

SOUTH AFRICA / JUDGMENT

C.A.S v A.L.S and Others (473/2016) [2018] ZAECPEHC 75 (11 December 2018)

[2018] ZAECPEHC 75

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Pickering

CASE / FILE NUMBER

473/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO: 473/2016

Date heard: 06/12/2018

Date delivered: 11/12/2018

In the matter between

C A S

Applicant

And

A L S

First Respondent

THE REGISTRAR, HIGH COURT,

PORT ELIZABETH

Second Respondent

THE SHERIFF, PORT ELIZABETH SOUTH

Third Respondent

JUDGMENT

PICKERING J

[1] Applicant, C A S, and first respondent, A L S were previously married to each other.

The marriage relationship unfortunately irretrievably broke down. A long and acrimonious divorce action ensued. Eventually, on 10 October 2017, applicant and first respondent entered into a Deed of Settlement which, on 11 October 2017, was made an order of Court. It was recorded in the preamble to the Deed of Settlement that the parties had reached agreement “on matters consequent upon the dissolution of their marriage.”

[2] Unfortunately a dispute arose as to the proper interpretation of clause 7 of the Deed of Settlement dealing with the payment by applicant to first respondent of certain monies. This in turn led to first respondent obtaining a Writ of Execution from second respondent, the Registrar of the High Court, Port Elizabeth.

[3] In the present application applicant seeks an order setting aside the Writ of Execution issued by second respondent on 25 July 2018 and directing first respondent to pay the costs of the application. No relief

is sought against second respondent or third respondent, the Sheriff of Port Elizabeth South, both of whom abode the decision of the Court.

[4] Clause 7 of the Deed of Settlement provides as follows:

“7. The Defendant shall be entitled to receive the net proceeds from the intended sale of the immovable property, being Erf 113, Lorraine, Port Elizabeth, owned by Searan CC, in an amount of R2 490 000,00 which sum shall be payable by the Plaintiff to the Defendant as follows:

7.1 R490 000,00 payable upon the signing of a deed of sale in respect of the property;

7.2 R1 000 000,00 payable within a period of 6 months from the date of the first payment; and

7.3 R1 000 000,00 payable within a period of 6 months from the date of the second payment;

7.4 The said payments of R490 000,00 and R1 000 000,00 set out in 7.1 and 7.2 above shall be made by the Plaintiff to the Defendant, whether or not the property is sold as mentioned above, by no later than the end of December 2018, whereafter the final payment of R1 000 000,00 shall be made within a further period of 6 months.”

[5] Clause 15 of the Deed of Settlement provides as follows:

“15. The Defendant shall be entitled to remain in the immovable property situated at [...], Port Elizabeth (which property belongs to the Plaintiff’s parents and is hereinafter referred to as ‘the property’), until the end of January 2019, or until payment of the further capital payment of R1 490 000,00, referred to in subparagraphs 7.1 and 7.2 above, whichever event occurs first, provided that if the Plaintiff were to effect payment of the said sum of R1 490 000,00 before the end of January 2019, whether as a result of the sale of the property, or as a result of the Plaintiff obtaining the funds by way of a loan or any other arrangements, the Defendant will have a notice period of 60 days, after receipt of

such payment of R1 490 000,00, within which to vacate the property.”

- [6] It is common cause that applicant, acting in terms of clause 7, caused the sums of R490 000,00 and R1 000 000,00 referred to in clause 7.1 and 7.2 respectively to be paid into first respondent's bank account on 11 October 2017, despite the fact that the property referred to in clause 7 namely [...], was not sold. These payments

triggered the provisions of clause 15, thereby entitling applicant to give first respondent the required notice of sixty days within which to vacate the Kragga Kamma property. Applicant did give such notice and first respondent duly vacated the property as required. Whatever applicant's motive in accelerating the payment of R1 490 000,00 may have been such motive is in my view irrelevant to the decision in this matter and to the interpretation of clause 7.

- [7] Thereafter, on 13 April 2018, namely six months after payment of the said amounts in terms of 7.1 and 7.2 first respondent demanded payment of the sum of R1 000 000,00 referred to in clause 7.3. It is first respondent's contention that, properly construed, the third payment of R1 million was to be paid within six months of the date of the second payment. This interpretation is contested by applicant. Applicant for his part contends that the fact that he accelerated payment of the amounts referred to in clauses 7.1 and 7.2 did not constitute a waiver of his rights contained in clause 7.4 which rights included the right to effect the final payment of R1 million within a further period of six months after the end of December 2018.

