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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 26567/2021

DATE: 20TH NOVEMBER 2023

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

K, D

First Plaintiff

E, D M

Second Plaintiff

E, I

Third Plaintiff

and

E, C

Defendant

Neutral Citation: *K and Others v F* (26567/2021) [2023] ZAGPJHC ---- (20 November 2023)

Coram: Adams J

Heard: 02 and 03 November 2023 – on 02 November 2023 the trial was conducted in open court and on 03 November 2023 the matter was heard ‘virtually’ as a videoconference on *Microsoft Teams*.

Delivered: 20 November 2023 – This judgment was handed down electronically by circulation to the parties’ representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 20 November 2023.

Summary: Compromise agreement – dispute of fact relating to a term of the alleged agreement – plaintiffs deny particular term – not expressly discussed during settlement meeting – for a contract to be considered valid and binding, there must be consensus *ad idem* between the contracting parties – subjectively no meeting of the minds on this aspect – not disputed that the plaintiff, in his mind, did not agree to term – therefore, parties not *ad idem* – no settlement agreement concluded.

ORDER

- (1) In terms of Uniform Rule of Court 33(4), the ‘Special Defence’ of settlement and compromise raised by the defendant in paragraphs 25A, 25B, 25C, 25D and 25E of her amended plea (‘the separated issue’), was separated from any and/or all other disputes between the parties.
- (2) At the commencement of the trial on Thursday, 02 November 2023, it was directed and ordered that the matter would proceed to trial only on ‘the separated issue’, with the hearing relating to the remaining disputes between the parties postponed *sine die*.
- (3) The defendant’s special defence of settlement / compromise fails and it is declared that the dispute between the parties has not been settled /

compromised by a settlement agreement concluded between them on 02 July 2023, as alleged by the defendant.

- (4) The defendant shall pay the plaintiffs' costs relating to the separated issue, including the costs consequent upon the employment of two Counsel, one being a Senior Counsel.

JUDGMENT

Adams J:

[1]. The first, the second and the third plaintiffs are all related. The second and the third plaintiffs are husband and wife and the first plaintiff is their son-in-law, married to their daughter. The defendant used to be married to Glen F ('Glen'), the son of the second and the third plaintiffs, but was divorced from him by a decree of divorce of this court on 08 June 2021, after what appear to have been protracted and somewhat acrimonious divorce proceedings. On 29 July 2021 – less than two months after the divorce was granted – the plaintiffs caused summons to be issued in this action against the defendant, claiming R1 million from her, which they allege is in respect of monies lent and advanced by them to the defendant at her special instance and request during July 2012.

[2]. The claims by the plaintiffs are vigorously defended by the defendant, who denies liability *inter alia* on the basis that the loans in favour of her and Glen were in contravention of the provisions of the National Credit Act¹ ('the NCA') and therefore void *ab initio*. As regards the alleged loan for R1 350 000 from the second and the third plaintiffs, the defendant denies liability for same as, according to her, there was no loan agreement concluded with her.

[3]. On Sunday, the 2nd of July 2023, a meeting was held at the offices of the attorneys of the plaintiffs, which was attended, on behalf of the plaintiffs, by the second plaintiff and the plaintiffs' attorney, Mr Darryl Ackerman, and, on behalf of the defendant, by her attorneys, Mr Swartz and a Ms Hodes. Also present at

¹ National Credit Act, Act 34 of 2005;

the meeting was Advocate Jonathan Hoffman, who acted in a mediatory role, and who is in fact the one who suggested to the parties that they should convene a meeting to see if they could find a resolution to the dispute between them. He had also offered to try and mediate as far as he could, as the parties and/or their legal representatives are all known to him.

