

SOUTH AFRICA / JUDGMENT

Kempff v Mothuloe (2016-31186) [2024] ZAGPJHC 312 (27 March 2024)

[2024] ZAGPJHC 312**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Strydom

CASE / FILE NUMBER

2016/31186

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 2016/31186

1. REPORTABLE: YES / NO
2. OF INTEREST TO OTHER JUDGES: YES / NO
3. REVISED: YES / NO

In the matter between

JOHANNES KEMPPFF N.O. Applicant

and

WYCLIFFE THIPE MOTHULOEO

Respondent

JUDGMENT

STRYDOM, J

- [1] This is an application in terms of Rule 41(4) of the Uniform Rules of Court, for a declarator that the parties to this action have abandoned their respective claims against each other. The court is asked to issue an order giving legal effect to the abandonment of these claims by the parties.

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- [2] There is a history of ongoing litigation between the late Neil David Rissik (“the deceased”) and Mr Mothuloe (“the respondent”).
- [3] The origin of the litigation is underpinned by an agreement in terms of which the deceased sold cattle to the respondent. Pursuant to a dispute between the parties, the respondent instituted an action against the deceased, before his death, in the North West Division of the High Court for payment. This action was later settled and a settlement agreement (“the initial settlement agreement”) was made an order of court. Performance in terms of the initial settlement agreement became contested and this led to a further settlement agreement (“the closing settlement agreement”). Again, the implementation of this closing settlement agreement became contested, and that led to an action and a counterclaim to be instituted in this Division, respectively, by the deceased and the respondent.
- [4] After the institution of the claim and counterclaim in this Division, a curator bonis was, by order of this court on 10 October 2018, appointed on behalf of the deceased who became mentally incapacitated. After the deceased passed away on 17 July 2020. the current applicant, the executor in the estate of the deceased, filed this application. Before this, the applicant was substituted as a party to the pending action in this Division.
- [5] Before this court at the hearing of this application, the authority of the applicant’s attorney to act for the applicant was challenged.
- [6] No notice in terms of Rule 7 of the rules of this court was filed by the respondent to place in dispute the authority of the attorney acting for the applicant. It is trite that under such circumstances an authority challenge cannot subsequently be made. Consequently, this court would not deal with this belated challenge. Nothing further needs to be said as far as this is concerned.
- [7] The respondent filed his answering affidavit out of time and applied for condonation. The condonation application was not opposed and should be granted.
- [8] During or about March 2020 at the time when the curator bonis was representing the deceased, still alive at that stage, he, through his attorney, Mr Vickers, engaged with the respondent, represented by his attorney, Mr Pokroy, to finally settle the claim and counterclaim instituted in this Division. The parties entered into a settlement agreement (referred to herein as “the final settlement agreement”).
- [9] Before this court the issue of whether the final settlement agreement is still valid and enforceable crystallised as the only further issue to be decided by this court. Challenges to the jurisdiction of this court and whether the deceased before his death was capable of dealing with his affairs were not pursued.
- [10] The final settlement agreement was concluded by way of an exchange of correspondence between the respective attorneys acting on behalf of the parties.

