

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

DATE

SIGNATURE

CASE NO: **29088/2008**

In the matter between:

SIX BAR TRADING 667 (PTY) LIMITED

Applicant

And

LATSKY, ISABELLA JOHANNA

Respondent

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] On 1 September 2008 the applicant instituted legal proceedings against the respondent for the payment of certain amounts. This action was defended but

ultimately settled. On 23 June 2015 the settlement agreement was made an order of court by Mngadi AJ (**'the order'**).

THE SETTLEMENT AGREEMENT

[2] The settlement agreement provides as follows:

"1. The Defendant undertakes to pay to the Plaintiff in full and final settlement of any claim for capital, interest and costs which the Plaintiff has against the Defendant, the sum of R 3 000 000.00 (Three Million Rand).

2. The said sum of R 3 000 000. 00 (Three Million Rand) will be paid by the Defendant to the Plaintiff on date of registration of transfer of the Remaining Extent of Portion 9 of the Farm Vlakfontein No. 30, Registration Division IR, Province Gauteng ("the property") to a third party once the Defendant has sold the property to such a third party.

3. In the event of the Defendant not selling the property within a period of 5 (five) years reckoned from date of signing hereof, the Plaintiff will in lieu of such payment, be entitled to the transfer of one third undivided share in the property free of encumbrances. The Plaintiff will be liable for the payment of all costs of transfer.

4. If the Plaintiff elects to do so, it shall be entitled to register a security bond over the property in the sum of R 3 000 000.00 (Three Million Rand). The Plaintiff will be liable for the payment of all costs for the registration of the bond.

5. Each party will pay its own costs of this action.

6. Neither of the parties will have any claims against each other arising out of any other cause of action."

('the settlement agreement')

[3] The settlement agreement was signed at the beginning of June 2010. The applicant exercised its rights under clause 4 of the settlement agreement by registering a security bond over the property in the sum of R 3 000 000 (three million rand).

THE PROBLEM

[4] The property as defined in the settlement agreement was not sold within a period of 5 (five) years reckoned from the date of signature of the settlement

agreement. The applicant was thus, and after expiry of the five year period, entitled to the transfer of a one-third undivided share in the property, free of encumbrances. When attempting to take transfer of the undivided one-third share, the applicant discovered that, in addition to the bond that it had registered over the property, there were two further mortgage bonds registered over the property in favour of the Standard Bank of South Africa Limited (**'the Standard Bank'**).

[5] A one-third unencumbered share in the property could thus not be registered in favour of the applicant as these bonds constituted encumbrances. The director of the applicant who deposed to the affidavit, Mr Charles Rich (**'Mr Rich'**) stated that it was only after the settlement agreement had been made an order of court, that the fact that two further bonds had been registered over the property, had come to his attention. Mr Rich said that the respondent must have known about these bonds at the time of the conclusion of the settlement agreement, as such bonds had already been registered by the time the settlement agreement was concluded. The one bond had been registered on the 1st February 2002 and the other, on the 19th October 2007.

THE INITIAL PROPOSAL

[6] On the 3rd July 2015 Mr Reon Marais (**'Mr Marais'**) addressed a letter on behalf of the applicant to the respondent proposing that the settlement agreement be amended to provide that payment of the agreed sum of R 3 000 000 (three million rand) be made no later than 2 September 2015 failing which, the applicant would be entitled to attach and sell the said property in execution. No response to this letter was received. That put paid to the sensible approach to resolving the matter and the litigation ensued.

THE INITIAL NOTICE OF MOTION

[7] The initial notice of motion contained two parts. In **Part A** the applicant sought that the order of court granted by Mngadi AJ on 23 June 2015 be rescinded and that the settlement agreement entered into between the parties on the 2nd June 2010 be rectified to provide that:

“2.1 Clause three (3) thereof be deleted for impossibility of performance.

2.2 Clause three (3) be substituted with the following clause:

‘In the event that the Defendant has not sold and re-registered the property to a third party within a period of five (5) years from date of signature of the agreement, the Defendant shall within a further three calendar months after the expiry of such five year period pay the said sum of R 3 000 000-00 to the Applicant, failing which the Applicant shall be entitled to attach and sell the said property in execution.’”

