was also enforceable. As a corollary to that, she said further, that as it was a binding confidential agreement it was not enforceable in these proceedings. She cited **Gayle v Miletic** JM 2011 SC 37, where the parties came to an agreement at mediation. Counsel for the Claimant filed notice of discontinuance before the terms of the agreement were carried out by the Defendant. The agreement was subsequently breached by the Defendant. An application was made to the court by the Claimant to enforce the mediation agreement. The court found that no order had been made by the court pursuant to rule 74 of the CPR 2002, that the agreement was a binding enforceable one so fresh proceedings would have to be brought to enforce the agreement. The court noted that even though the agreement provided for a notice of discontinuance to be filed within 14 days of the agreement being implemented, it was filed prior to and was therefore not filed in accordance with the agreement. The court held that it could make no orders in the original claim since the claimant had exercised his right to discontinue the claim as provided for by the CPR, which effectively terminated the claim.

[18] Counsel for the respondent took the view that the situation in the instant case was similar in that the parties attended mediation, came to a full agreement which was properly drawn up and signed and the report filed with the court, but with the terms being made confidential. Reliance was also placed on **Deltonia Williams et al v M.Z.**

Holdings Ltd et al decided July 25 2008 (unreported) a decision of Mangatal, J involving the breach of a consent order by the parties. In that case one of the issues the court decided was whether the consent order could be set aside in the original suit or whether fresh proceedings had to be brought. The principle, as espoused in that case, was that where a judgment had been passed and entered, even if by consent, the court could not set it aside unless fresh proceedings were brought. This was subject of course to the slip rule.

[19] Counsel for the respondent made one final parting shot. She pointed out that in so far as the without prejudice mediation discussions were confidential and inadmissible and in so far as the agreement reached was confidential, it would be unjust for the court to make a ruling in the claimant's favour, if it determined that the agreement was not valid and binding. I assume that the rationale of this argument is that if the agreement was not a full settlement, then it formed part of the discussions and negotiations of the mediation and those were confidential and ought not to be disclosed. That being so they were inadmissible and the court ought not to rely on it to make a ruling in the applicants favour.

ANALYSIS

[20] I must thank both counsels for their industry as well as their erudite and succinct submissions in this case, which has proven very helpful and enlightening . I accept that "mediation is a tool designed to promote mutually acceptable and early resolution of disputes" (see Master Macleod in **Bruce William Marshall et al v Ensil Canada Ltd. et al,** Superior Court of Canada (unreported). I also accept that in arriving at an agreement it may mean that "each party freely agreed to do certain things in return for defined benefits in which event it may be considered to be a contract between the parties and enforceable as such." (See Justice Lawrence-Beswick in **Gayle v Miletic** at para 13). Mediation is therefore, a very important tool in dispute resolution. Confidentiality and good faith are crucial to its continuing importance and integrity. That is why I have taken the time to consider this case very carefully.

[21] Where settlement has been agreed, the parties must decide how to record it and how it will be enforced if either party does not abide by its terms. Where a case is settled in advance of a hearing each party has a responsibility to inform the court. The settlement itself can be viewed as a contract, so is binding even if it is not made into a formal order of the court. The agreements should deal with future status of the claim; whether there should be final judgment in favour of one party, whether the claim should be dismissed or a stay granted or whether the claim should be withdrawn and notice of discontinuance filed. Settlements are enforceable contracts between the parties, the consideration for which is forbearance to sue. Where there is a compromise of the proceedings the original cause of action should not be extinguished prior to the terms of the contract being complete. If so then the only remaining action is for breach of contract.

