

SOUTH AFRICA / JUDGMENT

J.M v K.M (2771/2012) [2018] ZAKZDHC 38 (31 July 2018) [2018] ZAKZDHC 38

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Henriques

CASE / FILE NUMBER

2771/2012

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 2771/2012

In the matter between:-

J M APPLICANT

and

K M RESPONDENT

-

ORDERS

(a) Judgment is granted in favour of the applicant against the respondent:-

(i) in the sum of R3.5 million;

(ii) interest on the aforesaid sum of R3.5 million calculated at the rate of 15.5 % per annum with effect from 1 March 2016 to date of payment.

(b) The respondent is to effect payment of the judgment amount of R3.5 million plus interest as referred to in paragraph (a)(ii) above within ten court days of granting of this order.

- (c) The relief sought in paragraph 4 of the applicant's notice of motion is adjourned sine die and the applicant is granted leave to reinstate this application, supplemented as may be necessary, in regard to such relief in the event of the respondent failing to comply with paragraphs (a) and (b) of the order.
- (d) The respondent is ordered to sign all documents required in order to transfer into the name of the applicant the property which is situate at [...] K. Road, Kenville, Durban and whose formal property description is Portion 131 of Erf [...] of Duikerfontein, within 5 days of being presented with such documents. In the event that the respondent, for whatever reason, fails and/or refuses to sign such documents then the sheriff of this honourable court is authorised to sign such documents in his stead and, in that event, the respondent shall pay for such charges as the sheriff may raise in connection therewith.
- (e) The respondent is to pay the costs of this application.

JUDGMENT

HENRIQUES J

Introduction

[1] The applicant instituted motion court proceedings against the respondent on 15 September 2016, as a consequence of the respondent's alleged default in complying with the settlement agreement dated 11 August 2015.

[2] The settlement agreement referred to in paragraph 1 was concluded under the above case number and in this court in the resolution of the plaintiff's (the current applicant) action to set aside the settlement agreement dated 15 November 2010, annexure "KM1" to the papers.

History

- [3] The parties were married to each other out of community of property and, were subsequently divorced on 15 November 2010 in terms of a final order of divorce.
- [4] As a precursor to the grant of a final order of divorce, the parties entered into a settlement agreement dated 15 November 2010, relating to the settlement of the proprietary consequences of the marriage.
- [5] On 13 March 2012 the applicant instituted an action against the respondent for an order declaring the settlement agreement (dated 15 November 2010) to have been validly cancelled and no longer of any force or effect.
- [6] The said action was premised on the applicant's allegations of alleged misrepresentation on the part of the respondent, which misrepresentation induced the applicant to conclude such settlement agreement.

- [7] The action was defended by the respondent and ultimately settled in terms of a settlement agreement dated 11 August 2015 (annexure 'C' to the applicant's founding papers).
- [8] It is this settlement agreement that forms the subject matter of the dispute that serves before me.
- [9] The applicant contends that the respondent is in breach of the terms of the settlement agreement, specifically in relation to the following paragraphs:-

'2.

The Defendant shall pay to the Plaintiff the sum of R3.5 million prior to the Defendant vacating the property. The Defendant will furnish a guarantee for the said sum of R3.5 million not less than two weeks before the Plaintiff vacates the property.

3.

The Defendant will do all things necessary to transfer the property at 31Kara Road into the name of the Plaintiff forthwith after this agreement has been signed. The Plaintiff undertakes to sign all documents, pay the necessary fees, disbursements and rates,

electricity and water charges, and to do all things necessary to facilitate the transfer of the said property into her name.'

- [10] It is common cause that the respondent did not comply with the terms of paragraphs 2 and 3 of the settlement agreement; however the respondent contends that he is excused from such performance for various reasons, including but not limited to the applicant's

conduct in constructively preventing performance by the respondent. In the initial answering affidavit this is dealt with extensively. At the hearing of the matter, the respondent sought leave to supplement this answering affidavit with his supplementary affidavit dated 1 August 2017. The applicant has filed a reply to same. I believe it prudent to allow the parties to file such further affidavit so as to ensure a proper ventilation of the issues.

- [11] The history of the litigation between the applicant and respondent has been characterised by acrimony and bitterness.

