REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HCAA34/2023
COURT *A QUO* CASE NO: 3957/2023

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
DATE: 19/05/2025
SIGNATURE

In the matter between:

J[...] P[...] V[...] S[...]	Appellant
And	
M[...] M[...] V[...] S[...]	First Respondent

EXILITE 385 CC	Second Respondent
SEVILOR 83 CC	Third Respondent
BDO BUSINESS RESTRUCTURING (PTY) LTD	Fourth Respondent

Coram: Muller J, Ngobeni *et* **Makoti AJ**

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **19 May 2025**.

JUDGMENT

Makoti AJ

Introduction

[1] This appeal came before us with leave having been granted by the Court *a quo*, per Naudé-Odendaal J. At the hearing of the appeal only the Appellant's representatives attended court. The appeal proceeded unopposed, without the benefit of argument from any of the respondents. The first respondent's representatives, who participated in the proceedings in the court *a quo*, elected not to file written argument in this appeal. I am left in a position where the respondent has not advanced any argument as to why the orders made by the court *a quo* are correct or ought to be sustained. This is most unfortunate.

[2] The appellant impugns the and orders granted by Naudé-Odendaal J dated 28 August 2023.[1] This appeal raises the following issues for consideration:

1 Case No. 3957/2023.

[2.1] Whether the court *a quo* erred in not finding the settlement agreement between the appellant and the first respondent to be void and unenforceable;

[2.2] If the settlement agreement is not void and unenforceable, whether the court *a quo* erred in not concluding that it was validly cancelled by the appellant; and

[2.3] Lastly, whether the order granted by Makgoba JP on 13 August 2019[2] remains in full force and effect. This is contingent on this court finding that the settlement agreement is void and unenforceable, alternatively, that it was validly cancelled.

[3] Each of these grounds will be revisited upon consideration of the facts as I consider them below.

The Facts

[4] The origin of this part of their conflict stems from the appellant's two-pronged application that was divided into a Part A and B. These were heard separately on 09 May 2023 and 23 May 2023. No contention arises from the decision in Part A of the application. In Part B the appellant had sought an order to declare the parties' settlement agreement, apparently concluded at Lephalale on 13 August 2021, void and unenforceable. As an alternative, that it was validly cancelled by the appellant.

[5] Further, the appellant sought an order declaring or confirming that the previous orders that were granted in Part A remain applicable and in full force and effect. The orders essentially allowed the appellant access to certain properties, as well as the right to participate in the affairs of Exilite 385 CC (Exilite), the second respondent, and a Land Cruiser (C[...]). The court also barred the first

2 Case No. 4298/2019.

respondent from accessing immovable property known as Farm Middleboompunt 425 Lephalale.

[6] Importantly for purposes of this judgment, in the court *a quo*, Makgoba JP ordered that:

"*5. Neither party shall sell, alienate or encumber any of the assets of the estate of the Second Respondent, which is to include game listed in Annexure 'MM13' to the First and Second Respondents' answering affidavit."*

[7] A further dispute arose between the appellant and the first respondent which resulted in him instituting contempt proceedings against the latter. Before that dispute could be decided, the first respondent instituted an application to wind up the affairs of Exilite. A provisional winding up order was granted on 28 November 2019.

[8] Then, on 23 August 2021 the appellant and the first respondent concluded a written settlement agreement in terms of which they were to end this long running litigation, but proceed with their divorce. They also agreed to the following, *inter alia*:

[8.1] The appellant sold his 100% member's interest in the third respondent, Servilor 83 CC, to the first respondent for an amount of **R3 900 000-00** (Three Million and Nine Hundred Thousand Rand Only).

[8.2] The first respondent indemnified the appellant of maintenance obligations for their three minor children, and up to the end of the year 2024.

[8.3] the appellant was to abandon any claim to Farm Middelboomspunt.

[8.4] The first respondent was to retain 100% member's interest in Exilite.

