

REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 16907/10

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

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DATE

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SIGNATURE

In the matter between:

SCHEEPERS: JOHANNES EGBERTUS

First Applicant

MILLENIUM ADVERTISING CC

Second Applicant

and

VAN NIEKERK: ILZE FOURIE

Respondent

JUDGEMENT

CARSTENSEN AJ:

1. In this matter, the Applicants originally sought an order compelling the Respondent to sign a deed of sale in terms of which portion 67 (a

portion of portion 57) of the Farm Brakkloof number 443, measuring 8565m² held in term of title deed T14689/89, is sold by her to Seven Falls Trading 101 (Pty) Ltd for the sum of R17 625 000.00 and to do all things necessary to transfer the property to Seven Falls within 7 days of the order, alternatively that the Sheriff should sign the deed of sale.

2. At the hearing the Applicants, without the objection of the Respondent, indicated that they would seek a more limited relief, namely:

- 2.1. that the Respondent's cancellation dated the 24th of February 2014 of the Plettenberg Bay property portion of the settlement agreement dated the 3rd of August 2012 which was made an order of court on the 3rd of August 2012 under case number 16907/10 is invalid;

- 2.2. that the Respondent be directed to pass transfer of the property to the Applicants or the Applicants' nominee , on payment of the balance of the purchase price.

3. The First Applicant and Respondent had lived together as husband and wife and during that time, a number of properties including the Plettenberg Bay property, the RV house, the Vaal River property and the Ontdekkers Road property were purchased by the Applicant and registered in the name of the Respondent.

4. During 2002 / 2003, the parties relationship came to an end and what the parties called a “divorce agreement”, was concluded on the 7th of September 2004.
5. The Applicant, on the 5th of November 2004, had paid the Respondent an amount of R6 463 249.96 in part settlement.
6. That agreement was made an order of court on the 3rd of August 2012.
7. In terms of that agreement:
 - 7.1. The Plettenberg Bay property, the RV house and the Vaal River property would be valued and the agreed value would be the average value.
 - 7.2. The payment of R6 463 249.96 was recorded.
 - 7.3. The parties agreed that the Applicant would take transfer of the properties and make payment to the Respondent in respect thereof.
8. The Ontdekkers Road property had been sold and was not included in the settlement agreement.
9. The parties subsequently agreed that the Vaal River property would be excluded from the settlement agreement, this is not in dispute.
10. Also subsequent to the settlement agreement, the RV House was

sold and the proceeds of R2 368 000.00 was paid to the Respondent on the 8th of April 2014.

11. Consequently, the only outstanding issues in relation to the settlement agreement was the valuation of the Plettenberg Bay property, the transfer of that property to the Applicant and the payment therefore by the Applicant.
12. The parties did not agree on a valuation and consequently, on or about 25th of March 2014, this court granted an order that the date of final determination of the agreed value of the properties was 2nd December 2012 in the 12 months period provided for in clause 2.5 of the settlement agreement, commenced to run on that date and would expire on the 1st of December 2013.
13. The court, in its judgement, was very critical of the conduct of the Applicant. During the proceedings, the Applicant conceded that the true value of the Plettenberg Bay property was the amount of R17 625 000.00.
14. Notwithstanding the fact that the 1st of December 2013 came and went, transfer of the property was not affected into the name of the Applicant and neither did the Applicant make payment in respect thereof.
15. Consequently, on the 12th of February 2014, the Respondent's attorney put the Applicant on terms to make payment of the purchase

price for the Plettenberg Bay property or to deliver guarantees, failing which they would cancel, on behalf of their client, that portion of the settlement agreement.

16. The Applicant did not react to that letter.
17. Thus, on the 24th of February 2014, the Respondent's attorneys cancelled the Plettenberg Bay portion of the settlement agreement.
18. The Applicant has adopted the attitude that the cancellation is invalid and seeks to enforce the settlement agreement.
19. The Applicant contended that the cancellation was invalid for three reasons.
20. Firstly, there had been no breach of the settlement agreement as the Applicant was not obliged to make payment of the balance until transfer had taken place. In this regard, the Applicant relied on:
 - 20.1. clause 2.3 of the settlement agreement: *"In return, Scheepers (or his nominee) will take transfer of the Plettenberg Bay property and the RV House against payment of the balance and all costs to give effect to the transfer, Scheepers will be entitled to appoint a transferring attorney"*.
 - 20.2. clause 2.5 of the settlement agreement: *"The balance is payable by Scheepers to Van Niekerk on transfer of the*

properties which shall take place by no later than 12 months from the date of final determination of the value of the three properties”.

