

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER:6305/2018

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

HGM STEELBOYS CC

PLAINTFF

And

MOEPATHUTSE PROPERTY MANAGEMENT

FIRST DEFENDANT

AND COSTRUCTION

SECOND DEFENDANT

MONI FLORA MAGONGWA

THIRD DEFENDANT

MATSOBANE JOSEPH MANALA

FOURTH DEFENDANT

PUDIYABATHO

JUDGEMENT

KGANYAGO J

- [1] During October 2018 the plaintiff has instituted action against defendants claiming R889 223-69. The action against the first defendant was based on goods sold and delivered. The second to the fourth defendants were sued on the basis of the surety agreement that they have signed binding themselves as co-principal debtor, jointly and severally with the first defendant.
- [2] The defendants have defended the plaintiff's action. On entering an appearance to defend, the plaintiff applied for summary judgment. Before the summary judgment could be heard, the parties negotiated and reached a settlement agreement wherein the defendants agreed to pay the plaintiff the sum of R700 000-00. The plaintiff did not proceed with the summary judgment application. The settlement agreement was not made an order of court.
- [3] The defendants have failed to pay the plaintiff in terms of the settlement agreement. The plaintiff has applied for a default judgment on the basis of the settlement agreement in terms of Rule 41(4) of the Uniform Rules of Court (the Rules) on the same papers.
- [4] The plaintiff's default judgment application was set down for the 26th January 2021. The settlement agreement did not make provision for parties to approach court on the same papers in case of breach of the

agreement. On 26th January 2021 the first question which the court had raised with the plaintiff's counsel was whether the plaintiff can approach the court on the same papers and apply for a default judgment even though the settlement agreement did not make provision for that. The second question was whether the settlement agreement did not compromise the plaintiff's action since it was not made an order of court. Counsel for the plaintiff requested for an adjournment in order to enable her to file short head of arguments.

[5] In her head of arguments counsel for the plaintiff relies on **Rule 41(4)** of the Uniform Rules of Court, the cases of **Massey Ferguson (South Africa) Ltd v Ermelo Motors (Pty) Ltd 1973(4) SA 206 (T)** and **Siebert & Honey v Tonder 1981(Z) SA 146 (O)**. It is the plaintiff's contention that when the plaintiff and defendants entered into the settlement agreement, their intention was to have the action finalised by way of settlement. That Rule 41(4) does not have requirements regarding the settlement, but that it simply amplifies the intention of the parties for the action to be concluded on a manner as set forth in the settlement agreement. Further that the purpose of sub-rule 4 should help to reassure the parties that their agreement is enforceable and avoid further unnecessary legal action.

[6] The plaintiff further submits that under common law, application on notice to the defendant is required to be made to court relevant to a settlement being made an order of that court. The plaintiff further

submits that in this matter the attempt to make the settlement an order of court was brought clearly within the provisions of Rule 41(4) in mind, and not by way of confession to judgment or in terms of the common law. It is the plaintiff's contention that the reference in Rule 41(4) to the entitlement to apply for judgment requires application on notice to all relevant parties, as stipulated in the Rules, and that all that is required is a notice to the other side that an application will be brought on the date assigned by the registrar or directed by a Judge. The plaintiff therefore submit that it has complied with the requirements for bringing a proper application in terms of Rule 6(1) by giving the defendants proper notice of its intention to bring the application, based on the settlement to court for the appropriate order.

[7] It is common cause that after the plaintiff has instituted action against the defendants, both parties have negotiated and ultimately reached an agreement as to the settlement of the matter. The agreement of both plaintiff and defendants was reduced to writing and both parties have signed the settlement agreement. According to the plaintiff, the defendants have failed to effect payment as per the settlement agreement. The plaintiff has brought an application in terms of Rule 41(4) seeking a default judgment based on the signed settlement agreement.

[8] Rule 41(4) read as follows:

“Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out may apply for judgment in terms thereof on at least five days’ notice to all interested parties.”