[4]. At the said meeting, so the defendant claims, the dispute between the parties in this action, as well as other related disputes, were settled on the basis that the plaintiffs would be paid in total the sum of R600 000 and that the aforesaid settlement sum would be paid, as a first charge, from the proceeds of the sale of the matrimonial home of Glen and the defendant, whereafter the nett proceeds would be divided equally between Glen and the defendant. The nett effect of this is that the agreed settlement amount, as per the defendant, would be paid half by the defendant and half by Glen. This is denied by the plaintiffs who avers that the agreement was that the R600 000 would be paid from the defendant's portion of the proceeds of the sale of the house.

[5]. The defendant is adamant that the agreement, as alleged by her, was reached and she accordingly raised a 'special defence' of compromise in her amended plea, the relevant portion of which reads as follows: -

'25A. On 3 July 2023 and at the offices of the plaintiffs' attorneys, Darryl Ackerman Attorneys, the plaintiffs, duly represented by the second plaintiff, and the defendant, duly represented by Ms Gabriella Hodes and Mr D Swartz of the Defendant's attorneys concluded an oral agreement ("the settlement agreement").

25B. The express terms of the settlement agreement were as follows: -

- 25B.1 From the proceeds of the sale of the immovable property being Portion Number 10 of Erf [...] in the Township of Birdhaven, held under title deed number T65744/2012 and situated at [...], Johannesburg ("the property"), the amount of R600 000.00 will be paid to the plaintiffs.
- 25B.2 The balance of the proceeds of the sale of the immovable property after the deduction of the amount of R600 000.00 referred to in paragraph 25B.1 above will be paid equally to the defendant and to Glen F
- 25B.3 All of the pending litigation between the plaintiffs, the defendant and F was fully and finally settled on the terms as stated in paragraphs 25B.1 and 25B.2 above, save for the monthly payments of the divorce costs payable by F to the defendant which would be unaffected and remained due and payable monthly.

25C. The plaintiffs refuse to abide by, and have consequently repudiated, the settlement agreement as evidenced *inter alia* by correspondence from the plaintiffs' attorneys. The defendant refuses to accept the plaintiffs' repudiation of the settlement agreement.

25D. The plaintiffs' refusal to abide by, and consequent repudiation of, the settlement agreement is unreasonable and *mala fide*.

25E. In the circumstances: -

25E.1 The plaintiffs are obliged to adhere to the settlement agreement.

25E.2 The plaintiffs' claims, if any, have been compromised in terms of the settlement agreement.'

[6]. At this stage, the issue to be considered in this action is whether agreement has been reached by the parties, as alleged and pleaded by the defendant. Crystallized further, the main dispute between the parties is whether the agreement provided that the R600 000 settlement amount was to be paid from the defendant's portion of the proceeds of the house or whether that amount was to be a first charge against the proceeds. The parties are *ad idem* as regards the other terms of the agreement and it is only the aforesaid issue which requires consideration by the Court. At the commencement of the trial on Thursday, 02 November 2023, the parties indicated that they require this issue to be separated from all other disputes between the parties and that the trial should proceed only on that aspect of the matter. I am in agreement with the submissions on behalf of the parties that it would be convenient to separate the issues and I accordingly granted an order to that effect.

[7]. This issue should be decided against the factual backdrop of the matter and, in particular, against the facts relating to the meeting between the parties on 02 July 2023, most of which is common cause. The facts are to be gleaned from the evidence led during the trial. In that regard, Mr Swartz, Ms Hodes and Advocate Hoffman gave evidence on behalf of the defendant and the second plaintiff and Mr Ackerman testified on behalf of the plaintiffs.

[8]. In my view, the real question to be asked is whether subjectively there was a meeting of the minds in relation to this aspect of the agreement and whether the parties were *ad idem* about this particular term of the agreement. This question is asked at a fundamental level and relates to the basic general

principle relating to contracts that there must be consensus *ad idem* between the contracting parties.

