

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO. 2472/2020

In the matter between:

ANSU JONES

Applicant

And

CECIL LEWIS JONES

Respondent

JUDGMENT

GQAMANA J

[1] The applicant claims payment from the respondent in the amount of R977 000.00 as well the costs.¹ This application concerns the enforcement of an undertaking by the respondent to pay to the applicant fifty percent of the net proceeds from the sale of the farm, emanating from an oral agreement to that effect.

[2] The background facts which underpins this application are as follows. The applicant and the respondent were married to each, until such marriage was terminated by a divorce order on 8 November 2002.² The terms of the aforesaid divorce order reads:

“Dat die huweliksband tussen eiser/es en verweerderles hierby ontbind word.

1 Index; pp 1 – 2, prayers 1 and 3. Prayer 2 was abandoned by the applicant.

2 Index; p 14; annexure “AJ1”.

Dat die Ooreenkoms tussen die partye ingehanding en gemerk “B”, hierby ’n bevel van die Hof gemaak word.”

- [3] In terms of clauses 2.1, 2.3 and 6 of the aforesaid settlement agreement referred to in the divorce order the parties agreed *inter alia*, that:

“ONROERENDE EIEDOM GELEë TE SLIGOSTRAATE 6, KENMARE.

KRUGERSDORP: [the Krugersdorp property]:

- 2.1 Hierdie eiendom bly die gesamentlike eiendom van die Eiser en die Verweerder, onderhewig aan die Eiser se lewenslange vruggebruik (*ius habitatio*). Die Eiser se prokureurs van rekord word opdrag gegee om na afloop van die verkryging van die egskeidingsbevel sodanige *ius habitatio* teen die titelakte van die eiendom te laat registreer.
- 2.3 Indien die eiendom by ooreenkoms tussen die partye verkoop sou word, word die netto-opbrengs van die verkoop van die eiendom gelykop tussen die partye verdeel. Mnr. Couzyn Hertzog & Horak sien toe tot oordrag van die eiendom.

QUANDO FLORA GIFTS [the flower shop]

- 6 Die Verweerder onderneem om sy 50% - aandeel in die blommewinkel, Quando Flora Gifts aan die Eiser oor te dra sonder om enige vergoeding daarvoor te ontvang asook om alle dokumentasie op aanvraag te onderteken ten einde uitvoering te gee aan die oordrag van sy ledebelang.”

- [4] Despite the divorce order, the applicant and respondent decided to continue with cohabitation and, for many years thereafter they lived together as partners but were not married. In 2003, the respondent purchased the Balmoral farm (“the farm”) for R445 000.00 and a bond was registered over the farm. It is contended by the applicant that the intention of the respondent and her was that, both of them should be registered as joint owners of the farm. However, she only became aware later that she was not registered as the joint owner in the farm. In support of her contention, she attached the copy of the deed of sale and she contends that she signed it and her name as the purchaser together with the respondent was deleted. Her version is denied by the respondent.

- [5] The Krugersdorp property and the flower shop were both sold. There is a dispute about the purchase price of the Krugersdorp property but that is of no moment in my view. Because it is common cause that in terms of clause 2.3 of the settlement agreement, the applicant was entitled to 50% of the net proceeds of the Krugersdorp property and on her

version she is not claiming that amount in this application. In addition, the respondent in terms of clause 6 of the settlement agreement had to transfer 50% of his interest in the flower shop to the applicant. The flower shop was sold for R180 000.00 and the entire amount had to be paid to the applicant. It is common cause that the proceeds of the flower shop (i.e. R180 000.00) and the 50% of the applicant's net proceeds on the sale of the Krugersdorp property, were both paid to the respondent instead of the applicant. The respondent is also not disputing that he used some of the proceeds of the sale of the flower shop and the Krugersdorp property which belonged to the applicant, to fund the purchase of the farm.³ The respondent, however, contends that this was done with the applicant's full knowledge and blessing.

[6] During 2014/2015, the respondent made an oral undertaking to pay the applicant 50% of the net proceeds of the sale of the farm, whenever that farm is sold. On the applicant's version, it is that undertaking which her claim is founded and which she seeks to enforce. It is common cause that the farm was sold for an amount of R2 050 000.00 during 2020.

