

SOUTH AFRICA / JUDGMENT

A.C v D.C (61/2018) [2018] ZAECGHC 56 (19 June 2018)

[2018] ZAECGHC 56

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Plasket

CASE / FILE NUMBER

61/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 61/2018

DATE

HEARD: 14/6/2018

DATE

DELIVERED: 19/6/18

NOT

REPORTABLE

In

the matter between:

A

C APPLICANT

and

D

C RESPONDENT

JUDGMENT

PLASKET J

[1] The applicant and the respondent were married to each other. On 22 April 2016, the Northern Cape Division of the High Court, Kimberley granted them a decree of divorce which incorporated a deed of settlement. This application concerns the interpretation of one clause of that deed of settlement.

[2] Clause 7 of the deed of settlement provides:

‘7. Die Eiser sal verplig wees om in oorleg met die Verweerderes binne een jaar vanaf datum van ‘n egskedingsbevel ‘n woonhuis tot ‘n maksimum koopsom van R3 miljoen en geleë te Grahamstad, aan te koop in naam van n te stigte trust, waarvan die Verweerderes en die partye se minderjarige kinders die kapitaal- en inkomstebegunstigdes sal wees, en van welke trust die Verweerderes en twee onafhanklike ouditeure die trustees sal wees.

7.1 Die Eiser sal verplig wees om alle paaieimente ten opsigte van ‘n eerste verband ter finansiering van sodanige aankoop te betaal.’

[3] The applicant’s complaint is that the respondent has not complied with his obligations in terms of clause 7, despite the fact that the decree of divorce was granted over two years ago and the trust contemplated by clause 7 was created over a year ago by the applicant. The applicant has now identified a property in Grahamstown that meets the requirements of clause 7. She has entered into negotiations with its owner, who has signed a deed of sale. It awaits the signature of the respondent.

[4] The applicant accordingly applies for orders declaring the respondent to be in breach of his obligations in terms of clause 7 ‘for his failure to have purchased, on behalf of the A C Family Trust, a residence in Grahamstown for the sum of R3 000 000 within one year of the 22 April 2016’; and directing him to ‘sign the offer to purchase, Annexure “L” to the founding papers, within three days of service of a copy of the Order of Court upon him and to comply with the terms thereof’. A costs order is also sought.

[5] The respondent has resisted purchasing the property on the basis that clause 7 does not place such an obligation on him. He also took the point that the application is defective, and ought to be dismissed, because the trustees of the A C Family Trust have not been joined as parties.

[6] What is required in this judgment, apart from a decision on the non-joinder point, is an interpretation of clause 7. In my view, it is clear and unambiguous.

[7] It places an obligation in the first instance on the respondent – the ‘Eiser’ in the Northern Cape Division – in consultation with the applicant – the ‘Verweerderes’ in the Northern Cape Division – to purchase a house in Grahamstown.

- [8] Secondly, the respondent was required to purchase that house within a year of the decree of divorce. Thirdly, the maximum price of the house was to be R3 million. Fourthly, the house was to be purchased by the respondent in the name of a trust to be formed. The respondent has failed to meet a single obligation to which he agreed when he signed the deed of settlement.
- [9] Clause 7.1 permits the respondent to raise a mortgage bond to finance the purchase but it provides that he is responsible for all repayments. In my view, clause 7.1 does not envisage the applicant obtaining a mortgage bond over the house that he is to purchase and transfer into the name of the trust. The purpose of clause 7 is to provide security of tenure for the applicant's and the respondent's children, and co-incidentally, for the applicant as well. That purpose would be undermined if the applicant could use the property envisaged by clause 7 as security for his loan: he could, at any stage, render them vulnerable to homelessness by defaulting on his bond repayments. Nothing in clause 7.1 militates against this interpretation.
- [10] I turn now to the non-joinder point. It was argued that the trustees of the trust should have been joined as parties. There is no merit in the point. The applicant is seeking to enforce a contractual right that she enjoys as against the respondent. The trustees are not party to the deed of settlement. They have no rights or interests that may be affected by the litigation between the applicant and the respondent. After all, the house that will be owned by the trust has not been purchased yet.
- [11] The respondent has not complied with any of the obligations placed upon him by clause 7. He has not purchased a house in the name of the trust that the applicant has created. He ought to have done so within a year of 22 April 2016. He must now do so as a matter of urgency.
- [12] I make the following order:
1. It is declared that the respondent is in breach of his obligations in terms of paragraph 7 of the deed of settlement concluded on 12 April 2016 and made an order of court of the Northern Cape Division of the High Court on 22 April 2016 for his failure to have purchased, on behalf of the A C Family Trust, a residence in Grahamstown for the sum of R3 000 000 within one year of 22 April 2016.
 2. The respondent is directed to sign the offer to purchase, Annexure "L" to the founding papers, within three days of service of a copy of this order on him, and to comply with the terms thereof.
 3. The respondent is directed to pay the applicant's costs.

C. PLASKET

JUDGE OF THE HIGH COURT

Appearances:

For the applicant: D de la Harpe

Instructed by Netteltons,

Grahamstown.

For the defendant: S Cole

Instructed by Becker, Bergh & More Inc

Upington.

Nolte Smith Inc, Grahamstown.

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Prepared on 11 October 2026 · Esheria