[22] I am constrained to consider whether there was a valid, binding and enforceable agreement arrived at in mediation between the parties despite its confidentiality. I wish it were otherwise. I do so most reluctantly. However, I am emboldened by the fact that if the attorney for the respondent is correct and it was a valid agreement which was breached, the terms would have to be disclosed, in any event, at any fresh proceedings brought to enforce it. If it were otherwise the aggrieved party would have no recourse. Implicit in a confidential agreement is the element of good faith that both parties will abide by the terms as well as the confidentiality clause. If one party breaches the terms of the arrangement, is the other side to be bound by confidentiality to the extent that it cannot seek the intervention of the court in respect of it? I think not. There is a high degree of necessity in preserving the confidentiality of mediation discussions. The rules provide for it. The integrity of the mandatory mediation system demands it. However, this is not a case where the discussions and mediators notes at mediation are being disclosed. This is a valid application to the court to adjudicate upon a disputed agreement which was made confidential. The distinction is clear and also important. The respondent ought not to be able to hide behind the confidentiality of the agreement where he is in breach of it. This is just plain commonsense.

[23] The Canadian courts have recently concluded that evidence about the conduct of mediation may be admissible after an agreement has been concluded in order to resolve a dispute about the meaning of the agreement but only where the probative value far outweighs the prejudicial effect of such disclosure. See **Rudd et al v Trossacs Investments Inc. et. al** [2004] 72 OR (3d) 62 (S.C.J.) cited in **Bruce William Marshall**.

[24] As already noted there was to be an apology which wording was to be agreed. There was to be publication of said apology, the when where and how of which was also left to be agreed. There was to be payment of a sum but was silent as to when, where or how it was to be paid; whether it was before, after or during said apology and whether independent of or contingent on it.

[25] In **Roger James Weston v Sara Elizabeth Dayman** [2006] EWCA Civ 1165 cited in **Deltonia Williams**, Lady Justice Arden in the Court of Appeal, in interpreting the terms of a Tomlin order, noted firstly that a consent order was to be interpreted like a contract; a proposition for which there is authority which she cited. She went on to state that the terms of the Tomlin order were to be construed as a commercial instrument. The aim of this probe was not to ascertain the real intentions of the parties to the agreement but to place the relevant contractual language in meaningful context. The objective question would be what the reasonable person would have understood the parties to mean by use of those specific words, the answer being found in the text itself and the context in which it was made. I believe this to be a good approach to be guided by.

[26] Public policy dictates that men of full age and capacity, advised by learned counsel should be left to contract freely and on such terms as they devise and that such contracts should be held sacred and be enforced by the courts. But where the elements of a binding contract do not exist there is nothing to enforce. The settlement must embody a concluded agreement amounting to a contract between the parties. In the context of this defamation claim, the parties, by the terms of their agreement, have taken a conciliatory approach and have agreed to agree at later date. I believe it is

possible for parties to make concessions or take a conciliatory approach to mediation without intending there to be an immediate binding agreement. But by and through this conciliation one may later result. Mediation and conciliation are not mutually exclusive concepts.

[27] In this case, looking at the words of the agreement in context, there is no full and final settlement. If the parties never meet to agree the terms then no binding contract will ever be concluded. This is not an agreement into which the court can imply terms or one which the court can make certain that which is uncertain. The agreement is flawed in character with too many things left to be worked out. Such an agreement is unenforceable on the basis of uncertainty. The general principle is that you cannot agree to agree and be bound, subject to legal exceptions, of which this case is not one. In any event it could well be said that this is an agreement where there is a failure of consideration

[28] The parties having gone to mediation and entered into an agreement on counsel's brief, does the court have the jurisdiction to make any orders in this case? For the answer to that I turn to the CPR 2002. Rule 74.1 in Part 74 of the CPR provides for automatic referral to mediation in the civil jurisdiction of the court. Its purposes are stated, *inter alia,* to be for the improvement in the pace of litigation; promoting early and fair resolution of disputes, reducing the cost of litigation and improving access to justice. All cases are automatically referred to mediation except Fixed Date Claims; Administrative Law Proceedings, Writ of Habeas Corpus, Bail Applications, Non-Contentious Probate and Admiralty Proceedings.

[29] This claim form was subject to automatic referral to mediation under Part 74. All parties and their attorneys-at-law, where they are represented, must attend mediation sessions. Any agreements reached by the parties at mediation must be recorded in writing and signed by the parties and their attorneys-at-law, if they are represented. The mediator is expected to file a report to the court. Inclusive in this report is the signed written agreement reached between the parties, if any had been arrived at. The mediator may also indicate to the court which party is to file the agreement, if it does not

accompany his report and it is yet to be filed. The agreement need not to be filed in court if its terms are confidential. The rules are silent as to what becomes of such a confidential agreement.