- [11] This correspondence, constituting the final settlement agreement, started with a letter addressed to Mr Pokroy, acting for the respondent, written by Mr Vickers, acting for the curator bonis, dated 10 March 2020. In this letter, the settlement proposal was made that each party withdraw their respective claims instituted in this Division and that the parties pay their costs, which would include the costs due for taxation.
- [12] In this letter it was, inter alia, stated and I quote:
- “the above proposal – is subject to the approval and sanction of The Master”*
- [13] The respondent’s attorney on 16 March 2020, following a telephonic communication with Mr Vickers, in writing accepted the proposal and repeated the condition that the proposal was subject to the approval and sanction of the Master of the High Court.
- [14] The respondent’s attorney concluded by stating and I quote:
- “Please confirm that on approval and sanction by the Master of the High Court, the matter pending under case number 31186/2016 in the High Court Johannesburg will be considered as concluded”.*
- [15] Quite some time thereafter Mr Vickers, now representing the applicant in his capacity as executor of the estate of the deceased, sent a letter to the Master, dated 3 March 2022 (but delivered on 8 March 2022), and informed the Master about the final settlement agreement and made him aware of the fact that the final settlement agreement was subject to his approval and sanction. In the letter to the Master, he was requested to sanction the final settlement agreement or, if he was not so inclined, to furnish reasons for his decision.
- [16] There was a delay of almost two years between the date the final settlement agreement was concluded on 16 March 2020 and the letter addressed to the Master delivered by hand on 8 March 2022. The delay might have, to some limited extent, been caused by the passing away of the deceased on 17 July 2020. Thereafter, on 8 October 2020, was the applicant appointed as executor in the estate of the deceased. Nothing turns on this delay as the respondent’s case is that after the Master failed to approve and sanction the final settlement agreement this agreement became void. It was argued that by that time a reasonable period for the fulfilment of the suspensive condition had come and gone and that the Master no longer could provide the approval as he was functus officio.
- [17] Mr Pule, the Master of the South Gauteng High Court replied to this letter on 8 March 2022 by questioning on what authority or law does he have power to sanction settlement agreements concluded between parties. He then answered his question by stating that the Master does not have such power, and if he does, he would be acting ultra vires his powers.
- [18] Before this court, the view taken by the Master was not in any way shown to be incorrect. The parties accepted the stance taken by the Master, which would have meant that his approval and sanctioning of the final settlement agreement was never required.

- [19] The current dispute between the parties relates to the legal question of whether the final settlement agreement is still valid considering that the Master never approved and sanctioned the final settlement agreement entered into between Mr Carter N.O., as the curator bonis and the respondent.
- [20] On behalf of the applicant, it was argued that the reply of the Master rendered the final settlement agreement unconditional.
- [21] It was argued on behalf of the respondent that the condition attached to the final settlement agreement was not fulfilled and therefore the final settlement agreement lapsed. The applicant sought an order giving effect to the final settlement agreement and the respondent asked this court to dismiss the application with costs as the final settlement agreement was no longer in existence.
- [22] The first question for decision is what the nature of the condition was. In my view, the condition is suspensive. A suspensive condition suspends or postpones the full operation of the obligation which it qualifies until certainty is reached, in that the condition is fulfilled or in that it fails. The conclusion of a contract subject to a suspensive condition creates a real and definite contractual relationship between parties. The exigible content of the contract is only suspended pending the fulfilment of the suspensive condition.
- [23] It is not disputed that the Master failed to approve and sanction the final settlement agreement. On behalf of the applicant, it was argued that the effect of the response of the Master was that his approval was not required and that the suspensive condition was satisfied. In my view, in such circumstances, it cannot merely be accepted that the suspensive condition was satisfied. The

suspensive condition was not met as approval and sanctioning was not provided by the Master. Ordinarily, if a suspensive condition fails, the obligation which was qualified by the condition comes to an end. It lapses unless, upon an interpretation of the contract, it can be found that it was an implied term of the contract that if it later appears that the ratio for the insertion of the suspensive condition was based on a wrong assumption of what the legal position was and that the Master was not empowered to lawfully approve and sanction a settlement agreement between a curator bonis and a third party, then the condition would fall away, and the contract would become unconditional.

- [24] The further inquiry to determine whether a suspensive condition was fulfilled or not is to consider waiver. If a condition is inserted

into a contract exclusively for the benefit of one party to the contract, that party may prevent the obligation from falling away by waiving the benefit created by the condition. The other party can then not rely on the non-fulfilment of the condition. Notice of waiver must, however, be given before the expiry of any time limit set for fulfilment of the condition and, if no time limit is set, before the expiry of reasonable time[1].