[9] Before the court *a quo* the appellant impugned the settlement agreement on the basis that it was void. According to him the agreement was *contra bonos mores* and therefore void as it limited their minor childrens' right to claim maintenance. This was said to be because the agreement indemnified the appellant from his maintenance obligations. The argument continues that the applicant has in any case cancelled the agreement as a result of the first respondent's failure to meet their obligations in terms of the agreement.

[10] It is clear that, on both versions, the settlement agreement was concluded subject to a number of suspensive conditions. The appellant's version is that the suspensive conditions were fulfilled. He contended that the first respondent failed to comply with her obligations in terms of the settlement agreement, having failed to pay the sum of **R1 000 000-00** (One Million Rand) within the agreed period of 12 months. Additionally, he contended that the second respondent failed to pay the full amount of **R600 000-00** (Six Hundred Thousand Rand) for a vehicle which she had taken as her own. The first respondent allegedly paid **R400 000-00** (Four Hundred Thousand Rand) leaving a shortfall of **R200 000-00** (Two Hundred Thousand Rand) for one of their motor vehicles.

[11] A notice of demand to remedy the breach, dated 21 December 2022, was not heeded by the first respondent. Accordingly, this led to the appellant taking the decision to cancel the agreement. A notice informing the first respondent of the cancellation of the agreement was sent through the appellant's legal representatives on 22 February 2023.

[12] When the matter went before the court *a quo* it was opposed by the first respondent. She had pleaded, amongst other facts, that she had fully complied with the terms of the settlement agreement by paying all the amounts that she and the appellant had agreed about.

The decision *a quo*

[13] The application was dismissed by the court *a quo*. The court also discharged a *rule nisi* that had been granted earlier on 09 May 2023. The *status quo ante* was restored when an application for leave to appeal was filed and extended upon leave being granted.

[14] The court *a quo* laboriously considered whether the settlement was *contra bonos mores*. The decision went against the appellant, with the court finding that the settlement agreement was applicable up to end of 2024. It also found that the maintenance clause complained of took into account that maintenance had been paid upfront, and was not a waiver of the children's rights to maintenance. The Court concluded the issue thus:

> *"[46] In my view, having considered the surrounding factors and circumstances, I deem it fit and in the best interest of the minor children that the parties agreed to the First Respondent rather than purchasing the property and a lump sum payment in the form of value for the farm, be paid as maintenance in advance for a three year period. In my view, the Applicant was not absolved from paying maintenance and indirectly fulfilled his duty and responsibility to pay maintenance towards the minor children. The specific clause in the settlement agreement is not against public policy in this specific instance and having considered the surrounding factors at play and therefore not contra bonos mores. The application in respect of Pat B of the Notice of Motion therefore stands to be dismissed. It further follows that the rule nisi issued and interim order made on 09 May 2023 is automatically discharged."*

[15] This matter came before us on appeal after the end of 2024. It seems, therefore, inescapable that the issue whether the settlement agreement is against public policy or *contra bonos mores* has become moot. It is no longer

applicable and no practical outcome will be achieved by this Court of appeal deciding it.[3] Therefore, it is not in the interest of justice to adjudicate it in this appeal.[4]

[16] With regard to the second issue in this appeal, the question is whether the First Respondent has breached the settlement agreement. The Court *a quo* rejected the Appellant's contention that he cancelled the settlement agreement due to the First Respondent's breach. It would do justice to the issue to traverse the part of the judgment which dealt with this question. The Court *a quo* noted that:

> *"[23] … The First Respondent submitted that the Applicant bases his averment on two separate alleged breaches, namely:-*
>
> *(a) That the First Respondent failed to pay the amount of R1 000 000.00 (One Million Rand) as required by clause 2.1.3 of the settlement agreement; and*
>
> *(b) That the First Respondent only paid R400 000.00 (Four Hundred Thousand Rand) instead of R600 000.00 as required by clause 2.1.4 of the settlement agreement.*
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> *[24] In this regard, I am of the view that the Applicant's allegations are without merit. Not only on the agreement that the Applicant attached to the founding affidavit, but also on the copy of the settlement agreement attached to the First Respondent's answering affidavit, is it evident that the parties agreed that clause 2.1.3 dealing with R1 000 000.00 was not to be applicable and was the paragraph deleted and initialled by both parties.*
>
> *[25] In addition, the amount of R400 000.00 in clause 2.1.4 was deleted and substituted with an amount of R400 000.00 on both agreements before me and the amendment was initialled seemingly by both parties. The*

3 Section 16(2)(a)(i) of the Superior Courts Act No. 10 of 2013.

4 *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* (104/2022) [2023] ZASCA 35 (31 March 2023) at para 12.

