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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 2569/2016
Heard on: 19/05/2017
Delivered on: 02/06/2017

In the matter between:

J. B. APPLICANT/DEFENDANT

And

R. B. _____ RESPONDENT/PLAINTIFF

JUDGMENT ON COSTS

MAMOSEBO J

[1] In the initial application Mr J. B. sought the following relief:

1.1 That the respondent, Mrs R. B., his ex-wife, be ordered to transfer the property situated at W. C. [...], Table View, Cape Town, into her name within 30 days of the granting of the order, failing

which she is ordered to put the property in question up for sale at a public auction within 14 days of the expiry of the initial period.

1.2 That in the event that Mrs B. fails to comply with Prayer 1.1 (above) the sheriff in whose jurisdiction the property is situated (Cape Town / Western Cape), is hereby authorised and directed to put the said property up for public auction on the first available date and the sheriff is furthermore authorised and directed to sign all necessary documents to give effect to the transfer of the property.

[2] Mr and Mrs B. were married in community of property but their marriage ended in divorce before Lacock J on 09 March 2009. Each party was legally represented. The decree of divorce incorporated a Deed of Settlement was made an order of court.

[3] Para 2 of the Deed of Settlement “Annexure A” reads:

“2.1 Dat die verweerder betaal aan die eiseres die bedrag van R1 600 000.00, welke bedrag betaalbaar is binne ses maande vanaf datum hiervan of teen registrasie van die eiendomme, bekend as Erf [...] (P.) (ook bekend as K. [...], P.) en Erf 402, P. (ook bekend as H. [...], P.), welke ookal eerste plaasvind.

2.2 Dat die eiendom geleë te W. C. [...], Table View, Kaapstad, die uitsluitlike eiendom van die eiseres word en sal eiseres verantwoordelik wees vir die betaling van die uitstaande balans op die verband en enige registrasiekoste verbonde aan die transporterings van die eiendom op haar naam.

2.3 Dat die partye alle dokumentasie benodig vir die oordrag van enige van die voormelde eiendomme onderteken en moet eiseres alle nodige

dokumentasie ten opsigte van haar ledebelang in die J. B. Brokers CC en Erf [...] CC, onderteken.”

Each party was ordered to bear his or her own costs.

- [4] The couple entered into a separate agreement, “Annexure B” on 06 December 2012 which regulated the payments to Mrs B. as well as the transfer of the property at [...] W. C., Table View, Cape Town into Mrs B.’s name. Para 1.6 of this agreement stipulates:

“R. B. undertakes to put the property to the open market to be sold at a market related price should the bond not be transferred to R. B. within 2 (two) months after the full amount due to R. B. have been settled in full. R. B. shall provide written proof to J. B. in this regard.”

- [5] The application in para 1 (1.1 and 1.2) was issued on 23 November 2016 and duly served on Mrs B.. She filed her Notice of Intention to Oppose on 21 December 2016 but did not file any Answering Affidavit or opposing papers to counter Mr B.’s allegations.

- [6] The matter was enrolled for hearing on 27 January 2017. On this day my sister Erasmus AJ granted the following order by agreement between the parties:

“1. The respondent shall proceed (either herself or by means of, or with the assistance of, a financier third party) with the necessary actions to transfer the property known as W. C. [...], Table View, Cape Town (hereinafter referred to as ‘the property’) and the relevant bond into her [and/or such financier third party(s) name] within sixty (60) days of the date of this order and provide proof thereof and deliver relevant concomitant guarantees upon request by the applicant, failing which the respondent is ordered to

put the property up to be sold at a public auction within thirty (30) days after such initial sixty (60) days period.

2. *Both the applicant and the respondent are ordered to sign any documents and to do any such things are necessary and/or required to give full and proper effect to the order in paragraph 1 above.*
3. *The applicant shall not be entitled to any remuneration or sale amount or other benefit as a result of the aforementioned process.*
4. *In the event that the respondent fails to comply with the order in paragraph 1 above, the sheriff in whose jurisdiction the property is situated, is hereby authorised and directed to put the property up for auction on the first available date and the sheriff is furthermore authorised and directed to sign all necessary documents to give effect to the transfer of the property.*
5. *The issue of costs is reserved and is postponed for hearing on the opposed roll on 19 May 2017.”*

[7] It is common cause or not in dispute that Mr B. settled the amount in terms of the agreement which he owed Mrs B.. Mrs B. was in the premises obliged to put the property to the open market to be sold at a market related price in the event that the bond being transferred into her name within the stipulated two months. See para 4 (above).

[8] The two months period within which Mrs B. had to transfer the property (W. C. [...], Table View, Cape Town) into her name kicked in on 19 May 2016 as confirmed by her own attorney who wrote “Annexure C”:
“Ons verwys na bostaande aangeleentheid asook vorige korrespondensie hierin.