[30] By virtue of rule 74.12 where an agreement has been reached and filed the court must make an order in terms of the agreement pursuant to rule 42.7. Rule 42.7 deals with consent orders and judgments. Where rule 42.7 applies the order must be drawn in the terms agreed and expressed to be by consent and must be signed by the attorneys for each part to whom the order relates, then filed in the registry. The effect of this is that where the parties agree at mediation and it is filed in court; an application is to be made to the court for a consent order in terms of the mediation agreement. Upon the making of this consent order, it becomes enforceable against the parties as an order of the court. It is therefore enforceable in the same proceeding and there is no need to bring fresh action to enforce its terms. Rule 42.7 (2) list the types of judgements or orders to which the rule applies. It includes an order for dismissal of a claim and for stay of proceedings on terms attached as a schedule to the order but not part of it (Tomlin orders). It also includes procedural orders by consent.

[31] Conversely, where the mediation agreement is confidential (made on counsel's brief) it is not filed in court and therefore no order is made by the court. The parties therefore have no order or judgment to enforce in the proceedings. If the claim had been extinguished by operation of law, the alternative in such a case is for the party aggrieved to sue on the agreement as a contract. Any issue as to whether such a contract is binding or otherwise is to be determined at the instance of the court hearing those fresh proceedings.

[32] The United Kingdom position was distilled by Slade J. in the case of **Green v Rozen** for the guidance of the bench and bar. In that case the learned Judge outlined five ways of formalizing settlement agreements in English civil practice and procedure. These included but were not limited to where:

(i) The court enters judgment in terms of the settlement but also making an order for stay of execution of judgment as long as the compromise is

complied with; For example, where the agreement is for payments by instalment. If there is a default the party aggrieved can proceed to levy execution for the outstanding amount.

(ii) Where a consent judgment has been entered ordering the claimant and defendant to carry out certain obligation, if either side is in breach an application can be made to the court to enforce the order and the court will enforce it.

(iii) The agreement can be recorded in a Tomlin Order. This is where the action is stayed by consent on terms scheduled to the order. It has the effect of staying the claim "save for the purpose of carrying the terms into effect"; "Liberty to apply as to carrying such terms into effect". Here there is no positive court order that the terms have to be carried out. So the parties will have to return to court using the liberty to apply provisions to try and argue for an order to enforce the terms.

(iv) Where there is a court order by consent staying proceedings on the terms endorsed on Counsels Brief. It's arguably an unqualified stay of proceedings equivalent to a discontinuance which cannot be removed. Or it may be removed only if proper grounds are shown.

(v) Where the court has made no order and the agreement is settled on terms in Counsels Brief. This is usually followed by a request for withdrawal of the record. The effect is that the original claim is superseded by the compromise. Where there is a breach of the new agreement it can only be enforced by issuing fresh proceedings.

[33] Of course there is the fifth method decided In **Atkinson v Canstan and Segura** where the compromise was for no order at all where, by consent, the agreement was made "no order" save as to cost, but set out the agreed terms in recital. The Claimant's were entitled, in those circumstances to enforce the terms stated in the recital without need to bring a fresh claim.

[34] The difference between the treatment of the case of **Western Broadcasting Services v Seaga** at first instance and the instant case, is that in the former, there was a negotiated settlement between the parties on which the court was asked to rule summarily. The court took the view that the parties having settled there was no need for trial and a declaration was made to that effect but no stay of proceedings or dismissal of the original claim. Ultimately, the Privy Council found that there was no

enforceable contract on which a judgement or order could be made and the trial judge was wrong to so declare that there was. There is also a distinction between the instant case and **Green v Rozen**. In **Green v Rozen** part of the compromise was a consent agreement to stay proceedings on the terms endorsed on counsel's brief. The case was returned to court and the court was advised of the settlement. No stay was ordered by the court. The parties proceeded to taxation. To all intent and purposes that case as between those parties was res judicata. The agreement to stay acted as a stay.

