

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

CASE NO: A292/2020

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO  
DATE: 02/03/2023

In the matter between:

J[....] E[....]1

Appellant

and

C[....] E[....]2

Respondent

**JUDGMENT**

**MOKOSE J**

[1] The appellant and respondent were previously married to each other in community of property, which marriage was terminated by an order of divorce, which order incorporated a settlement agreement between the parties. Except for a few items of furniture, some personal items, a Toyota bakkie and the business known as The Guest House B&B were allocated to the appellant in the settlement agreement.

The respondent, as part of the settlement agreement waived all loan claims against the family trust and resigned as a trustee and beneficiary thereof.

[2] An interim application was launched by the respondent to compel the appellant to comply with the terms of the settlement agreement and order payment of the sum of R350 000,00. The respondent had agreed in terms of the settlement agreement to do so within thirty days of the date of the divorce and the further sum of R2 750 000,00 was payable on or before 28 February 2017. The appellant fell in mora with the payment of the sum of R350 000,00. On 23 April 2017 he offered to pay the sum of R219 818,79 in full and final settlement by which time the respondent has made it known to the appellant that she suspected that there had been a misrepresentation of the full extent of the joint estate. This tender was rejected by the respondent.

[3] The respondent instituted an action against the appellant and others under case No 48949/2013 ("the main action") in which she seeks an order that the court confirms that the settlement agreement was cancelled by her on the basis that the appellant misrepresented to her the value of the joint estate and for an order that she is entitled to half the joint estate as it existed at the date of the divorce, including the assets of the Ellis Familie Trust. This matter is pending.

[4] In the application that is the subject matter of the appeal before this Court, the respondent, as the applicant a quo, had sought an order for:

- (i) Payment of the sum of R350 000,00 and R2 950 000,00 within 7 days of the date of the order, pending the outcome of the aforementioned action;
- (ii) In the event that the respondent succeeded in her aforementioned action, the respondent would be obliged to cause restitution of the capital amount received in terms of the orders in this matter in a matter to be directed by the Court granting the order in the said action; and
- (iii) that the appellant further be ordered to pay to the respondent mora interest on the amounts aforesaid from 13 April 2012 in respect of the amount of R350 000,00 until date of payment thereof and from 1 March 2017 on the sum of R2 950 000,00 until date of payment.

[5] The court a quo ordered, inter alia, that the appellant is to pay the total sum of R3 300 000,00 to the applicant within 7 days of the date of the order pending the outcome of the action instituted by the respondent in the main application.

[6] It is common cause that the appellant refused to pay both the sum of R350 000,00 and R2 950 000,00 which he had undertaken to pay by the end of February 2017. He relied on the belief that his obligations were suspended as a result of the action instituted by the respondent which he viewed as a repudiation of the settlement agreement. The appellant was further of the view that the amounts claimed by the respondent were only payable to her as a result of the provisions of clause 9.1 of the settlement agreement.

[7] The issue in this matter is whether the appellant should be held to comply with the obligations in terms of the settlement agreement in circumstances where the respondent had allegedly repudiated the settlement agreement and refutes the court order which had been granted.

[8] The appellant contends that his obligations to the respondent were in terms of the court order and ceased to be in terms of the settlement agreement. He further contends that the relief obtained by the respondent was final in the nature of specific performance of the settlement agreement. Accordingly, the respondent cannot seek to avoid the contract and at the same time seek to enforce it. He relies on the case of *Comwezi Security Services (Pty) Limited v Mowzer NO*<sup>1</sup> in which the question of compliance with the settlement agreement was discussed. This judgment confirmed the trite position that a repudiation not accepted by the other party leaves the contract and all obligations in terms thereof of full force and effect, but that a court has a discretion in appropriate circumstances, to suspend the obligations of the "innocent party" while the repudiation continues. An appropriate circumstance is where the obligation in question is a reciprocal one.