In **Part B** of the notice of motion, the applicant sought that the rectified settlement agreement be made an order of court.

AMENDMENT TO THE NOTICE OF MOTION

[8] The applicant amended its notice of motion, without objection, by the inclusion of the following prayer after prayer 2.2:

“3. Alternatively to the above, and in the event that the court finds that clause 3 of the settlement agreement is not impossible (sic) to perform, then:

3.1 The Respondent be ordered to make payment to the Applicant in the amount of R 3 000 000. 00; or

3.2 The Respondent be ordered to settle any and all outstanding bonds and encumbrances over the property, including but not limited to Bond Number B17142/2007 and Bond Number B9616/2002, held by Standard Bank of South Africa, within three months from the date of the order;

3.3 The Respondent be ordered to sign all necessary documentation, within ten (10) business days of the expiration of the three month period referred to above, to give effect to Clause 3 of the settlement agreement; and

3.4 In the event of the Respondent failing to sign all necessary documentation within the prescribed time frame, the Sheriff of the Court be authorised and directed to sign all necessary documentation on the Respondents behalf to give effect to clause 3 of the settlement agreement.”

IMPOSSIBILITY OF PERMORMANCE AND RECTIFICATION

[9] Mr Rich contended that he did not know of the existence of the two other bonds at the time of the conclusion of the settlement agreement whereas the respondent said that an attorney, Mr Charles Gishen who facilitated the settlement, knew about it and had communicated this information to Mr Rich (or is presumed to have done so). Mr Rich denies that a Mr Charles Gishen represented him. He alleged that it was a Mr Martin Gishen of Gishen Gilcrest Attorneys. Mr Martin Gishen is presently a solicitor practicing as such in Australia who summarised the situation as follows:

“As far as I can recall at the meeting we (myself and Charles) were made aware of the existence of a bond registered over the property and it is for this reason that I included the words ... “free of encumbrances” in clause 3 of the Settlement Agreement, the agreement being that if Latsky did not pay the R3M within 5 years Rich would be entitled to payment of the sum of R3M or, at his option, one third of the property bond free ie Latsky would have to pay the bond and the current rates and taxes... “ (my emphasis)

[10] The settlement agreement provided for two payment options:

10.1 Payment of R 3 000 000 after the property had been transferred to a third party (**‘the first option’**); or

10.2 Registration of a one third undivided share in the property, free of encumbrances after 5 (five) years from the date of signature (**‘the second option’**).

[11] The applicant initially approached the matter by contending that the second option was, by reason of the prior bonds, impossible to perform, unenforceable and

void *ab initio*. It contended that it was irrelevant that the applicant was well aware of Standard Bank's single encumbrance over the property at the time of signature of the settlement agreement. It argued that the facts showed that at the time when both the applicant and the respondent signed the settlement agreement, it was impossible for the applicant to register a one-third undivided share in the property, free of encumbrances, in the name of the applicant.

[12] This assertion of impossibility was hotly contested and respondent contended that nothing contained in the settlement agreement was incapable of being performed at the time of entering into the settlement agreement. The R3 000 000 could objectively have been paid within the first five year period if the property had been sold and the one-third undivided share in the property could and (can still) be transferred and registered, if and when the other two bonds in favour of Standard Bank are cancelled. Thus both options 1 and 2 were capable of performance at the time of the conclusion of the settlement agreement.

[13] The applicant, at the hearing of this matter, did not persist with the rectification and impossibility of performance argument as it had, prior to the hearing served the amendment to the notice of motion which amendment was not opposed. The fact that the amendment was not opposed has some bearing on whether the respondent was prejudiced in the preparation and presentation of its case, a matter to which I shall return.

CONSENSUAL RESCISSION

[14] The applicant firstly prays for an order rescinding the order of 23 June 2015. This prayer *per se* is not opposed by the respondent. However, it does not follow that this order should be granted. The reason underpinning the rescission application was

the need to rectify the settlement agreement by virtue of the alleged impossibility of performance argument, all of which has now been abandoned. The alternative relief is based upon it being found that clause 3 is possible to perform. Applicant conceded that clause 3 is indeed possible to perform. Clearly, payment of the debts secured by the prior bonds, would result in the cancellation of the bonds and there is nothing impossible about that.