[35] In **Gayle v Miletic** the mediation agreement was filed with the court but no order of the court was made in terms of the settlement. That is where the similarity with the instant case ends. In **Gayle v Miletic** there was a certain valid and binding agreement. Part of the agreement was that a notice of discontinuance was to be filed within 14 days of the signing of a sale agreement and transfer of land. The notice of discontinuance was filed before the documents were signed by the Defendant. The agreement in the instant case makes no mention of what was to become of the original claim.

[36] In all these cases the agreement reached by the parties was a valid, binding and enforceable contract sometimes referred to in the cases as an undoubted compromise. In the instant case the parties made an agreement at mediation and its terms were confidential. No part of the agreement included consent to stay proceedings on terms. This settlement agreement was not filed with the court under Part 74 (although the mediator's report was filed) and therefore, the court could not make any orders with reference to it. The parties did not return to court and inform the court of any settlement. There is therefore no judgment, order or stay of proceedings in the case. The agreement if it were valid would therefore, not be enforceable in these proceedings.

[37] Does the court still have jurisdiction to make orders in this case? Again I believe the answer lies in the CPR 2002. Part 37 of the CPR deals with the right to discontinue a claim. The general rule is that a Claimant may discontinuance all or part of a claim without the permission of the court. To discontinue a claim or any part thereof a Claimant must file and serve a notice of discontinuance. Where there is more than one Defendant the notice must specify against which Defendant(s) the claim is discontinued.

Discontinuance against any Defendant takes effect on the date when the notice of discontinuance is served on that Defendant under rule 37.3(1) (a). The claim or the relevant part of the claim is brought to an end as against that Defendant on that date. This is subject only to the right of the Defendant to apply to set the notice aside or any proceedings as to costs.

[38] No notice of discontinuance has been filed in this suit. No stay of proceedings was agreed upon by the parties and none was applied for or ordered by the court. It means therefore, that the claim against the respondent still subsists. The applicant has the right to continue the claim to trial until it is dismissed, struck out or a judgment is made in favour of one side or the other. It is for the respondent to defend the claim. In defending the claim the respondent may raise as a defence the fact of the settlement agreement, if he wishes to rely on it. It would be then open to the court to determine at that stage whether there was a valid agreement as to matters in dispute between the parties to make it res judicata and dismiss the proceedings, enter summary judgment or grant a stay of proceedings as the case may be.

[39] The applicant, having felt that there was no binding agreement made at mediation and that the respondent in defiance of his conciliatory stance, failed to enter into one as per the agreement reached, is entitled to proceed with the original claim.

CONCLUSION

[40] In light of my conclusion on the life of the original claim, it was perhaps not necessary in order to dispose of this matter, to consider the validity of the agreement reached at mediation and I did so with great reluctance. The settlement agreement was confidential. In order to make this application the applicant was forced to disclose it. However, in truth the respondent cannot complain since it was his inaction that forced this application. The agreement having been disclosed however, I can say it is not a binding and enforceable contract but an agreement in principle only, with much left to do before it is completed. No application for a court order in terms of the settlement was made to this court as per the rules in Part 74, which is not surprising since negotiations between the parties were incomplete as regards a binding contract. However, most

importantly, no notice of discontinuance having been filed, no stay of proceedings having been granted and none being effected by operation of law, the claim still subsists and the applicant is entitled to proceed to trial. It is for the respondent to raise the issue of the settlement, if he considers it relevant, as a defence or preliminary issue at trial. The matter may be determined by trial the Judge on the principles of issue estoppel or res judicata, if the respondent can convince the court he has a valid enforceable agreement settling the issues as between them. The claim may then be dismissed or stayed based on the validity of that agreement. The applicant, however, is not entitled to rely on the terms of the agreement at the trial of this claim

[41] I do not consider it appropriate to order the parties back to mediation based on the stance already taken by the respondent. The court therefore orders that a Case Management date be set in the matter with a view to the parties proceeding to trial. I will hear the parties on the issue of costs.