[9] It is common cause that the appellant never approached this court for an order to suspend the order for payment as per the settlement agreement. The respondent

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<sup>1</sup> [2104] ZASCA 22 t paragraphs 10 to 12.

avers that there is therefore no excuse not to have made the payments as per the order. However, the appellant relies on a contention that he derived a reciprocal “advantage” from concluding the agreement, namely that he would not have to litigate about the division of the joint estate. The court a quo held that this contention is misconceived.

[10] The appellant contends that he agreed to the respondent getting more than her fair share of the joint estate and that he would not have given up anything by signing the settlement agreement. No evidence was given in the court a quo that the appellant sacrificed anything when signing the contract whether it was to save on costs of litigation or to avoid inconvenience. It is notable that the appellant has only dealt with that which he alleges the respondent was satisfied to accept and not with the values of the joint estate nor the family trust.

[11] Reciprocity of performance is present where the one performance in terms of a contract is in exchange for a performance of the other party in terms of a contract.<sup>2</sup> There is a clear difference between the terms of a contract and the motivation of concluding that contract. The motivation may include benefits a party may expect to derive from the contract. It was held in the matter of *Van Reenen Steel (Pty) Limited v Smith NO and another*<sup>3</sup> that a party cannot vitiate a contract based upon a mistaken motive relating to an existing fact even if the motive is common unless the contract is made dependant on the motive or if the requirements for a misrepresentation are present.

[12] I agree that this contention by the respondent is misconceived. The benefit which the appellant alleges he is deprived of while the action is pending is not a counter performance. This is not a case of reciprocity of performances. The appellant had been entrusted with tasks and obligations in the process of distributing the assets of the joint estate in terms of the settlement agreement which was made an order of court. There were no reciprocal obligations on the respondent in terms of the settlement agreement. On the appellant's own version, he has in his possession more of the assets of the joint estate than would represent a fair division. It is evident

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<sup>2</sup> De Wet and Van Wyk *Kontraktereg en Handelsreg* 5th edition (1978) page 177

<sup>3</sup> 2002 (4) SA 264 (SCA) at para 9

that there has been no prejudice to the appellant in not suspending his obligations in terms of the settlement agreement.

[13] The appellant also contends that the relief sought and obtained by the respondent was final in nature and that the respondent's contention that it was interim is borne out by the relief claimed being, inter alia:

- (i) In prayer 3 of the Notice of Motion the respondent claimed that the appellant must be further ordered to pay to the respondent mora interest on the amounts claimed from 13 April 2012 in respect of the sum of R350 000 to date of payment and from 1 March 2017 on the sum of R2 950 000 until date of payment;
- (ii) that the relief claimed was enforcement of the settlement agreement which is specific performance which in final in nature and effect.

[14] The mora interest is part of the performance. Performance of a term of the obligation does not make the order final in its nature. The interim order does not have final effect because if the respondent should succeed, restitution should follow and the court in the main matter will again have to consider whether the money now claimed will have to be returned by the respondent in full or in part. If the respondent fails in the action, the amount would not be paid back. An interim position may still be confirmed in the main matter. Because the order was granted interim, the court of first instance would be entitled to amend the order as it sees fit.

[15] In the premises and for the reasons stated above, we are of the view that the court a quo did not err in its finding that the relief sought by the respondent was not final in its effect and did not constitute an order for specific performance of a contract which had been made an order of court and was final in nature. Accordingly, the following order is granted:

The appeal is dismissed with costs including the costs of two counsel

MOKOSE J  
Judge of the High Court

of South Africa

I agree and it is so ordered

DAVIS J

Judge of the High Court  
of South Africa

I agree and it is so ordered

BALOYI-MBEMBELE AJ

Acting Judge of the High Court  
Of South Africa

Matter heard: 10 October 2022

Judgment handed down: 02 March 2023

Appearances: Adv SD Wagener SC

For the Appellant: For Respondent:

For the Respondent: Adv JL Van Der Merwe SC

Adv M Naude