[15] The practice of applying for rescission of orders by consent has been criticised by the Courts in a line of cases. The inherent jurisdiction of the Court does not include the right to interfere with the principle of finality of judgments, other than in circumstances specifically provided for in the rules or at common law (see *Lazarus and Another v Nedcor Bank Limited*; *Lazarus and another v ABSA Bank Limited*, 1999 (2) SA 782 (W); *Swart v ABSA Bank*, 2009 (5) SA 219 (CPD) at 223B; *Saphula v Nedcor Bank Limited*, 1999 (2) SA 76 (WLD))

SPECIFIC PERFORMANCE

[16] Having amended the notice of motion and it being common cause between the parties, apparently without regard to the line of cases relating to rescission that I have referred to above, that this Court should rescind the order, the parties then argued the matter from the premise that what was in issue was whether or not specific performance ought to be granted.

[17] That being so the issues for determination became firstly, what the nature of the factors were a court should (and could) take into consideration in determining whether specific performance should be granted and secondly, whether the court had the power to regulate the procedure of the manner in which specific performance was to be carried out.

[18] As indicated, this argument is premised on the erroneous assumption that parties to an order of Court are able to obtain rescission for the asking, i.e. that they can ask the Court simply to rubber stamp the consensual rescission of the order granted on 23 June 2015. The applicant expressly and during argument abandoned reliance upon the argument that the settlement agreement ought to be rectified and that the order sought and granted was based on incorrect facts. That being so, there are no facts before me which would entitle this Court, being bound as it is by the authorities cited, to rescind the order. Now the question arises whether, despite not rescinding the order, this Court can or should issue any further order on what has already been pronounced upon by a Court of competent jurisdiction? Should the applicant not be confined in its efforts to enforce the order to the usual remedies of (i) having a writ of execution issued by the Registrar, or (ii) launching contempt of Court proceedings? It appears not.

CONTEMPT OR EXECUTION ONLY?

[19] In *Eke v Parsons* [2015] ZACC 30, Madlanga J (speaking on behalf of the majority of the justices), having rejected the formalistic approach which takes a narrow view of the efficacy and value of court orders granted as a result of settlement agreements, held as follows, at para 24:

“Whilst ordinarily the purpose served by a settlement order is that, in the event of non-compliance, the party in whose favour it operates should be in a position to enforce it through execution or contempt proceedings, the efficacy of settlement orders cannot be limited to that. A court may choose to be innovative in ensuring adherence to the order. Depending on the nature of the court order, it may – for example – first issue a *mandamus* for compliance. Failing compliance, it may then consider committal for contempt.” (quoted without footnotes)

[20] Of considerable significance too is that which is stated in paragraph 31 of *Eke v Parsons* (supra):

“The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, “a matter judged”). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a *mandamus*.” (quoted without footnotes)

ANALYSIS OF THE RIGHTS EMBODIED IN THE COURT ORDER

[21] The court order envisages two scenarios. One being the scenario existing within a period of five years reckoned from date of signature of the settlement agreement and the second the period after the expiry of such five year period. Prior to the expiry of the five year period, the applicant was entitled to the payment of R 3 000 000 should the property have been sold to a third party. After the expiry of the five year period, the applicant is no longer entitled to payment of the sum of R 3 000 000 but is, in lieu of such payment, entitled to the transfer of a one-third undivided share in the property, free of encumbrances.

[22] The difficulty the applicant faces in this matter is that because there are two mortgage bonds registered over the property in favour of the Standard Bank, the applicant is unable to register a one-third unencumbered portion of the property into its name.

