



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D11077/2023

In the matter between:

REDINK RENTALS (RF) LIMITED

FIRST APPLICANT

TOWER INVESTMENTS (PTY) LTD

SECOND APPLICANT

REDINK RENTALS SECURITY (SPV) RF (PTY) LTD

THIRD APPLICANT

and

EDUCOR HOLDINGS (PTY) LTD

FIRST RESPONDENT

A1 CAPITAL (PTY) LTD

SECOND RESPONDENT

DAMELIN (PTY) LTD

THIRD RESPONDENT

INTEC COLLEGE (PTY) LTD

FOURTH RESPONDENT

LYCEUM COLLEGE (PTY) LTD

FIFTH RESPONDENT

ORDER

In the premises the following order is made:

1. The respondents' application is dismissed.
2. Each party to bear its own costs.

JUDGMENT

Mathenjwa J

[1] The first and second applicants instituted applications for the winding-up of the first and second respondents under case numbers D9850/2021 and D10495/2021 respectively. The winding-up applications were argued and judgment reserved. The first, second and third respondents subsequently concluded a settlement agreement with the applicants on 2 May 2023 prior to the handing down of the judgment. On 4 May 2023 the winding-up applications were withdrawn by the first and second applicants by consent in terms of the settlement agreement.

[2] After the withdrawal of the winding-up applications the respondents defaulted on payment in terms of the settlement agreement. The applicants issued notices informing the respondents that they were in default with payment in terms of the settlement agreement and calling upon the respondents to make payment within five days.

[3] On 6 October 2023 the applicants launched the main application for monetary judgment against the respondents. On 20 October 2023 the respondents delivered a notice to oppose the main application and on 8 November 2023 they delivered their notice in terms of rule 30(2)(b) informing the applicants that the application for default judgment was irregular and afforded them an opportunity to remedy the irregularity. After the applicants had failed to remedy the irregularity the respondents launched this application (the interlocutory application) which is opposed by the applicants.

[4] Both the main application and the interlocutory application was enrolled for hearing before me on 28 February 2025. At the commencement of the hearing I was advised by counsel for both parties that the first and fourth respondents were in a state of deregistration. Kasvan Kannigan who was a director of the first respondent prior to its deregistration deposed to a supplementary affidavit in which he stated that he learnt on 5 February 2025 that the first respondent was in a state of deregistration and on 25 February 2025 he applied for the re-registration of the first respondent. Melvin Munsami who was the director of the fourth respondent prior to its deregistration deposed to an affidavit wherein he stated that he recently became aware after this matter had already been set down for hearing that the fourth respondent is presently

in a state of deregistration and on 27 February 2025 he made an application for the re-registration of the fourth respondent.

[5] Both counsel agreed that the main application should be adjourned. Counsel for the respondents Mr *Harpur* SC contends that the interlocutory application also should be adjourned but the applicants counsel Mr *Troskie* SC opposed the adjournment of the interlocutory application. At the end of the parties' argument I made the following order:

1. The main application is adjourned *sine die*.
2. The application for adjournment of the interlocutory application is refused.
3. Reasons for refusal of the adjournment will be given in the judgment'.

[6] I refused the application for adjournment for the following reasons. The respondents request for an adjournment was based on the fact that the first and fourth respondents were deregistered and no longer exist, therefore no order can be made against the non-existing respondents. In my view the matter before me is distinguishable from an application where a party is seeking substantive relief against the respondents jointly and several. This is a joint application by all five respondents in terms of which they seek an order to set aside the main application on the basis that it is an irregular step. None of the respondents deposed to the founding affidavit in support of the application; their attorney deposed to such affidavit and that attorney is still alive. The attorney who deposed to the affidavit ought to be familiar with all the facts of the case, he may supplement or amend the application should the need arise regardless of whether the first and fourth respondents were before court or not, save that a costs order may not be given against the two non-existing respondents. Furthermore, the applicants are not seeking a substantive order or the performance of any action by the first and fourth respondents, but an order that the application on a procedural issue be dismissed.

