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A SETTLEMENT REACHED BEFORE A MEDIATOR AND A COURT SETTLEMENT — A GLOSS TO THE JUDGMENT OF THE COURT OF APPEAL IN KATOWICE OF 23 SEPTEMBER 2016, FILE REF. NO. I ACA 404/16

PROPOSITION

The difference between a settlement reached before the court and a court-approved settlement concluded before a mediator is that only the former has a legal force equal to that of a notarial deed.[1]

THE FACTS OF THE CASE IN THE CRIMINAL PROCEEDINGS

The victim entered into a tenancy agreement for an indefinite period with the defendant, who held only a 13.1% share in the real property in question. Due to the fact that the defendant did not admit to concluding the tenancy agreement, collecting fees on that and disposing of the premises occupied by the claimant, the other co-owner called the victim to pay the amounts due for a period of three years for occupying the premises in question without having a legal title to it. In the course of criminal proceedings against the defendant in a fraud case to the detriment of the victim, the parties reached an

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[1] Judgement of the Court of Appeal in Katowice of 23 September 2016, file ref. no. I ACa 404/16, Legalis no. 1522792.

agreement before a mediator whereby the defendant was to transfer her share of the real property to the aggrieved person to compensate for the damage. The settlement before a mediator was concluded in an ordinary written form, with its provisions stipulating that the transfer of the share in the property would take place within 14 days from the date of its signing. In the course of criminal proceedings, the defendant withdrew from the settlement signed before a mediator and was acquitted by the district court of the alleged act.

THE POSITION OF THE REGIONAL COURT IN THE CIVIL PROCEEDINGS

In the civil proceedings before the regional court, the claimant demanded that the defendant, while fulfilling the obligation imposed by the settlement concluded before a mediator in criminal proceedings, submit a declaration of intent that she would transfer to the claimant her share in the real property as a donation. In response to the claim, the respondent filed a motion to dismiss the claim, arguing that it was unfounded and the settlement concluded before a mediator was invalid because the statement of the respondent as a donor had not been made before a notary public. Furthermore, if the settlement agreement reached before a mediator were to be treated as a preliminary agreement, the defendant raised an objection concerning the limitation of the claims under the settlement. The subject matter of the proceedings before the regional court was the validity of the agreement concluded before a mediator and whether it gave rise to an obligation to transfer the ownership of the share in the real property belonging to the defendant. The regional court dismissed the claim stating that the settlement was subject to a sanction of nullity the form of a notarial deed had not been observed. The regional court rightly assumed that the form of a notarial deed is a prerequisite for the validity of the disposition agreement, because the donor's statement should be made in the form of a notarial deed (Art. 890 of the Polish Civil Code[2]), as well as an obligation to transfer the ownership of real property (Art. 158 CC), and an act performed without the prescribed form is invalid (Article 73 para. 2 CC). Therefore, the content of the parties' declarations of intent expressed in the settlement, which in the case at hand raised doubts as to whether it was an agreement requiring a transfer of real property ownership or a disposition agreement transferring ownership, is irrelevant.

[2] Journal Laws of 2018, item 1025, as amended [hereinafter CC].

THE POSITION OF THE COURT OF APPEAL

The court of appeal found the claims raised by the claimant in the appeal to be unfounded and dismissed it. The court also shared the view of the regional court that a notarial-deed form is indeed a prerequisite for the validity of an obligation and dispositive agreement (one which transfers ownership in the performance of the obligation agreement). Moreover, in the case at hand, whether the settlement concluded before a mediator can be treated as a preliminary agreement is irrelevant since it was not concluded in the form of a notarial deed, and therefore its execution cannot be enforced, however, only compensation can be claimed for damage within the limits of a negative contractual interest. The court of appeal also found that the settlement concluded before a mediator was not court-approved and thus did not have the legal force of a settlement agreement concluded before the court, rightly invoking Article 183^{15} of the Code of Criminal Procedure.[3] The court also validly noted that if a settlement reached before a mediator had the legal force of an agreement concluded before the court, it would lead to the transfer of ownership of real property without instituting proceedings obliging the defendant to make a declaration of will to transfer ownership of the real property.