21. I do not believe that the Applicant’s contention in this regard is correct. Firstly, it is my view that on a proper interpretation of the settlement agreement, that it was the Applicant’s obligation:

21.1. to appoint the transferring attorneys;

21.2. to pay all the transfer costs;

21.3. to take transfer; and

21.4. against transfer, to make payment of the value.

22. I believe to argue payment could be made simultaneously with transfer is unrealistic and does not take into account the practice or practical consequences of transfer.

22.1. In the main, the purchaser would present some form of guarantee to secure the purchase price. Transfer is then registered before the Registrar of Deeds and once that occurs, the guarantee, in whatever form it may take, is presented and payment effected.

22.2. Should transfer take place without guarantees, a seller could be in a position of being no longer the registered owner of the property and face the prospect of having to

sue, a possibly indigent or recalcitrant purchaser for the purchase price.

23. In any event, the First Applicant, I was assured in argument by Mr Wickins who appeared on behalf of the Applicant, that his client was willing, able and in a position to make payment of the purchase price.
24. Consequently, there seems to be no reason why the Applicant has not given a guarantee as requested, albeit perhaps in the alternative, by the Respondent's attorney. The only motive seems to be to delay the process or to frustrate the Respondent, as was carefully pointed out by Judge Wepener in his judgement.
25. Consequently, I am of the view that the Applicant was indeed in breach of the agreement and consequently, in contempt of the order of court, in failing to take transfer and to make payment of (or at least secure) the purchase price.
26. The second argument which the Applicant raised was that the settlement agreement constituted an indivisible transaction and to cancel a portion of the settlement agreement was impossible or inappropriate and would result in the Respondent approbating and reprobating insofar as the Respondent would seek to enforce the contract and cancellation it at the same time.
27. I, again, do not agree with the Applicants' submissions in this regard.
28. Firstly, the parties clearly regarded the settlement agreement as

“divisible” insofar as they had already:

- 28.1. excluded the Vaal River property from the settlement agreement;
 - 28.2. allowed the RV House to be sold and payment to be made to the Respondent.
29. Secondly, the only remaining aspect was the transfer of the Plettenberg Bay property and the payment of the value thereof to the Respondent, which value had been settled in the amount of R17 625 000.00.
30. There seems, therefore, to be no bar to either enforcing or cancelling this portion of the agreement.
31. The one difficulty, however, I may point out is that apart from the Vaal River property and the RV House, the Applicant had made payment to the Respondent of the sum of R6 463 249.96.
32. During argument, it was made clear by the Respondent’s counsel that the Respondent would not tender return of that amount should I find in favour of the Respondent and thus find that the Respondent’s cancellation of the portion of the settlement agreement was valid and enforceable and, as a result, dismiss the application.
33. This in itself is not an obstacle and does not render the settlement agreement, in my view, legally indivisible.

34. The final point raised by the Applicant was that the settlement agreement had been made an order of court and consequently, it could not simply be cancelled.
35. To meet this claim the Respondent contended that this in fact this was the Respondent's only option as the other remedies, such as contempt proceedings could be met with the plea impecuniosity as could an order for specific performance.
36. The Respondent argued that despite the fact that the settlement agreement had been made an order of court, it remained of a contractual nature. In this regard, the Respondent distinguished the decision of Flemming J in Johannesburg Taxi Association v Barra-City Taxi Association, 1989 (4) SA 808 (W). This matter created some uncertainty whether the non-compliance of a settlement agreement could be contempt, notwithstanding the fact that it had been made an order of court.
37. Webster J, in the unreported decision of Hanekom v Hanekom, 2008 JDR 1277 (T), found that no party to an agreement that had been incorporated into a court order could repudiate it. Particularly then no party could cancel it.
38. It is my view that parties who decide to make a settlement agreement an order of court must abide by that consequence. That is that that settlement agreement becomes an order of court and cannot be repudiated or cancelled. This may give rise to many difficulties and

impracticalities as were referred to by Flemming J. However, the only manner by which the “agreement” could then be varied, altered or set aside is through normal court process as provided for in the main by the Uniform Rules of Court.