[7] In opposing and resisting the relief the applicant seeks, the respondent argued that the applicant, through her attorney, misrepresented to him that the applicant still has an enforceable claim in terms of the divorce order which was granted on 8 November 2002 and based on such misrepresentation, he made the offer in *error* and such error was *justus*. Therefore, the applicant's claim against him was unenforceable. In addition, the respondent takes issue with the quantification of the applicant's claim.

[8] Flowing from the defences raised in the preceding paragraph, the respondent seeks to escape liability on the basis that, he was misled by the applicant through her attorney in making the oral undertaking to pay 50% of the net proceeds of the sale of the farm. On the respondent's version, he acted under the mistaken belief that the amounts claimed on the

³ Index p 70 para 5.2.

applicant's behalf were due and payable and had he been aware of the true state of affairs, that such amounts had prescribed and were no longer enforceable, he would not have made the undertaking. The respondent's aforesaid defence is predicated on his contention that the applicant's claim is founded on the divorce order granted in November 2002.

- [9] In advancing the respondent's case, *Mr Du Toit* argued that, the applicant's claim for both the proceeds of the sale of the flower shop, and the net proceeds of the sale of the Krugersdorp property,⁴ have prescribed.
- [10] The applicant's counsel *Mr Arnoldi SC* conceded that, if the applicant's claim was for the payment of the R180 000.00 i.e. the proceeds of the sale of the flower shop, such a claim would have prescribed. But his argument was that the applicant's claim is founded on an oral undertaking by the respondent to pay 50% of the net proceeds of the sale of the farm and not on the old debt and, reference to the settlement agreement in the divorce order is simply to lay the historical background upon which the oral undertaking was made by the respondent. It was argued that the old debt was taken over by the new undertaking that the applicant would receive 50% of the proceeds of the farm when it is sold. The applicant only became aware during 2020⁵ that the farm was sold for an amount of R2 050 000.00 to Dicla Training & Projects (Pty) Ltd.
- [11] Relevant to the respondent's argument is section 11(a) and (d) of the Prescription Act 68 of 1969, ("the Act") which deals with the periods of prescription of debts. A debt prescribes after 30 years in respect of a judgment debt and three years in respect of any other debt.

⁴ Which was sold in March 2005.

⁵ Index; p 43.

[12] It is trite that prescription begins to run as soon as the debt is due. However, the term due is not defined in the Act. In *Standard Bank of South Africa v Miracle Mile Investments 67 (Pty) Ltd and Another*,⁶ the SCA held that:

“In terms of the [Prescription] Act, a debt must be immediately enforceable before a claim in respect of it arise. In the normal cause of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor. Thus, in *Deloitte Haskins & Sells Consultants (Pty) Ltd Bowthorpe Hellerman Deutsch (Pty) Ltd 1991(1) SA 525 (A)* at 532 G – H, the court held that for prescription to commence running,

“there has to be a debt immediately claimable by the creditor or, stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately.”

[13] Mr *du Toit* made the following submissions that, the applicant’s rights and entitlement on the net proceeds of the Krugersdorp property was determined by the deed of settlement in the divorce order. The settlement agreement is silent on the time for payment of the applicant’s portion of the proceeds and because there was no time set, the debt became due when the Krugersdorp property was sold. The property was sold in March 2005 and therefor, the debt was immediately claimed then and has since prescribed in terms of s11(d) of the Act. The same argument was advanced in respect of the proceeds of the flower shop that, the applicant’s claim for R180 000.00 has also prescribed. Therefor the undertaking the respondent made was based on misrepresentation by the applicant’s attorney that such debt was still enforceable. For his submission reliance was placed in *Trinity Asset Management Pty Ltd v Grindstone Investment 132 (Pty) Ltd*.⁷ His entire argument was premised on the respondent’s contention that the applicant’s claim is founded on the divorce order of November 2002. To a greater extent, the argument on prescription and misrepresentation are factually intertwined.

[14] The evidence and case made out by the applicant in her founding affidavit is that, her claim is for the enforcement of the oral undertaking made by the respondent that she would receive 50% of the net proceeds of sale of the farm. It is for an applicant to set out and

6 2017(1) SA 185 (SCA) para 24.