[9] The terms of the settlement agreement read as follows:

“1. The first to fourth defendants shall jointly and severally, one pays the other to be absolved, pay to the plaintiff an amount of R700 000-00(seven hundred thousand rand) in full and final settlement of this action.

2. The amount referred to in clause 1 hereof (R700 000-00) shall be paid by the defendants to the plaintiff on or before close of business on 04 May 2019.

3.The plaintiff and defendants shall each be liable for their own costs incurred in this matter as at the respective dates of signature hereof.

4.The defendants undertake to provide the Department of Cooperative Governance, Human Settlements and Traditional Affairs with a copy of this settlement agreement within 5 (five) days of signature thereof, failing which the plaintiff may do so.

5.The settlement is the whole agreement between the parties in respect of settling the above matter. None of the parties rely in entering into this settlement agreement on any warranties, representations, disclosures or expressions of opinion which have not been incorporated into this settlement agreement. No amended, variation or novation of this settlement agreement shall be valid or enforceable unless such amendment, variation or novation is reduced to writing and signed by the plaintiff and the first to fourth defendants.”

[10] When the plaintiff and defendants negotiated the settlement, concessions were made and that resulted in the defendant’s liability been reduced. Therefore, when the settlement agreement was signed, it

was a compromise of the dispute that led to the plaintiff instituting action against the defendants. The plaintiff is not entitled to fall back on the original cause of action in case of breach unless the settlement agreement made an express or implied provision for that. (**See Weltmans Custom Office Furniture (In Liq) v Whistlers CC.¹⁾**)

[11] The defendants have failed to effect payments in terms of the settlement agreement. The question is whether the plaintiff since it will not be able to fall back on the original cause of action, can it be able to obtain a default judgment in terms of Rule 41(4) based on the settlement agreement signed by both parties.

[12] The settlement agreement does not contain any provision of enforcement in case of breach by either party. It has no provision for consent to judgment in case the defendants default with their payments. It also does not have express or implied provision that entitle the plaintiff to return to court on same papers in case of default by the defendants.

[13] **In Elke v Parsons²** Madlanga J said:

“[25] This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place, relate directly or indirectly to an issue or lis between the parties. Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court...

¹ 1999(3) SA 116 (SCA) at paras 15 & 16

² 2016(3) SA 27 (CC) at paras 25 & 26

[26] Secondly, the agreement must not be objectionable, that is, its terms must be capable, both from a legal and practical point of view, of being included in a court order. That means, its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy. Thirdly, the agreement must hold some practical and legitimate advantage.”

[14] An agreement should be drafted in clear and unambiguous terms so that it will not leave any room for doubt. The plaintiff's and defendants' agreement makes no provision for breach or failure to comply with its terms. It therefore does not appear in the settlement agreement as to how many days must the defendants be given in case of breach or failure to comply with its terms. From the papers filed, it does not appear that any demand for payment was ever made to the defendants after the 4th May 2019 which will have put the defendants in mora.

[15] Clause 5 of the settlement agreement provides that none of the parties rely in entering into this settlement agreement on any warranties, representations, disclosures or expressions of opinion which have not been incorporated into the settlement agreement. As I have already pointed out in paragraph 12 supra, the settlement agreement does not have provision for consent to judgment in case of breach or failure to comply with its terms. The settlement agreement has also no provision for the plaintiff to approach the court on same papers in case of breach or failure to comply with its terms. Therefore, in my view, the plaintiff is not entitled to a default judgment in the manner in which it is seeking. The function of the courts is to adjudicate live disputes between the parties and not to be turned into debt collectors. Since the agreement

was never made an order of court, the route which the plaintiff was supposed to follow, was to institute a fresh action based on the alleged breach of the settlement agreement, or bring an application to have the settlement made an order of court since it was reached during the cause of the litigation.

[16] In the result I make the following order

16.1 The plaintiff's application for default judgment in terms of Rule 41(4) is dismissed

16.2 There is no order as to costs.

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

Counsel for the plaintiff	: Ms Maryke de Jager
Instructed by	: De Bruin Oberholzer Attorneys
Date heard	: 28th January 2021
Date delivered	: 11th March 2021