39. Consequently, I am of the view that the Respondent’s cancellation dated 24th of February 2014 in the Plettenberg Bay property portion of the settlement agreement dated 3rd August 2012, which was made an order of court on the 3rd of August 2012 under case number 16907/10, is invalid.
40. However, that does not result in the Applicant being entitled to the relief which he seeks.
41. It is clear from the parties argument and submissions that should the settlement agreement have been cancelled, the Applicant would have to sue the Respondent for payment of the R6 463 249.96.
42. It is also clear to me, taking into account the Applicant’s attitude that should transfer of the property take place, the Respondent would be in a positon and would, in all likelihood in my view, have to institute action against the Applicant for payment of the balance of the purchase price.
43. Consequently, I am of the view that the Applicant should not be entitled to take transfer until payment has been secured.
44. This would put an end to the litigation between the parties.

45. I suggested to counsel for the Applicant that a proper order would be that the Applicant provide guarantees to secure the purchase price and then take transfer of the property. The Applicant consented to such an order being made, on the terms set out hereunder.
46. The Applicant also agreed that should the guarantee not be presented, then the entire court order which incorporated the settlement agreement, could be set aside.
47. In light of those concessions, I am prepared to make an order that the Applicant is entitled to take transfer of the Plettenberg Bay property on the basis set out below.
48. The Applicant's delay of taking transfer and making payment in respect of the Plettenberg Bay property from December 2012 to date is inexcusable. The Applicant's attitude that payment need only be made on transfer is impractical, has led to an understandable frustration on the part of the Respondent and has triggered a sequence of events which led to this application.
49. On the other hand, the Respondent's view that it could cancel a court order is unreasonable. In addition, I am of the view that allowing the Applicant 7 (seven) days to present guarantees was impractical.
50. Consequently, I am of the view that neither party should be entitled to costs in respect of this application.
51. In the premises, I make the following order:

- 51.1. The Respondent's cancellation dated the 24th of February 2014 of the Plettenberg Bay property portion of the settlement agreement dated 3rd August 2012, which was made an order of court on the 3rd of August 2012 under case number 16907/10, is invalid.
- 51.2. The Applicant is directed to present a written bankers' guarantee in the sum of R17 625 000.00 as well as to secure all transfer fees, costs and duties to the transferring attorneys within 45 (forty five) days from date of this order.
- 51.3. The Applicant is directed to appoint transferring attorneys and the Respondent is directed to do all things necessary to pass transfer of the property described as portion 67 (a portion of portion 57) of the Farm Brakkloof number 443, measuring 8565m² held under title deed T14689/89, to the Applicant or to the Applicant's nominee, within 120 (one hundred and twenty) days from date of the guarantee.
- 51.4. In the event that the Applicant does not present the guarantee within the aforesaid time period or in a form acceptable to the transferring attorneys, the court order incorporating the settlement agreement dated 3rd of August 2012 under case number 16907/10 is set aside immediately on expiry of the 90 (ninety) day period.

51.5. Insofar as that court order may be set aside, the parties rights and ownership in respect of the Vaal River property and the RV House, remain unaffected by such setting aside.

51.6. Each party is to pay their own costs of this application.

**P L CARSTENSEN
ACTING JUDGE OF THE
HIGH COURT**

HEARD: 13 OCTOBER 2014
DELIVERED: 29 OCTOBER 2014

COUNSEL FOR APPLICANTS: GD WICKINS
INSTRUCTED BY: BROOKS & BRAND INC.

COUNSEL FOR RESPONDENT: GP VAN RHYN
INSTRUCTED BY: OTTO KRAUSE INC.

(jmt.20.10.14)