

THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 2271 / 2022

In the matter between:

BERDINE ODENDAAL

Applicant

and

THE SOUTH AFRICAN RESERVE BANK

Respondent

Coram: Wille, J

Heard: 1 February 2024

Delivered: 7 February 2024

JUDGMENT – [LEAVE TO APPEAL]

WILLE, J:

Introduction

[1] This was an application for leave to appeal against (as I understood it) a portion of the order (and, therefore) the judgment I delivered during the middle of last year. I made myself available to hear this application last year. Still, due to the unavailability of the senior counsel retained by both parties, the hearing of this application took some time. Thus, more than six months have passed since the adverse ruling against the applicant. The applicant seeks leave to vacate the order against her through this application. I dismissed her initial application with costs.

[2] Initially, the applicant sought, among other things, mandatory interdicts against the respondent for the specific performance of alleged undertakings given by the respondent. This was allegedly in terms of an agreement struck with the respondent. The applicant sought an order directing the respondent to permit her to receive payment of R150,000,00 (per month) from certain funds subject to an attachment under 'blocking orders' issued at the respondent's instance and, in addition to this, her reasonable legal fees.

[3] Initially, the relief was sought (so says the applicant) based on an alleged agreement between the parties and relying on an alleged breach of the applicant's constitutional rights. The constitutional ingredient to her application (such as it was) does not form part of this application for leave to appeal in that the applicant has abandoned this argument. Further, as I understand it, the applicant has also abandoned her claim for her reasonable legal fees over and above the monthly allowance of R150,000.00.

[4] This application for leave to appeal is now solely focused on the sum of R158,000.00, which has been retained by the respondent following my order and remains in the ringed-fenced blocked funds under the respondent's control. The sum of R158,000.00 is made up of one tranche of R150,000.00 allegedly due to the respondent in terms of the agreement struck with the respondent. The remaining sum of R8000,00 is the only remaining tranche in these blocked funds under the control of the respondent, representing the last portion of these ring-fenced funds. This then, is what this application for leave to appeal was about.

Grounds of appeal

[5] The core complaint concerns my determination of the issue of '*repudiation*' in the peculiar circumstances where a contracting party demands the specific performance of an alleged asserted contractual right, which right itself is the subject of a dispute. The applicant initially advanced that she had the right to claim for her reasonable legal fees over and above the monthly allowance of R150,000.00.

[6] The applicant averred that because she advanced an application seeking specific performance of a term of the agreement with the respondent (which term she alleges existed) different from the 'true' agreement between the parties, she was not signifying an unequivocal intention not to perform an obligation resting on her in terms of the 'true' agreement. This could not (so she says) conceivably constitute a repudiation of her '*obligations*' regarding the contract with the respondent. This was her case from inception. After that, surprisingly, during the argument advanced, the applicant contended that no obligations rested on her in terms of the agreement with the respondent concerning the allocation of these blocked funds. This was a belated and dramatic shift from the initial argument advanced by the applicant.

Consideration

[7] On the contrary, the respondent contended that an obligation refers to the requirements or actions the parties must fulfil to meet their contractual obligations. These may include making payments, delivering goods or services, or maintaining confidentiality. The respondent submitted that an obligation is also the legal requirement to obey the entire contract.

[8] Put another way, obeying the entire contract also includes adhering to other terms and conditions, such as timelines, warranties, dispute resolution procedures, and any other provisions specified in the contract.

[9] Essentially, obeying the entire contract means abiding by all the terms and conditions outlined in the agreement, including but not limited to fulfilling obligations. It is crucial to consider and comply with all aspects of the contract to ensure that it is fully enforced and that all parties' rights and obligations are respected.

[10] It serves to be emphasized that the applicant initially launched an application only to release 'reasonable legal funds' to her from the funds blocked by the respondent. This portion of the relief has now been abandoned. By way of an amendment, the applicant sought to 're-instate' the release of R150,000.00 (per month) from the blocked funds to her, which amounts she had been historically receiving in terms of the agreement she had struck with the respondent.

[11] Significantly, if the applicant believed that uncertainty existed regarding some of the terms of the agreement, it was open for her to proceed by way of a declarator. In the circumstances, a declarator could not be considered to constitute a breach of the contract. I say this because a declarator is a legal action taken by a party to a contract to seek a court's declaration or determination of the party's rights, obligations, or the interpretation of contract terms. It is a safe means to clarify the contract's terms or resolve any disputes arising from its interpretation.

[12] Conversely, an application for specific performance could constitute a breach of contract, which could occur when one party fails to fulfil their obligations as outlined in the contract without a legal justification. It involves a violation or non-performance of a material term or condition of the contract. So, while a declarator is a legal action seeking clarification or resolution, it will not ordinarily constitute a breach of contract.

[13] Instead, it is a tool to address disputes or uncertainties concerning the contract. It does not directly address a breach of contract. Thus, it seeks to establish the legal rights and obligations of the parties involved and aims to resolve uncertainties or disputes regarding the interpretation or validity of the contract itself.

[14] The applicant elected not to proceed by way of a declarator while this procedure was always open to her. The respondent would have been hard pressed to stop the monthly payments to the applicant in the face of a declaratory remedy. Instead, like *Oliver Twist*, the applicant elected to make the demand for 'more' money through litigation. This in the context where the applicant is not subjected to poverty. Further, she does not experience harsh living conditions and her predicament does not shed light on the social inequalities and injustices of the

Victorian-Era (in England). I refrain from making any references to any other *dramatis personae* in this celebrated novel by Charles Dickens.

[15] Undoubtedly, the answer to all these questions was fact-driven. I believed the respondent's facts were good, and the applicant's facts were not good. Turning for a moment to the legal issues. My findings on the issue of '*repudiation*' did not affect reversing any judicial precedent, did not create new law, and did not lead to an incorrect result. The applicant was obliged to abide by all the material terms of the agreement with the respondent. In addition, the very trust between the parties was not promoted by the application for specific performance incorrectly chartered by the applicant.

[16] In summary, I remain unpersuaded that a court of appeal could arrive at a different conclusion based on a dispassionate evaluation of the facts and our jurisprudence.¹ I believe there is no reasonable prospect that an appeal court will find that repudiation does not occur when a contracting party unequivocally intends not to comply with his or her material contractual obligations, without lawful excuse.

[17] On the undisputed facts, the applicant had already received over R1.7 million from her blocked account, which was (at the time of the application) nearly depleted. The applicant's reasonable expenses must, therefore, have included her legal fees, as she had her own income to cover her living expenses. This according to her initial list of expenses submitted to the respondent for consideration.

Order

[18] For all these reasons, the application for leave to appeal is refused. I make the following order:

1. The application for leave to appeal is refused.
2. The applicant shall be liable for the costs of the application (including the costs of the retained senior counsel) on the scale. between party and party. as taxed or agreed.

¹ *Ramakatsa and Others v African National Congress* [724/2019] [2012] ZASCA 31(31 March 2021) para [10].

E.D. WILLE
(Cape Town)