[7] This then brings me to the application for condonation. It appears from the applicants main application that they have referred to default judgment, confession in terms of rule 31(1)(c) and judgment in terms of rule 41(4) whereas in their heads of argument their application is an ordinary application for a money judgment.

The respondents application is premised on the alleged fragrant disregard of the rules by the applicants. Given the ambiguity surrounding the grounds of the application, the respondents may suffer serious prejudice if the applicants were to be permitted to pursue the relief in the main application notwithstanding the unresolved complaint. The respondents application is out of time by 13 court days. Considering the short period of delay and the importance of the issues raised in the interlocutory application, it is in the interests of justice to condone the respondents late launching of the application for proper ventilation of the alleged irregular step. Therefore, the application is condoned.

[8] The respondents in their founding affidavit contend that the judgment sought by the applicants in terms of rule 31(1)(c) is irregular since the application for winding-up of the respondents were actions *in rem* whereas the main application is an action *in personam*. Furthermore, the judgment sought in terms of rule 41(4) is irregular since the winding-up proceedings against the respondents were withdrawn. The respondents contend that it is irregular for a party to apply for judgment in terms of a settlement agreement where the proceedings in respect of which the settlement was concluded had been withdrawn.

[9] The applicants in their answering affidavit dispute that they have taken an irregular step and state that it is the express terms of the settlement agreement itself that provides:

- (a) in the event of the respondents breaching any term of the settlement agreement, the applicants shall be entitled to lodge the confession to judgment with the registrar; and
- (b) in the event of the respondents defaulting on the repayment terms recorded in the settlement agreement, the applicants shall be entitled to lodge the written confession to judgment with the registrar as provided for by rule 41(4) and that the withdrawal of applications under case numbers D9850/2021 and D10495/2021 shall not be an impediment to judgment.

[10] In address before Court Mr *Trotskie* submitted that the main application was neither brought in terms of rule 31(1)(c) nor rule 41(4) instead it is a monetary

application brought in terms of rule 6(1). Mr *Harpur* submitted that the denial by the applicants that their application was brought in terms of rule 31(1)(c) read with rule 41(4) thereby contradicting their version in the founding affidavit shows that the application is defective and should be set aside.

[11] The issues for determination in this application are: firstly, whether rule 41(4) prevents a party relying on a settlement agreement from applying to court for enforcement of the terms of the agreement where the proceedings preceding the conclusion of such agreement has been withdrawn and secondly, whether when a party applies to court for enforcement of the terms of the settlement agreement where the proceedings preceding the conclusion of the agreement has been withdrawn that amounts to an irregular step.

[12] In their notice of motion in the main application the applicants seek a monetary judgment for a fixed amount of money. There is no reference to a default judgment or judgment in terms of rules 31(1)(c) and 41(4) in the applicants' notice of motion. However, in paragraph 2 of their founding affidavit the applicants state that the affidavit is in support of the relief sought for default judgment pursuant to a settlement agreement as provided for in rule 31(1)(c) read with rule 41(4). It is instructive that although the applicants referred to rule 31(1)(c) which makes provision for a defendant to furnish a confession to the plaintiff, 'whereupon the plaintiff may apply in writing through the registrar to a judge for judgment according to such confession'. The main application was not brought in terms of that provision, in that no confession was submitted by the applicants to the registrar for judgment.

[13] It is clear from the relief sought that the applicants do not seek judgment in terms of the settlement agreement. The applicants have referred to the terms of the settlement agreement throughout their founding affidavit and in the answering affidavit to the interlocutory application. For example, when explaining the material terms of the settlement agreement in paragraph 14 of the founding affidavit the applicants relied heavily on rule 41(4). In paragraph 14.11 the applicants state that in the event of the respondents defaulting on the payment in terms of the agreement they shall be entitled

to lodge the confession to judgment with the registrar in terms of rule 41(4). In paragraph 55.4 the applicants state that they were placing reliance on a notice served to the respondents in terms of rule 41(4) in launching these proceedings. The parties' settlement agreement refers to rule 41(4) and service of notice in terms of rule 41(4) and providing the respondents with notice in accordance with rule 41(4) in the event that they fail to make payments as stipulated in the settlement agreement. Because these things represent provisions of the settlement agreement, it is therefore inevitable to refer to rule 31(1)(c) and rule 41(4), confession to judgement and default judgement while discussing the terms of the agreement.