[23] The question which arises is why a writ of execution was not issued, a Court order being in existence. The answer to this lies in the form of the settlement agreement and its wording. It does not, as it should have, provide in peremptory

terms what the respondent was supposed to do after the expiry of the five year period. Instead, it simply pronounces what the applicant's rights would be in that event. This does not assist the Sheriff in being asked to execute such an order. For the Sheriff to be properly informed of how to execute the order in a suitably worded writ he or she needs to know precisely what it is that is to be done. It is the failure to apply this simple and practical principle in the framing of settlement agreements intended to be made orders of Court that gives rise to this problem, and the incurring of unnecessary costs. Whilst the Court is not unmindful of the challenges facing practitioners seeking to get their clients and their opponents to agree to the terms of a settlement agreement, often drawn at the doors of Court, it is always advisable to consider the task of the Sheriff confronted with the settlement that has now become an order of Court and ask how would the Sheriff execute this order. If the answer is not clear then greater attention needs to be paid to the terms of the draft settlement.

[24] The second scenario i.e the position after the expiry of five years reckoned from date of signature of the settlement agreement which was made an order of court, does not provide for the payment of the R 3 000 000. It simply provides for the registration of an undivided one-third share of the property into the name of the applicant.

[25] This court is now seized with ensuring that there is adherence to this order. In this regard it is not confined to just the writ of execution or the contempt of Court route. That is a false dichotomy. Its options are wider and more practical. For example it may, as contemplated in *Eke v Parsons* (supra), first issue a *mandamus* for compliance wherein it spells out with greater precision and considerations of

practicality dealing with circumstances on the ground, and failing compliance it may then order committal for contempt.

[26] The applicant, though flailing about for a remedy when faced with the inability to register an undivided one-third share of the property into its name, took the appropriately reasonable step of addressing correspondence to the respondent, proposing that the settlement agreement be amended to provide that payment of the sum of R 3 000 000 be made by no later than 2 September 2015 failing which, the applicant would be entitled to attach and sell the property in execution. As pointed out above, no response to this proposal was received and this must weigh with the Court when considering the question of liability for costs.

[27] What applicant ought to have done was to call upon the respondent to pay the outstanding bonds held by Standard Bank. It was, after all, these facts or the failure to pay these amounts which prevented the registration of the one-third undivided share into the name of the applicant. Still, it had opened the door to a negotiated resolution to the impasse and it must receive credit for this.

NATURE OF THE APPLICATION BEFORE THIS COURT

[28] The alternative amended relief the applicant is claiming in terms of the amendment, is for specific performance compelling the respondent to ensure that all encumbrances over the property are settled, alternatively, damages for breach of the aforesaid obligations. The respondent argues that the problem that the applicant faces is that the relief it now seeks was not even mentioned in its founding affidavit or the replying affidavit. Respondent's counsel argues that the cause of action as set out in applicants founding affidavit and as persisted with in the replying affidavit, was that the specific performance that it now seeks was impossible to perform.

[29] In *MEC for Health, Gauteng vs 3P Consulting*, 2012(2) SA 542 (SCA) at 551D, Van Heerden JA held as follows:

“While it is so that a party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically raised in the papers, provided that all relevant facts are before the court, this will not be allowed if it causes prejudice to the other party”. See too *Minister Van Wet en Order v Matshoba*, 1990(1) SA 280 (A) at 285E – I.

[30] The respondent contends further that the relief sought in the amended notice of motion by the applicant runs directly opposite to the factual contentions put forward in its affidavits filed. I disagree. The facts in this matter are effectively common cause. It is the legal construction of these facts which has changed.

[31] The respondent further contends that the applicants’ case as formulated in its founding affidavit, did not call for evidence relating to whether or not the respondent was able to give effect to an order for specific performance. I am unable to agree with the respondent. The applicant applied to amend its notice of motion. The respondent did not object to this amendment and raised no contentions that it would be prejudiced by the amendment. The respondent did also not request the leave of this court to file further affidavits pursuant to such amendment. The matter now falls to be adjudicated upon the evidence before this court.

ENFORCEMENT OF THE ORDER

[32] The settlement agreement was made an order of court on 23 June 2015 on an unopposed basis and by definition with the respondent’s consent. The settlement agreement was thus, according to the respondent, as at June 2010 and still currently, capable of being enforced (indeed, this was the very basis for her opposition). In the respondent’s affidavit, she contends that the settlement agreement is both valid and

enforceable. She further stated under oath that what the applicant would have received, had no bonds been registered over the property, was one third thereof.