Applicant's contentions

- [12] The applicant in essence seeks the enforcement of the terms of the settlement agreement of 11 August 2015, and, specific performance from the respondent in complying with such terms. The applicant contends that the terms are unambiguous and clear and that the accusations advanced by the respondent are neither relevant nor germane in determining the respondent's breach of such terms of the settlement agreement.

Respondent's contentions

- [13] The respondent contends that:

- (a) The applicant's deliberate and intentional conduct in obstructing him from selling the immovable property frustrated his performance, alternatively rendered it impossible for him to perform in terms of the settlement agreement.
- (b) The applicant breached the settlement agreement in failing to give the respondent access to electricity.
- (c) The applicant's conduct amounted to an infringement of the principles of good faith as the applicant bore a duty to co-operate with the respondent in his endeavours to market and sell the immovable property situate in Umhlanga.
- (d) Certain misrepresentations by the applicant and her legal representatives induced the respondent to conclude the settlement agreement.
- (e) The respondent has a right to market the immovable property as a consequence of his ownership and should be construed as an implied term of the settlement agreement.

Analysis

- [14] The applicant's case is premised solely on the express terms of the settlement agreement and the breach or non-performance in compliance with such terms by the respondent.
- [15] The onus, once the applicant has established the validity of the settlement agreement and non-performance by the respondent, shifts to the respondent to establish that he is excused from performance either by the express or implied terms of the agreement.
- [16] The respondent, in concluding the settlement agreement whilst alleging misrepresentation on the part of the applicant and/or her legal advisors, has not taken any steps to challenge the validity of the agreement nor apply for its rectification.
- [17] It was neither argued nor submitted that the settlement agreement is invalid or does not reflect the true intention of the parties at the time same was concluded. On the contrary, the respondent submitted that he was represented by senior counsel when the settlement agreement was concluded, and which same senior counsel the respondent intended instructing in opposing this application.
- [18] It is improbable to say the least that the respondent would not have understood the terms and effect of the settlement agreement, whilst having the benefit of being represented by senior counsel.
- [19] Paragraph 2 of the settlement agreement referred to earlier in this judgment is clear and unambiguous in its terms. The respondent

undertook to pay the applicant the sum of R3.5 million prior to the applicant vacating the property. Such term was not dependent or subject to any pre-condition or concomitant obligation on the applicant and neither was any contingent condition imposed regarding

the payment of R3.5 million. It is not recorded that the payment was subject to the sale of the immovable property situate at Umhlanga and that the proceeds of such sale would be utilised to effect payment of the sum of R 3.5 million to the applicant.

[20] Had the parties intended such condition to be applicable, it is highly improbable that same would not have been recorded in the settlement agreement. Considering the enmity between the parties, the acrimonious history of litigation and the fact that both parties were represented by senior counsel in concluding the settlement agreement, it is both reasonable and safe to infer that such condition would have been recorded had the parties so intended.

[21] The respondent, in circumstances which can only be described as concession, tendered prior to the hearing of this application,

payment of the sum of R3.5 million to the applicant, notwithstanding the fact that the immovable property had still not been sold. [1]

[22] The respondent's contention that the applicant was under a reciprocal obligation to co-operate with him in marketing and selling the immovable property, from which sale the respondent would effect to the applicant payment of R3.5 million belies the fact that the respondent's performance in terms of the settlement agreement was not subject to any such condition, which the respondent clearly seems to accept hence the respondent's tender to the applicant.

[23] In interpreting the 'intention of the parties' in concluding agreements, I apply the well-known dictum of Wallis JA in the matter of Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) wherein the learned judge was at pains to emphasise that words in issue must be given their ordinary grammatical meaning and that the meaning of such words are not to be substituted by the imposition of one's own views.

[24] The respondent's further contention that the condition that the payment of R3.5 million to the applicant must be considered as an implied term of the agreement is equally unsustainable.

[25] In Roazar CC v The Falls Supermarket CC [2018] 1 All SA 438 (SCA) at 439, Tshiqi JA held '[i]t was not competent for the court to import a term not intended by parties simply on the basis of the principle of "ubuntu"'.

[26] In the absence of establishing that his performance for effecting payment of the sum of R3.5 million to the applicant was dependent on the sale of the immovable property, the respondent's exhaustible summary of the efforts he made to market and sell the

immovable property, is rendered both nugatory and irrelevant to the germane issue in this application.