- [8] In *Engelbrecht and Another N.O. v Senwes Ltd* 2007 (3) SA 29 (SCA) the following was stated at [6]:

“[6] The Court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement.”

- [9] In the well-known matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) the following was stated at paragraph [18] with regard to the interpretation of words used in legislation, or contract:

“Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. ... The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

- [10] See too: *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at [10] – [12]. At [12] Wallis JA stated as follows:

“Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very

clear, has fallen away. Interpretation is no longer a process that occurs in stages but is ‘essentially one unitary exercise’.”

See too: *Auction Alliance v Wade Park* 2018 (4) SA 358 (SCA) at [9]

[11] Mr. Dyke S.C., who appeared for applicant submitted that, interpreted in a sensible and businesslike

manner with due regard being had to the context in which the Deed of Settlement was drawn, the only proper and meaningful interpretation

to be placed on clause 7 was that sub-clauses 7.1, 7.2 and 7.3 were to be read collectively as being of application in the event of a Deed of Sale in respect of Erf 113 being signed. In other words, the obligation to effect the third payment referred to in sub-clause 7.3 within 6 months of the payment in terms of sub-clause 7.2 would only be triggered if the property was sold. Mr. Dyke submitted that sub-clause 7.4 dealt exclusively with the arrangements that would apply in the event of the property not being sold. In that event, so he submitted, the amount of R1 490 000,00 referred to in sub-clauses 7.1 and 7.2 would be payable to first respondent by no later than the end of December 2018 whereafter the final payment of R1 million would be made within six months.

[12] Mr. Schubart S.C., who appeared for first respondent, submitted that the interpretation placed upon sub-clause 7.4 by applicant was wrong and ignored the phrase “whether or not the property is sold as mentioned above.”

[13] In my view it is clear, in the light of the phrase “whether or not the property is sold”, that sub-clause 7.4 was not intended to deal exclusively with the situation that would pertain in the event of the property not being sold. It was clearly intended, in my view, also to deal with the situation where the property was sold at a date such that the period of 6 months (from the date of first payment) referred to in sub-clause 7.2 would not have expired before the end of December

2018. In that case, regardless of the time periods referred to in sub-clauses 7.1 and 7.2 the total amount of R1 490 000,00 was payable to first respondent before the end of December 2018.

[14] Clearly this provision was intended to protect first respondent to the extent that whether or

not the property was sold the amount of R1 490 000,00 had to be paid to her before the end of December 2018. It is clear that if the property was sold the final payment referred to in sub-clause 7.3 had thereafter to be paid within 6 months of the date on which the second payment was made, whenever that might have been. I can see no warrant for interpreting sub-clause 7.4 differently in the event of the property not being sold.

- [15] In this regard I do not agree with the submission that sub-clauses 7.1 to 7.3 are irrelevant to the interpretation of sub-clause 7.4. In my view they must be read conjunctively therewith. Sub-clause 7.4 refers specifically to the payments to be made in terms of sub-clauses 7.1 and 7.2. The reference in sub-clause 7.4 to the “final payment of R1 000 000,00” is a reference to the payment referred to in sub-clause 7.3 in terms whereof first respondent is entitled to receive such payment within 6 months of the previous payment.
- [16] In my view the word “whereafter” in sub-clause 7.4 does not qualify the phrase “by no later than the end of December 2018” as was submitted by Mr. Dyke but clearly refers to the date on which the second payment in terms of sub-clause 7.2 was made, if such second payment was made prior to the end of December 2018.
- [17] As was submitted by Mr. Schubart, if the word “whereafter” was intended to be a reference to “the end of December 2018” it would have been a very simple matter for the agreement to have specified in sub-clause 7.4 that in the event of the property not being sold and irrespective of when prior to the end of December 2018 the payments referred to in sub-clauses 7.1 and 7.2 were made, the final payment of R1 000 000,00 was only required to be made by no later than the end of June 2019. That it did not do so is a clear indication that even if the property was not sold the period of 6 months referred to in sub-clause 7.3 was applicable.
- [18] In my view therefore the final payment of R1 000 000,00 was due and payable within 6 months of 11 October 2017.
- [19] Accordingly the application to set aside the Writ of Execution issued by second respondent on 25 July 2018 is dismissed with costs.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv Dyke SC

Instructed by: Anthony Incorporated, Port Elizabeth

Appearing on behalf of Respondent: Adv Schubart SC

Instructed by: Lizelle Pretorius, Port Elizabeth

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