[9]. The parties are agreed that the purpose of the meeting was to settle this litigation and certain litigation related to it. The parties also seem to have agreed on the main terms of the settlement agreement, such as the amount of the settlement to be paid to the plaintiffs. However, the very next day, being Monday, the 3rd of July 2023, it became apparent to all concerned that there may not have been agreement on this one particular issue. Within an hour of receiving the defendant's version of what transpired at the meeting from Ms Hodes, Mr Ackerman responded that there was a patent misunderstanding, and insisted that:

'Before we take any further steps in preparing a draft settlement agreement, you need to confirm that your understanding of the agreement matches ours.'

[10]. The point is simply that, in the minds of the second plaintiff and Mr Ackerman, the agreement was that the settlement sum of R600 000 would be paid from the defendant's portion of the proceeds of the sale of the house. This was their evidence during the trial and this was their version right from the start as communicated to the defendant's legal representatives the very next day after the meeting. The parties were not *ad idem*, and the minds did not meet. There can be no doubt about that.

[11]. The alternative postulation is that, as between Mr Ackerman and the second plaintiff, they had specifically agreed and accepted on the day of the meeting that the said sum would be paid from the proceeds before the balance is split equally between the defendant and Glen. Thereafter, they decided between them that they wanted to resile from the agreement, and fabricated the story about their understanding of the terms of the agreement. We know from the evidence that that is not so. The second plaintiff testified that his understanding was always that the said amount would be paid from the defendant's portion of the proceeds. In any event, this alternative postulation and version, in my view, is highly improbable and far-fetched.

[12]. This is so despite the fact that, the discussion during the meeting was probably to the effect that the R600 000 settlement sum would come from the proceeds of the sale of the house, whereafter the balance would be split 'equally' between the defendant and Glen. The evidence of Advocate Hoffman was to that effect. This does not however detract from the fact that it has to be accepted that the second plaintiff understood this to mean that the said sum would come from the defendant's portion of the proceeds. The second plaintiff never said that he would accept R300 000 from the defendant. The words R300 000 were never used at the meeting. Had he been asked at the meeting whether his understanding of the agreement is that Glen would be paying R300 000 towards the settlement amount, his answer would no doubt have been in the negative.

[13]. The foregoing, in my view, is confirmed by the evidence of Mr Swartz, who indicated that, at the time of the meeting, there may have been doubt in his mind whether the second plaintiff knew exactly what his proposal entailed. Why it was not simply asked of the second plaintiff as to whether he agreed to his son paying R300 000, remains a mystery. Moreover, it bolsters my view that the second plaintiff, in his mind, was not agreeing to that particular term. That, in my judgment, is the end of the defendant's assertion that an agreement was concluded on the terms and conditions alleged by her.

[19] For all of these reasons, the defendant's 'special defence' of compromise should fail.

Costs

[20] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule.

[21] The defendant should therefore be ordered to pay the plaintiffs' costs relating to the compromise defence.

Order

[22] Accordingly, I make the following order: -

- (1) In terms of Uniform Rule of Court 33(4), the 'Special Defence' of settlement and compromise raised by the defendant in paragraphs 25A, 25B, 25C, 25D and 25E of her amended plea ('the separated issue'), was separated from any and/or all other disputes between the parties.
- (2) At the commencement of the trial on Thursday, 02 November 2023, it was directed and ordered that the matter would proceed to trial only on 'the separated issue', with the hearing relating to the remaining disputes between the parties postponed *sine die*.
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- (4) The defendant shall pay the plaintiffs' costs relating to the separated issue, including the costs consequent upon the employment of two Counsel, one being a Senior Counsel.

L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON:	2 nd and 3 rd November 2023
JUDGMENT DATE:	20 th November 2023 – judgment handed down electronically
FOR THE FIRST TO THE THIRD PLAINTIFFS:	Advocate J P Daniels SC, together with Advocate M J Cooke
INSTRUCTED BY:	Darryl Ackerman Attorneys, Dunkeld West, Johannesburg
FOR THE DEFENDANT:	Advocate C Whitcutt SC, together with Advocate E Larney
INSTRUCTED BY:	Swartz Weil Van der Merwe Greenberg Incorporated, Melrose Estate, Johannesburg