First Respondent complied with clause 2.1.4 and purchased the vehicle in the amount of R400 000.00."

[17] The court *a quo* found no evidence of a breach. The Appellant contends that the manual cancellation and signatures which are reflected in paragraph 2.1.3 dealt only with the terms of payment of the amount of R3 900 000-00 and not the clause in its entirety. If that be the case, the Appellant contended further, the First Respondent was placed on *mora* when she was served with a written demand to make payment of the outstanding amount of **R1 000 000-00** plus **R200 000-00** for the vehicle.

[18] The said amount of **R1 000 000-00** which was mentioned in clause 2.1.3 of the settlement agreement formed part of the full purchase price of **R3 900 000-00**.[5] Clause 2.1.3 is not a stand-alone clause, but is of subclause amongst others, which together set out how the amount of **R3 900 000-00** was to be paid by the First Respondent to the Appellant. Although it is correct, *ex facie* sub-clause 2.1.3, that the settlement agreement was cancelled (being countersigned by the parties), it is not apparent that any of the parties had intended that the amount was to no longer payable.

[19] I am unable to find that cancellation by ink of clause 2.1.3 of the settlement agreement revealed the parties' intention. There was no meeting of their minds regarding dispensing with the First Respondent's contractual obligation to pay the said amount of **R1 000 000-00**. If that was the intention then one would have expected the parties to have also altered the amount of R3,9 million to reflect the decision to reduce the purchase price.

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5 Clause 2.1 of the settlement agreement.

[20] The Appellant, relying on *Breytenbach v Van Wyk*[6] and other authorities contended that where a contract does not set time for payment, a demand by the creditor is necessary to place the debtor in *mora*. I am in agreement with this submission. To the extent that the Court *a quo* found that the amount of R1 million was no longer payable, or had been dispensed with by the parties, it erred. This is so especially taking into account that the full purchase price of R3,9 million remained unchanged.

[21] There was no dispute as amongst all the parties that the Appellant had indeed demanded payment and placed the First Respondent in *mora*. The demand was for both the amount of R1 million and for an amount of R200 000-00 which was said to be the balance of the purchase price for the motor vehicle. From the papers, it appears that the total sum that was claimed on behalf of the Appellant and which led to its decision to cancel the settlement agreement came to about R1 200 000-00. Further, there is no dispute that the First Respondent did not make payment of the said amount following the demand.

[22] Cancellation of an agreement for breach or repudiation is acceptable in our law. In *Pretorius v Bedwell*[7] it was held that repudiation happens when:

> *"[10] … one party to a contract, without lawful grounds, indicates to the other party, whether by words or conduct, a deliberate and unequivocal intention to no longer be bound by the contract. Then the innocent party will be entitled to either: (i) reject the repudiation and claim specific performance; or (ii) accept the repudiation, cancel the contract and claim damages. If he or she elects to accept the repudiation, the contract comes to an end upon the communication of the acceptance of the repudiation to the party who has repudiated. Only then does a claim*

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6 1923 AD 541 at 549. See also, Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga 2013 (2) SA 259 (SCA) at para 17.

7 Pretorius v Bedwell (659/2020) [2022] ZASCA 4 (11 January 2022).

for damages arise. Accordingly, prescription commences to run from that date."

[23] The repudiation in this case being the refusal to pay the full amount as agreed in the settlement agreement. It was the view of the First Respondent that she no longer had to pay the amount of R1 million as the clause that mentioned it had been scratched out. She did not respond to the Appellant's email when he sent a notice for her to settle the amount, and the R200 000-00 balance for the motor vehicle. A letter of demand which followed later did not persuade her to reconsider and pay the outstanding balance.