Na deeglike oorweging en in oorleg met ons kliënt is ons nou van opinie dat u kliënt wel die bedrag soos ooreengekom afbetaal het.

Sedert u bewus is van die logistieke- en ander beperkinge wat ons kantore ervaar as gevolg van die fisiese afstand tussen ons kliënt en ons kantore asook die feit dat die lêer tussen departemente gewissel het, stel ons u hiermee in kennis dat die twee maande waarna verwys word in klousule 1.6 van die relevante skikkingsooreenkoms vandag begin verloop.

Ons kliënt bevestig dat sy dienoooreenkomstig sal handel.”

- [9] After the lapse of two months, which later spanned over four months, and notwithstanding numerous correspondence and being placed on that unless the requested necessary documents are furnished by the close of business on 16 September 2016 an application would be launched to compel compliance the failure endured. Hence this application.
- [10] Mr B. states and I have to agree with him that Mrs B. does not take the matter seriously enough and that it is not good enough that she claims that Absa Bank is unwilling to approve the full amount of the bond and that she intended to “consult with a bond originator.”
- [11] The further averments by Mr B. are not without merit where he makes out his case as follows:
- “7.1 The Court Order and/or settlement agreement referred to herein supra gives me a clear right or alternatively a prima facie right to bring this application.
- 7.2 The Court Order and/or settlement agreement gives me the right to be released from the mortgage bond upon paying off the amount that was due to the respondent.
- 7.3 The respondent is infringing on my rights in that:

7.3.1 *I am unable to buy any other property due to the fact that the mortgage bond on the property in dispute is still registered on my name and I have not yet been released therefrom.*

7.3.2 *I am also not sure about the respondent's financial position and if she fails to pay the instalment on the mortgage bond and the arrears continues to accrue, the mortgagee might institute action to sell the house on auction and/or list both our names on the credit bureaus.*

7.3.3 *At this point I am not sure what the future holds in regards to the property hence this application to court to protect me from harm in any way possible.*

7.4 *The matter has been dragging since May 2016 and is still continuing without any progress on the side of the respondent.*

7.5 *This whole issue has already caused me a lot of headaches in the form of legal costs, failure to buy another house, inconvenience, possible credit bureau listing, etc*

7.6 *It might also cause further damage to me if the matter is not finalised as a matter of urgency.*

7.7 *There is no other suitable remedy available other than this application to force the respondent to comply with the Court Order and/or settlement agreement.*

7.8 *The balance of convenience therefore favours the granting of this application."*

[12] It is evident that Mrs B. needlessly frustrated her ex-husband by dragging out this matter to the point of being obstructionist. Mr B. is evidently successful and should not be out of pocket. She should have offered to pay costs at the inception of the case. In **Jenkins v SA Boiler Makers**,

Iron & Steel Workers & Ship Builders Society 1946 WLD 15 at 17 Price J stated:

“I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days, or perhaps even for weeks, trying dead issues to discover who would have won in order to determine questions of costs, where cases have been settled by the main claims being conceded. If the court were eventually to say, that it awarded costs to a particular party because on the evidence that party would have won on that issue, would the disappointed party then be entitled to appeal in order to upset the decision as to who would have won on the dead issue that has been tried? This must necessarily follow if Mr Kuper’s application is entitled to succeed. When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation. This is much to be preferred to laying down a principle which require courts to investigate dead issues to see who would have won on such issues. In most such cases the litigants would be required to incur far greater costs than those at stake. In my view the costs must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits of a case that has already been settled.”

- [13] Adv Thompson, appearing for the applicant, submitted that the conduct of Mrs B. does not only warrant an award of costs but such costs have to be on the attorney and client scale. Mrs B. was afforded ample opportunity

to rectify her non-compliance with the court order but a year later she had failed to do so. She was aware of the hearing date which was reserved for arguments for costs. However she failed to either appear or instruct a legal representative to appear on her behalf. Du Toit & De Beer, her erstwhile attorneys were validly served with the Notice of Set down on 15 May 2017 at 09h27.

[14] A divorce is a status matter where even a successful party is not regarded as a winner. However, the issue before me has nothing to do with the status of the parties but with the agreements that they have entered into subsequent to the divorce. Mrs B. was obstructionist and a punitive cost order is justifiable. See *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607.

[15] In the result the following order is made:

The respondent, Ms R. B., is ordered to pay costs on an attorney and client scale.

MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the applicant:

Instructed by:

For the respondent:

Adv DR Thompson

Gous Vertue & Associates

c/o Engelsman Magabane Inc

No appearance

Instructed by:

Barnard Inc

c/o Du Toit & De Beer Attorneys