7 2018 (1) SA 94 (CC) para 20.

define the nature of the dispute in the founding affidavit and the court's duty is to adjudicate upon those issues clearly defined in the affidavits. However where there are disputes of facts between the applicant's version and that of the respondent, the relief sought would be granted only if the facts stated by the respondent, together with the facts admitted in the applicants affidavits justify the order.⁸

[15] In this case in my view, reference to the divorce order and the settlement agreement in the applicant's founding affidavit was made only to show the sound legal basis upon which the respondent made such undertaking. The applicant is neither claiming the proceeds of the flower shop nor that of the Krugersdorp property. This is also borne out by the amount that she claims in the notice of motion. Her claim is not for the R180 000.00 and the 50% of net proceeds of the Krugersdorp property, but the 50% proceeds of the sale of the farm less the amount of R48 000.00 that she is indebted to the respondent. Until the farm was sold during 2020, her debt was not claimable and there was no debt in respect of which the respondent was under the obligation to perform. The debt became due when the farm was sold. Therefore, the applicant's claim has not prescribed.

[16] The respondent further argued that he was misrepresented to make the undertaking and as such he made the offer in *error*, and such *error* was *justus*.

[17] In *George v Fairmead (Pty) Ltd*,⁹ Fagan CJ said the following:

“... if his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound.” [my underlining is my emphasis].

[18] For the respondent to succeed on his defence of misrepresentation, he has to prove that the applicant and / or her attorney are to be blamed. The evidence presented herein,¹⁰ i.e.

⁸ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984(3) SA 623 (A).

⁹ 1958(2) SA 465 (A) at 471 C – D.

¹⁰ Annexures “AJ3”–AJ7”

emails and whatsapp messages all originate from the respondent. The respondent himself expressly repeated his undertaking in different wording but, the content remaining the same that the applicant would receive her 50% of the net proceeds of the sale of the farm. To demonstrate this point, the respondent on numerous occasions and evident in annexures “AJ3”, “AJ4”, “AJ6” and “AJ7” said the following:

“Wanneer die plaas verkoop word kry jy die helfte van die verkoopprijs min uitstaande bedrag...”¹¹

Ek sal my word hou en vir jou die helfte van die plaas se geld gee.¹²

Ek se weer vir jou ... **Jou helfte van Balmoral is sy lig weilig**, en my testament en ook met die ANC kontrak. So moet nie daar oor bekommerd wees nie¹³

... Ansu Ek het geen, **doel om jou te wil bedonner nie, jy kry jou helfte van die “F...” plaas soos ek die helfte gaan kry ... Jy kry die helfte van hierdie plaas soos wat ons ooreengestem het.** So, ek kan nie verstaan wat jou problem is, nou skielik nie asseblief Ansu wat is dit nou met jou?”¹⁴

- [19] The respondent in highlighting the misrepresentation he relied on, referred me to annexure “CLJ3”¹⁵ and argued that the applicant’s claim emanates from the settlement agreement in the divorce order as evident in paragraph 2 thereof. The letter states that the respondent was in terms of the court order obliged to pay the amount of the sale of the flower shop to the applicant. It was argued further that, paragraphs 3, 4 and 5 of the same letter contains allegations that are factually incorrect which also misled the respondent. The argument was further that the misrepresentation is also evident from annexure “CJL9”,¹⁶ in that paragraph 2 thereof, again refers to the court order of 8 November 2002. Based on these misrepresentations it was argued that the respondent was entitled to resile from the undertaking because he was misled to believe that the applicant’s claim was still

11 Index; p 25, “AJ3”.

12 Index; p 27, “AJ4”.

13 Index; p 29, “AJ6”.

14 Index; p 30 “AJ7”.

15 Index; p 81(A), the letter of 20 January 2014, from the applicant’s attorney.

16 Index; p 92.

enforceable while in fact, it was not. Therefor on the basis of *justus error*, the respondent should be allowed to resile from the undertaking.

[20] Mr *Arnoldi SC* conceded that paragraph 2 of annexure “CLJ3”¹⁷ is incorrect but he argued that what is contained therein is of no consequence.