[24] I have no trouble accepting that the amount of R600 000-00 which the parties agreed upon for the motor vehicle was reduced to R400 000-00. The effect was that the total purchase price was reduced to **R3 700 000-00**. The same cannot be said for the amount of R1 million. As I have indicated, that amount remained payable, with the parties not having agreed terms as to when it would be paid. Payment was demanded but the First Respondent refused to pay it.

[25] Mr Grundlingh for the Appellant relied on *Vromolimnos and Another v Weinbold and Another*[8] and argued that the First Respondent has refused to pay the balance of the agreed amount. He contended further that her conduct represented an unequivocal refusal to pay the full purchase price constituted repudiation. Also, that her refusal to pay the balance owing entitled the Appellant to cancel the settlement agreement. I agree.

[26] A breach that goes to the root of the agreement has been held to be a serious one.[9] The defences that were raised for the First Respondent were that clauses 2.1.3 and 2.1.4 were not applicable and that she had fully complied with her contractual obligations by settling what was due to be paid by her. She

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8 1991 (2) SA 157 (C) at 163B-C.

9 Singh v McCathy Retail t/a McIntosh Motors 2000 (4) SA 795 (SCA) para 13.

disputed that she had failed to perform her obligations in terms the agreement. Nonetheless, the First Respondent did not say that she made the payment of the R1 million, which is more than a quarter of the agreed purchase price. Failure to pay the amount would constitute serious failure or refusal to perform the obligations set out in the agreement.

[27] The First Respondent had an opportunity to remedy the failure when a notice was given to her on 21 December 2021 calling her to pay the outstanding amounts to the Appellant. The notice was followed by a demand on 10 January 2023, from the Appellant's attorneys. She failed to seize the opportunities presented to her to remedy her breach. On 22 February 2023 the Appellant through his attorneys cancelled the agreement. In my view, he is entitled, as the aggrieved party, to cancel the agreement. In finding differently the Court *a quo* erred. The appeal on this score must succeed.

Orders granted by Makgoba JP under case numbers 4298/2019

[28] The Appellant seeks confirmation that the court order granted in under case number 4298/2019 remains in full force and effect. That order was in one of the many cases involving the Appellant and the First Respondent. A long list of orders was granted in Part A of that application by then Judge President Makgoba.[10] Part B was never heard due to the winding up of the Second Respondent on 07 January 2020. The final winding up was subsequently set aside on 27 October 2021 after an application for that purpose was instituted by the liquidators.

[29] It is not necessary to regurgitate all the individual orders, save for paragraph 5 of the order in Part A which states the following:

10 Appeal record p 405.

> *"5. Neither party shall sell, alienate or encumber any of the assets of the Second Respondent, which is to include the game listed in Annexure "MM13" to the First and Second Respondent's answering affidavit."*

[30] The Appellant, who was the Applicant in that case, was himself ordered by Makgoba JP not to interfere with the business of the Second Respondent by *inter alia* issuing threats and/or instructions to the employees of the Second Respondent. That means, if that 2019 order is extant and in full force and effect, the Appellant would still be barred from interfering with the affairs of the Second Respondent.

[31] In Part A of this case the Appellant still pursued an interdict restricting the alienation, disposal or encumbrance of the assets of the Second and Third Respondent. On 9 May 2023 the parties concluded an agreement in which they authorised the sale of an immovable property belonging to the Second Respondent. The property in question is situated at 1[...] D[...] Drive, Pinnacle Point Golf Estate, Mossel Bay, the sale of which the Appellant had sought to interdict. The parties further agreed that the proceeds of the sale would be kept in an interest-bearing trust account with the Appellant's attorneys.

[32] Based on that agreement, it seems to me that the sale by agreement, if finalized, would have had implications for the order that was granted by Makgoba JP. The order of 09 May 2023 was considered to be a *rule nisi* and the Court *a quo* sought to discharge it upon dismissal of Part B of the application. This too was in error. The order was not a *rule nisi* and it was incapable of being discharged. Given its terms, the order had finality in effect in that the property referred to in it could be disposed of. No return date was given for any of the parties to explain why that order should not be made final.