[33] The respondent contended that the settlement agreement/order is capable of enforcement if Standard Bank consents to the registration of the one-third undivided share. What is clear, is that the settlement agreement is enforceable if she, the respondent, settles the bonds held by Standard Bank. According to the annexures annexed to the founding papers, Standard Bank are owed R875 000 in respect of Bond Number B171342/2007 and R125 000 in respect of Bond Number B9616/2002. These allegations were contained in paragraph 15 of the applicant's founding affidavit and were not denied by the respondent. They stand undisputed.

[34] The only thing which stands between the applicant and it being the owner of a one-third undivided share in the property, free of encumbrances, is the payment by the respondent of the amounts owing in respect of the two bonds to Standard Bank.

[35] The respondent had five years within which to sell the property and to pay the applicant the sum of R 3 000 000. She did not do so. She had five years within which to anticipate and prepare for the transfer of the one-third undivided share in the property "free of encumbrances". The respondent knew, since date of signature of the settlement agreement that, in the event of her not selling the property within the five year period, she would be obliged to transfer an unencumbered undivided one-third share. In this regard, the comments of Madlanga J in *Eke v Parsons* (supra) at paragraph 41 are apt:

"Justice between the two litigants demands that their settlement agreement, which was made an order of Court, must be given effect. After all, a court's duty is to do justice between the litigants. In this instance, justice demands that Mr Eke be held to his bargain." (quoted without footnotes).

[36] In my view, the respondent must be held to her bargain. At the time of the conclusion of the settlement agreement being June 2010, she agreed that she would be able to give transfer of a one-third undivided share free of encumbrances. In opposing the present application she deposed to an affidavit averring that the settlement agreement (her bargain) was enforceable and valid. When the notice of motion was amended and specific performance of the settlement agreement was sought, she did not oppose the amendment of the notice of motion. She further did not request this court's leave to file evidence in support of her inability to settle the outstanding bonds with Standard Bank or any other fact which in her view, would have been relevant to this court performing its functions. Under these circumstances I can see no reason why this court should not order the respondent to do what she undertook, five years ago, to do.

COSTS

[37] The basis for the relief which is granted, being the enforcement of a court order, is not the same case the applicant in its initial notice of motion brought the respondent to court to meet. The applicant, via correspondence and amendment attempted to meet the legal obstacles put up by the respondent and at every turn, was met with more hurdles. There could be no doubt in the mind of the respondent that what the applicant wanted, was either the R 3000 000 or the one-third undivided share in the property, unencumbered. The respondent offered neither.

[38] The applicant has been successful, admittedly not on the basis argued. In exercising my discretion in favour of the applicant in respect of the issue of costs, I am mindful of this. In my view, the respondent used the machinery of the law to avoid performing her obligations in terms of the settlement agreement (now order), as she

was entitled to. However, she has now come to the end of this legal road and must bear the costs of such privilege.

ORDER

[39] I accordingly grant the following order:

- 39.1. The respondent is ordered to settle any and all outstanding bonds and encumbrances over the Remaining Extent of Portion 9 of the Farm Vlakfontein No. 30, Registration Division IR, Province Gauteng (**'the property'**), including but not limited to Bond Number B171342/2007 and Bond Number B9616/2002, held by Standard Bank of South Africa Limited, within three months from the date of this order;
- 39.2. The obligations contained in prayer 39.1 hereof, do not include the obligation to settle the applicant's bond in the sum of R 3 000 000, it registered over the property;
- 39.3. The respondent is ordered to sign all necessary documentation, within ten (10) business days of the expiry of the three month period referred to in paragraph 39.1 hereof, to transfer a one-third undivided share in the property to the applicant;
- 39.4. In the event of the respondent failing to sign all necessary documentation within the prescribed time frame, the Sheriff of this Court is authorised and directed to sign all necessary documentation on the respondent's behalf;
- 39.5. The respondent is to pay the costs of this application.

I OPPERMAN
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 9 February 2016
Further heads submitted: 17 February 2016
Judgment delivered: 18 March 2016
Appearances:
For Applicant: Adv SJ Mushet
Instructed by: Reon Marais
For Respondent: Adv F du Toit SC
Instructed by: Christo Smith