[14] When the matter was argued before me I asked counsel for both parties whether they can refer to any authority in support of the contention that once the proceedings has been withdrawn in respect of which a settlement agreement was concluded the terms of the agreement is no longer enforceable in law, or alternatively in support of the contention that the terms of the settlement agreement are enforceable even though the proceedings preceding such agreement has been withdrawn. Counsels were unable to refer to such authority however counsel for the respondents contended that the plain meaning of rule 41 (4) is that a party may not rely on a settlement agreement if the proceedings in respect of which it was concluded has been withdrawn.

[15] Rule 41(4) provides that:

'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.'

A settlement agreement is a contract between the parties which is handled in terms of the law of contract.¹ The purpose of an agreement to settle a matter in dispute between the parties, is to put an end to existing litigation and to avoid litigation.² The importance of settlement of disputes has been reinforced by the introduction of rule

¹ *Thutha v Thutha* 2008 (3) SA 494 (Tkh).

² *Gollach & Gomperts (1967) v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 921C.

41A on 9 March 2020 which encourages parties to settle their disputes rather than engaging in costly and protracted litigation. Settlement agreements have benefits to the litigants by avoiding a costly and acrimonious trial, and to the administration of justice by reducing overcrowded court rolls.³

[16] It is trite that a settlement agreement may be made an order of the court in terms of rule 41(4) if;

- (a) it relates directly or indirectly to an issue or *lis* between the parties;
- (b) its terms must accord with the Constitution and the law; and
- (c) it holds some practical and legitimate advantage.⁴

If other terms of the settlement agreement were not incorporated by court in the settlement agreement order they can still be enforced by means of a fresh suit.⁵ Thus, in instances where a settlement agreement is not made an order of the court a party may still institute an application separate from the previous proceedings based on the contractual terms of the settlement agreement. In the event a party seeks to make a settlement agreement an order of court the application should be brought before the proceedings preceding the settlement agreement has been withdrawn. However, where the party seeks an order enforcing the terms of the settlement agreement, he or she may apply to court for enforcement of the terms of the settlement agreement even though the proceedings preceding the settlement agreement have been withdrawn. The reason being that a settlement agreement can be a novation in terms of which the parties may replace an old contract with a new contract.

[17] Rule 30(1) entitles a party against whom an irregular step has been taken by any other party to apply to court to set it aside. It is correct that the applicants referred to rule 31(1)(c) in their founding affidavit, whereas they have not applied for a confession to judgment through the registrar. It is not in dispute that the main application arose from the respondents' breach of the terms of the settlement agreement. In the settlement agreement reference is made to rule 41(1). Although

³ *Eke v Parsons* 2016 (3) SA 37 (CC) para 23.

⁴ *Eke* above fn 2 paras 25- 26.

⁵ *Ibid* para 24.

the applicants have referred to rule 41 (4) and default judgment which are terms of the settlement agreement, they do not seek an order for default judgment nor any order for enforcement of the settlement agreement in terms of rule 41(4). The applicants have referred to these rules as they are contained in the settlement agreement and have launched a monetary application based on breach of the settlement agreement. Therefore, the applicants have not taken any irregular step by launching the application for monetary judgment based on the respondents' breach of the settlement agreement, even though the proceedings preceding the settlement agreement had been withdrawn.

[18] The general principle that costs follow the event does not find application in this matter because the respondents succeeded on the condonation application and the applicants succeeded on the interlocutory application. Therefore, each party should bear its own costs.

Order

[19] In the premises the following order is made:

1. The respondents' application is dismissed.
2. Each party to bear its own costs.

Mathenjwa J

Date of hearing: 28 February 2025

Date of judgment: 27 March 2025

Appearances:

Applicants counsel: A J Troskie SC assisted by D W Eades

Instructed by: Larson Falconer Hassan Parsee Inc.
Durban

Respondents' counsel: G D Harpur SC

Instructed by: Cox Yeats Attorneys
Durban