DOUBTS

We should accept the position and argumentation of the court of appeal in this case and in relation to the agreement concluded before a mediator, which was not approved by the court. The court of appeal, in its interpretation of Article 183^{15} § 2 of the Civil Code, rightly held that this provision deprives a settlement concluded before a mediator of legal force equalling that of a notarial deed. However, it is not possible to endorse the argument used in the justification of the judgement "that the significant difference between a settlement agreement reached before the court and a court-approved agreement concluded before a mediator is that only an agreement concluded before a court has the legal force equal to that of notarial deeds." In formulating this argument, the Court of Appeal fully shared the position presented in the doctrine by Przemysław Telenga.[4] The major doubts do not

[3] Journal Laws of 2018, item 1360, as amended [hereinafter referred to as CCP].

[4] This position endorsed by the doctrine is presented in P. TELENGA, "Komentarz do art. 183^{15} KPC," in *Kodeks postępowania cywilnego. Komentarz*, ed. A. Jakubecki (Warszawa: Wolters Kluwer, 2012), 259.

therefore concern the argumentation used by the Court of Appeal in the presented case, but concern a fragment of the reasoning, in so far as it provides for the settlement concluded before a mediator and, most importantly, "approved by the court." This fragment overturns the whole argumentation used by the court of appeal, especially that it concerns a settlement on transfer of ownership of real estate.

While in the case in question the agreement concluded before a mediator in criminal proceedings was not approved by the court, the argument included in the appeal court's statement of reasons goes beyond the scope of the case and refers to the agreement concluded before a mediator and "approved by the court." The proposition thus formulated is therefore not only at variance with the content of Article 183^{15} § 1 CCP, which provides that an agreement concluded before a mediator, having been approved by the court, has the legal force of a settlement concluded before the court,[5] but also disregards the effects of failure to observe the form required for a given act in law since it is impossible to approve it by the court due to its invalidity under Article 73 § 2 CC. It should be noted that one of the prerequisites for the court's assessment of an agreement concluded before a mediator, constituting the basis for its approval, is the legality of the agreement referred to in Article 183^{14} § 3 CCP. This condition also applies to the requirements concerning the form required for a given act in law, which follows directly from the aforementioned Article 183^{15} § 2 CCP. This means that the court cannot approve a settlement before a mediator, which covers transfer of ownership of real estate, made in an ordinary written form—without being notarised. Thus, one of the conditions for the court to approve a settlement is that the parties must comply with the formal requirements for the act in question. Their fulfilment (the notarised form in the case of a settlement concerning transfer of ownership of real estate) causes that when approved by the court, the settlement has the same legal force as an agreement concluded before the court and—contrary to the argument expressed by the Court of Appeal—does not differ from an agreement concluded before the court. In terms of the form, the legal force of an agreement concluded before a mediator concerning transfer of ownership of real estate does not stem from its being

[5] E. STEFAŃSKA, "Komentarz do art. 183^{15} KPC," in *Kodeks postępowania cywilnego. Komentarz (art. 1–505[37])*, ed. M. Manowska (Warszawa: LexisNexis, 2011), 1:386; M. SYCHOWICZ, "Komentarz do art. 183^{15} KPC," in *Kodeks postępowania cywilnego. Komentarz do art. 1–366*, ed. A. Marciniak and K. Piasecki (Warszawa: Wydawnictwo C.H. Beck, 2016), 1: 791; O.M. PIASKOWSKA, "Komentarz do art. 183^{15} KPC," in K. ANTOLAK-SZYMANSKI and O.M. PIASKOWSKA, *Mediacja w postępowaniu cywilnym. Komentarz* (Warszawa: Wolters Kluwer, 2017), 228–29.

approved by the court but from the notarial-deed form observed by the parties,[6] which is one of the prerequisites for its approval and absence of grounds to specify differences in relation to a court settlement.