[33] The order of 09 May 2023 had implications making it practically impossible to reinstate the orders as they stood then given this intervening circumstance.

Implicit from the order it is that the identified properties could now be alienated through sale. The sale of any property belonging to the Second Respondent, one should recall, was prohibited in terms of the judgment and orders of Makgoba JP in the case bearing numbers 4298/2019.

[34] There was another intervening factor. The change of status of the Second Respondent when it got wound up. This was prior to the hearing of Part B of that application, when the Second Respondent was placed under provisional winding up in terms of an order from the Western Cape Division on 07 November 2019. The provisional winding up was made final on 7 January 2020. Then, on 23 August 2021 the Appellant and the First Respondent concluded the settlement agreement. In terms of the agreement it was agreed amongst others that the Appellant would sell 100% percent of his member interest in the Third Respondent to the First Respondent.

[35] Returning to Makgoba JP's orders, I do not see how the Part B order can be of full force and effect. It is simply not possible considering the interim order that was granted by agreement between the parties on 09 May 2023. This order was discharged as part of the impugned judgment and orders. It was restored by virtue of the application for and the granting of leave to appeal. If the appeal succeeds, which concerns Part B of the application, it has no implications for the order granted in terms of Part A.

[36] I do not see how it would be possible to resuscitate the orders which were granted by Makgoba JP. Other than that, the appeal succeeds. In my view, the only order that remains in place is the one that was granted at the hearing of Part A of this application on 09 May 2023.

Costs

[37] The Appellant seeks costs for the application, both for Part A and for Part B of this case. This is because the question of costs was reserved for later determination on 23 May 2023. I have mentioned that in Part A the Appellant sought to interdict the sale of any of the properties belonging to the Second and Third Respondents. The agreed outcome was an agreement that the property based in Pinnacle Point Golf Estate, Mossel Bay, would be sold.

[38] Costs usually follow the cause. The aim is to indemnify the successful litigant the expenses which the party has been put through, having been unjustly compelled to initiate or defend the litigation. In *Kruger Bros & Wasserman v Ruskin*[11] the Court held that:

> *"The rule of our law is that all costs –unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised but it cannot be challenged, taken alone and apart from the main order without his permission".*

[39] While the Appellant can claim victory in respect of Part B of the application, that is not the case in terms of Part A. What he sought in that urgent case was not achieved. Instead he ended up agreeing to have one of the properties sold. He was not successful in Part A. He cannot get the costs for that part of the application.

[40] Apart from what I have said above, I see no reasons why the general rule as to the awarding of costs should not be followed, and why the Appellant should not be awarded the costs of this appeal. The costs for Part B therefore follow the result. For his success, the Appellant is entitled to the costs of the application and of this appeal.

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[11] 1918 AD 63 at 69.

[41] It has become customary for litigants to ask for the highest scale of costs possible. Many times without just cause, as it is in this appeal. When the principle for awarding of costs is followed, which is to pay some recompense to the victor. Why scale C? Perhaps it is to discourage an opposing party from litigating. Though the Respondents are liable for costs, the normal party and party scale "A" is appropriate.

Order

[42] The following order is made:

[a] The appeal is upheld.

[b] The order granted by the Court *a quo* is set aside and substituted with the following:

"(i) The settlement agreement concluded between the Appellant and the First Respondent on 23 August 2021 at Lephalale, Limpopo province is declared duly cancelled by the Appellant.

(ii) The Respondents are ordered to pay the costs of this appeal only in respect of Part B of the Notice of Motion, which costs are to be determined on party and party scale "A".

(iii) There is no order as to costs for Part A of the Notice of Motion."

MZ MAKOTI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I, concur.

MULLER J
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

I, concur.

NGOBENI J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR APPLICANT	**:**	**ADV R GRUNDLING** **DE LANGE & SMIT ATTORNEYS** **POLOKWANE**
FOR FIRST RESPONDENTS	**:**	**NO APPEARANCE**
HEARD ON	**:**	**24 JANUARY 2024**
DELIVERED ON	**:**	**16 MAY 2025**