[21] For what I have already stated in paragraphs 14, 15 and 18 above, my objective evaluation of this case and the annexures thereto, the applicant’s claim is not founded on the settlement agreement, but on the oral undertaking the respondent made that, the applicant would receive 50% of the net proceeds of the sale of the farm. The annexures that I referred to in paragraph 18 above lends support to my finding. Reference to the old debt was merely to show the legal basis upon which the respondent made the undertaking.

[22] The respondent’s argument is not sustainable on the facts and evidence at my disposal. The respondent was aware of the content of the settlement agreement in the divorce order. He was also aware of the sale price of the flower shop and the Krugersdorp property. Reference to the sale of the flower shop and the Krugersdorp property in annexure “CLJ11”¹⁸ at paragraph 2.5 was incorporated therein to motivate to the respondent’s attorney to come to the settlement of the matter. Context is everything, because paragraph 2 of the letter, speaks exactly on settlement of the applicant’s claim in respect of the proceeds of the farm.

[23] The applicant also argued that when the farm was purchased the parties intended to be registered as joint owners because the offer to purchase, (annexure “X”) was signed by both of them but unbeknown to the applicant, her name was removed and she only became aware of that later. The respondent in his affidavit has not denied that there was no

¹⁷ At p 81(A).

¹⁸ Index; p 102.

intention that the applicant and him would be joint owners of the farm. His contention was that there was absolutely no need for the applicant to be a co-owner of the farm because the plan was not to farm the property on a commercial basis.¹⁹ However, I find this issue, on whether there was such an agreement or not on the joint ownership of the farm, to be of no moment. Even if, that issue is decided in favour of the respondent it would be inconsequential to crux of this case. The question here is whether the applicant through her attorneys misled the respondent to make the undertaking on a debt which was not enforceable and if so, whether he should be allowed to resile from such undertaking.

[24] On the respondent's own version, he admits that he used some of the proceeds of the sale of the flower shop and the Krugersdorp property to purchase the farm.²⁰ Flowing from this admission, the respondent took money which belonged to the applicant and utilized it towards the purchase of the farm. It is comprehensible why the respondent made the undertaking to the applicant that, she will receive 50% of the net proceeds of the farm when it is sold. The respondent was not misled by the applicant through her attorney to make such undertaking.

[25] The respondent's further submission was that, even if the court finds against him on misrepresentation, the application must still fail because the amount claimed in paragraph 1 of the notice of motion has not been proved. It is common cause that the farm was sold for R2 050 000.00.²¹ The undertaking by the respondent was to pay 50% of the net proceeds of the sale of the farm. There was a mortgage bond registered over the farm in the amount of R420 000.00. There was no evidence of the outstanding amount over such bond. Neither was there evidence on any amounts due for agent's fees that were still to be paid from the purchase price.

19 Index p 70 para 52,.3.

20 Index p 70 para 52.2.

21 Index p 43, annexure "AJ11".

[26] The respondent was invited by the applicant's attorney to submit the final account in respect of the sale of the farm in order for the applicant to be able to calculate her 50% of the net proceeds which she was entitled to. In the same letter, the applicant stated that on her available facts, her 50% share in the proceeds of the farm would be R1 025 000.00 and invited the respondent to dispute this amount and to state the correct version on the information at his disposal. The respondent decided not to dispute such calculation. The applicant could not have been expected to calculate more than what was within her knowledge. On the amount claimed in paragraph 1 of the notice of motion, the applicant has subtracted and set off an amount of R48 000.00, which she is indebted to the respondent from the 50% net proceed of R1 025 000.00, which she is entitled to in terms of the oral agreement with the respondent. Based on this evidence I am satisfied that the claim was properly quantified on behalf of the applicant.

[27] On the issue of costs, there was no submission made by either of the parties against the general rule, that the costs follow the results and there are no reasons on the facts herein to depart from such general rule.

[28] In the circumstances the following order would be issued:

1. The respondent is ordered to pay to the applicant the amount of R977 000.00.
2. The respondent is ordered to pay the applicant's the costs of this application.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	<i>Adv A F Arnoldi SC</i>
Instructed by	:	Couzyn Hertzog and Horak Inc.
Counsel for the Respondents	:	<i>Adv P du Toit</i>
Instructed by	:	Britz Attorneys
Date heard	:	27 May 2021
Date delivered	:	16 August 2021