A SETTLEMENT REACHED BEFORE THE COURT VERSUS A SETTLEMENT CONCLUDED BEFORE A MEDIATOR AND APPROVED BY THE COURT—A THEORETICAL CONSIDERATION OF DIFFERENCES

The court's approval of a settlement reached before a mediator, pursuant to Article 183^{15} § 1 CCP, has the effect of equating its legal force with that of a settlement concluded before the court. The equal legal validity of both types of settlements is apparent when new proceedings are instituted between the same parties in a settlement case. Both types of settlement rely on the seriousness of the agreed thing and, so making a substantive objection as to the *rei transacta* leads to a dismissal of the claim. In addition, a claim established by a court settlement, as well as a settlement concluded before a mediator and approved by the court, is subject to a time limit of six years. If a claim determined in this way covers periodical benefits, the claim for future periodical benefits will expire after three years (Art. 125 § 1 CC).

However, the legal force of a settlement agreement reached before a mediator and followed by its court approval has not been made equal to the legal force of a court agreement. Differences occur in the case where an agreement concluded before a mediator and a court settlement are enforceable by way of execution. Pursuant to Article 183^{15} § 1 sentence 2 CCP, an agreement concluded before a mediator and approved by way of an enforcement clause is an enforcement instrument. In contrast, a settlement concluded before a court, as long as it is enforceable, is an enforcement instrument, and therefore, in order to equate its force with an approved settlement reached before a mediator, it is necessary to make the court settlement enforceable.[7] In such a case, both settlements have the same validity in terms of their enforcement. This is the only difference between a settlement agreement reached before a mediator and approved by the court and a court settlement.

[6] Zob. R. WRZECIONEK, "Protokół z mediacji w sprawach z zakresu prawa cywilnego w formie aktu notarialnego," *Rejent* 1 (2009): 125–28.

[7] M. ULIASZ, *Kodeks postępowania cywilnego. Komentarz* (Warszawa: Wydawnictwo C.H. Beck, 2008), 286.

As already mentioned, an agreement reached before a mediator should satisfy the provisions imposing a specific form of legal action. However, legal form of an agreement concluded before a mediator should be considered in the context of proceedings concerning the possibility of getting the court's approval. Against this background, doubts arise in the doctrine as to whether a s agreement concluded before a mediator should satisfy the provisions on a specific form of legal action or whether it acquires the legal force of a court settlement by the mere fact of its approval by the court, regardless of the form of its conclusion.[8] The answer to this question lies in Article 183^{15} § 2 CCP, stating that "the provisions of § 1 shall not prejudice the provisions regarding a particular form of acts in law." Article 183^{15} § 1 CCP provides that a settlement agreement reached before a mediator and approved by the court has the legal force of a settlement reached before the court. It is therefore not possible to assume that the reference norm is intelligible to the addressees, especially if we juxtapose its content with § 6 resulting from the principles of legislative technique,[9] which states that "the provisions of an act shall be drafted in such a way as to ensure that the intentions of the legislator are expressed precisely and in a manner comprehensible to the addressees of the norms contained therein." On the face of it, we may wonder whether the "provision of § 1" implies a reference to a settlement agreement reached before a mediator after it has been approved by the court, or whether it implies a settlement reached before a mediator prior to court approval. Undoubtedly the reference contained in Article 183^{15} § 2 refers to a settlement reached before a mediator prior to its court approval, which means that the agreement should meet the formal requirements for a given legal act, also as already indicated, in order for it to be approved by the court. If the subject matter of a settlement is transfer of ownership of real estate, the parties who reached the agreement before a mediator may transfer ownership in the form of a notarial deed drawn up by a notary public, and then attach it to the mediation report, or alternatively conclude an agreement before a notary public acting as a mediator,[10] who will draw up a report in

[8] See M. BIAŁECKI, *Mediacja w postępowaniu cywilnym* (Warszawa: Wolters Kluwer, 2012), 243–244; J. MUCHA, "Ugodowe rozwiązywanie spraw rozpoznawanych w postępowaniach działowych — wybrane aspekty procesowe," *ADR. Arbitraż i Mediacja* 2 (2018): 90–91.

[9] Ordinance of the Prime Minister of 20 June 2002 on "The rules of legislative technique," Journal of Laws of 2016, item 283.