- [27] By similar rationale, the respondent's allegations of a breach of the settlement agreement by the applicant and the plethora of accusations of the misconduct of the applicant cannot in these circumstances assist the respondent in not complying with his obligations in terms of the settlement agreement. In reaching this conclusion, I have considered the contents of the supplementary affidavit.
- [28] The respondent was entitled to institute his own proceedings against the applicant relating to any complaint of a breach by the applicant of the terms of the settlement agreement.
- [29] Insofar as the transfer of the immovable property at 31 Kara Road, as recorded in paragraph 3 of the settlement agreement is concerned, the respondent has not advanced any cogent or sustainable grounds for not complying with the terms of the agreement. In any event, the entitlement to transfer of such immovable property and the respondent's obligation to effect such transfer emanated from the Antenuptial Contract (ANC) concluded between the parties as far back as 1980.

Relief sought by the applicant

- [30] I now propose to deal with the relief sought by the applicant in the notice of motion.

Monetary

judgment

- [31] In view of the respondent's failure to effect payment in terms of paragraph 2 of the settlement agreement, the applicant seeks a judgment in terms of the provisions of rule 41(4) of the Uniform Rules of Court.
- [32] Rule 41(4) provides '[u]nless 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'.
- [33] For the reasons referred to above, it is patently evident that the respondent has not complied with the provisions of paragraph 2 of the settlement agreement and the applicant is accordingly entitled to a monetary judgment.
- [34] In terms of paragraph 5 of the settlement agreement, the respondent would be liable for interest on the unpaid amount of R3.5 million with effect from 1 March 2016.
- [35] It is however in my view just and equitable that the respondent be afforded a period of ten court days within which to effect payment of R3.5 million plus the interest, as recorded above from the grant of a judgment.

Order declaring the immovable property executable

- [36] The relief sought by the applicant in relation to declaring the property situate at 86 Umhlanga Rocks Drive executable and the subsequent sale of same in execution, is premature for the reasons of the order proposed in paragraph [35] above, coupled with the fact that the present application does not comply with provisions of the amended rule 46A of the Uniform Rules of Court.
- [37] The applicant should however be granted leave to reinstate this application, supplemented as may be necessary, to comply with rule 46A in the event of the respondent's non-compliance with the orders set out in the preamble hereto.

Transfer of Kara Road Property

- [38] The respondent has advanced no cogent or sustainable opposition to the relief sought by the applicant, as regards the respondent signing all documents necessary to effect transfer of the immovable property, situate at 31 Kara Road, Kenville.
- [39] The applicant is accordingly entitled to the relief sought in paragraph 5 of the notice of motion.

Costs

- [40] The applicant has sought costs on a scale as between attorney and own client.
- [41] The settlement agreement makes no provision for the issue of costs in the event of a breach by either party of its obligations in terms of such agreement.
- [42] In the exercise of the court's discretion and taking into account all the circumstances of this matter, particularly the conduct of the parties, I am not persuaded that a punitive costs order as sought by the applicant is appropriate.
- [43] It is both just and equitable that costs should follow the result and the respondent be ordered to pay the applicant's party and party costs of the application.
- [44] I find it regrettably necessary to comment on the heads of argument filed specifically that filed on behalf of the respondent. It has been repeatedly mentioned and incorporated in this court's practice directive the function and form of heads of argument. The respondent's heads of argument made reference to numerous authorities which were of no relevance or assistance to this court, and the consequence of same was the delay of the court's time in traversing and analysing such authorities.
- [45] In making the above comments I express the hope that practitioners will give proper attention to the practice directive specifically relating to the filing of the heads of argument.

Orders

- [46] The following orders are granted:-

- (d) The respondent is ordered to sign all documents required in order to transfer into the name of the applicant the property which is situate at 31 Kara Road, Kenville, Durban and whose formal property description is Portion 131 of Erf 6 of Duikerfontein, within 5 days of being presented with such documents. In the event that the respondent, for whatever reason, fails and/or refuses to sign such documents then the sheriff of this honourable court is authorised to sign such documents in his stead and, in that event, the respondent shall pay for such charges as the sheriff may raise in connection therewith.

Henriques J

Case Information Date of hearing : 7 November 2017 Date of judgment : 31 July 2018 Appearances
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- [1] I may also add that such tender was not an unconditional one and did not contain a tender for payment of interest.

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