[10] See B.J. PAWLAK, "Notariusz mediatorem — korzyści i zagrożenia," *ADR. Arbitraż i Mediacja* 2 (2012): 75–93. It should be mentioned, however, that the parties may not conclude a settlement before a mediator, avoiding paying notary fees related to the need to keep the form of a notarial

the form of a notarial deed.[11] In such a case, the court assessing the settlement, in the absence of other negative criteria specified by Article 183^{14} § 3 CCP, may approve such a settlement. After its approval, an agreement concluded before a mediator has the same legal force in terms of form as a court agreement, and thus also the same legal force as a notarial deed, because prior to its approval the parties complied with the form required for a specific act in law. If an agreement concluded before a mediator does not meet the formal requirements for a given legal act, the court should issue a decision refusing to approve it. The argument spelled out in the judgement at hand is therefore erroneous in so far as it relates to a "court-approved" settlement. There are no differences as to the form of an agreement concluded before a court, which replaces the form provided for a given act in law,[12] and an agreement concluded before a mediator and approved by the court. Before approving a settlement agreement concluded before a mediator, the court should assess whether it meets the requirements for a given act in law, which, as mentioned above, is included in the criterion for assessing the agreement at to its legality. This means that there can be no agreement in the legal system to transfer ownership of real estate, concluded in ordinary written form before a mediator, which would then be approved by the court by way of an enforcement clause and which would consequently constitute an enforceable title.

As a result, the reference in Article 183^{15} § 2 CCP to the "provision of § 1" thereof refers to an agreement concluded before a mediator but, importantly, prior to its court approval. Therefore, *de lege ferenda*, in order to add transparency to the norm and remove any doubts concerning the legal validity of the settlement agreement concluded before a mediator, we can propose the following wording of Article 183^{15} § 2 CCP: "a settlement agreement reached before a mediator shall not prejudice the provisions on the specific form of legal action." Here, we speak of a settlement concluded before a mediator which has not been approved by the court. In this context, the term "shall not prejudice" can be interpreted as "shall not infringe" or "shall not

deed, and then conclude a settlement before a court replacing the notarial form. Then, the settlement will no longer be an agreement concluded before a mediator and will therefore not benefit from economic privileges resulting from an agreement concluded before a mediator, which are more favourable than in the case of an agreement concluded before a court.

[11] See Article 104 § 4 of Act of 14 February 1991 on the Notarial Service, Journal Laws of 2017, item 2291, as amended.

[12] Decision of the Supreme Court of 8 May 1975, file ref. no. III CRN 51/75, Legalis no. 18756.

exclude" the provisions on the specific form of an act in law. The obligation resulting from Article 183^{15} § 2 CCP should be considered as fundamental for the certainty and safety of legal transactions. Its absence would lead to transfer of ownership of real estate by way of settlements concluded before a mediator, which would then—on the basis of an application for their approval which would be free of charge—be court approved and made equal it its form with a settlement agreement concluded before the court pursuant to Article 183^{15} § 1 CCP.

CONCLUSION

While sharing the arguments of the appeal court expressed in the justification of the judgement at hand, in the light of the doubts and theoretical considerations previously presented, we cannot, however, endorse thus formulated proposition in so far as it refers to a settlement agreement concluded before a mediator and "approved by the court." A settlement concluded before a mediator in the matter of transferring ownership of real estate may be approved by the court provided that the form of a notarial deed has been observed, which entails that its mere approval by the court does not impart legal force to it with respect to the form required for a specific act in law. This excludes the possibility of making a distinction between an agreement concluded before a mediator after its approval by a court in terms of its legal force and a settlement agreement concluded before a court. The difference between an agreement reached before a court and an agreement concluded before a mediator—unless it was concluded in the form required for a given act in law—is that only the former has the force equal to that of a notarial deed. On the other hand, an agreement concluded before a mediator after its approval by the court, that is, before its approval and meeting the requirements as to the form of specific act in law, has the legal force of a court settlement agreement.

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Summary

The gloss discusses the considerations of the proposition formulated in the justification for the judgement of the Court of Appeal, in which it was assumed that the difference between a set-

tlement agreement concluded before the court and an agreement concluded before a mediator and approved by the court is that only the agreement concluded before the court has the legal force equal to that of a notarial deed. The presented doubts relate to the part of the reasoning concerning a settlement reached before a mediator and which has been "approved by the court."

Key words: mediation; court approval of a settlement.

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