- [25] For purposes of a decision in this matter the questions will be, first, whether an implied term should be read into the suspensive condition, to the effect that if it later became clear that the approval and sanctioning of the Master of the final settlement agreement was not required and could and would not lawfully be provided, the condition would fall away rendering the agreement unconditional. Second, whether the suspensive condition was inserted for the benefit of the applicant only in such a case, and whether notice of waiver was provided to the respondent before the final settlement agreement had lapsed.
- [26] The applicant in the papers before the court did not specifically refer to an implied term, but merely argued that the effect of the Master's reply was that the suspensive condition fell away. What was subsequently argued before this court, pursuant to questions posed by the court pertaining to an implied term, was that such an implied term should be read into the suspensive clause. The court will consider whether an implied term can be read into the final settlement agreement.
- [27] The concept of an implied term is used to denote an unexpressed provision of a contract that derives from the common intention of the parties, comprehending not only their actual intention, i.e. what they actually had in mind and did not trouble to express, but also their imputed intention, i.e. what they would have intended had their attention been drawn thereto[2].
- [28] When an implied term is relied upon it is not necessary to allege facts giving rise to the term, because it is a question of law whether the term is to be implied[3]. The evidential material to be taken into account is the background or setting of the contract, the background circumstances at the time the contract was entered into, and the language of the contract itself[4].
- [29] An important consideration when considering the common intention of the parties when the suspensive condition was inserted into the final settlement agreement, at the insistence of the applicant, according to the evidence before this court, is to bear in mind that one of the contracting parties was a curator bonis, whilst respondent acted in person. The purpose of the suspensive condition, in my view, was, having considered the context in which the final settlement agreement was concluded, to take a cautious approach to avoid possible steps to be taken by the Master to set the final settlement agreement aside.
- [30] Applying the officious or hypothetical bystander test, in my view, if a bystander had asked the parties, during the process of entering into the final settlement agreement, what the situation would have been if the Master refrained from approving and sanctioning the final settlement agreement, on the basis that he was not lawfully authorised to approve and sanction the final settlement agreement, their answer, on the balance of probabilities, would have been that the suspensive condition would in those circumstances not have applied.

- [31] The suspensive condition should, in my view, be read to imply that should approval and sanctioning of the Master not be obtained based on the reason that he is not lawfully empowered to provide such approval or sanctioning, then such a condition would no longer be applicable, and that the final settlement agreement would then become unconditional.
- [32] This being the case I am of the view, that the final settlement agreement was still intact and enforceable on its terms, being that the parties undertook to withdraw their respective actions and that each party would pay their own costs.
- [33] I should mention that I have considered the judgment in *George Municipality v Freysen*, N.O. [5] (not referred to by any of the counsel on behalf of the parties) which dealt with similar issues as what has been raised in this

court. A sale agreement was entered into by an executor dative and the George Municipality which contained a suspensive condition that the sale of the property was “subject to the consent of the Master...”. Freysen[6], accordingly, also dealt with the question concerning a suspensive condition which rendered an agreement subject to the consent of the Master. After the sale agreement was concluded the question arose whether at all the permission of the Master was lawfully required or not. Further, should the permission of the Master not have been lawfully required, whether an implied term could have been read into the agreement rendering the suspensive condition not to apply. In Freysen, on the facts of the matter, the court concluded that there was no justification to read into the agreement such an implied term.

- [34] In Freysen, the court dealt with the sale of land agreement by an executrix dative, where beneficiaries of the estate who might still have had an interest in the property have not yet been determined. The executrix dative was an elderly lady and the court on appeal found that if she was told during the entering of the sale agreement that the Master’s consent was not required in law she might as well have replied as follows: “If the Master does not consent, I am not prepared to take the responsibility on myself, and the estate will then not be bound by

the contract”. In context, the contracting parties when they agreed to the suspensive condition rendered under the wrongful impression that the

Master’s consent was required in terms of the Administration of Estate Act[7], considering that rights of heirs might be affected. This later appeared to be wrong as Ordinance 104 of 1833(Cape) was applicable as the testatrix died in 1912 when this Act was not yet in operation. It appears from the judgment of the court in Freysen that the executor’s dative reply would have been made in circumstances where she remained doubtful whether the statement, that the Master’s consent was not required, was indeed correct and that she would have considered the rights of beneficiaries of the estate. The court in Freysen found that an implied term could not be read into the sale agreement and that the sale agreement lapsed as the suspensive condition was not met.

- [35] In the matter before this court the final settlement agreement was concluded between a curator bonis and the respondent and not an executor. At the time of entering the agreement, the rights of any beneficiaries in the deceased estate were not of any concern. Previous settlement agreements were concluded which failed to successfully settle the disputes between the parties. The only concern of the curator bonis would have been that he should not exceed his powers, because if he did, there might have been consequences for him personally.
- [36] I am of the view, that if the contracting parties were told that the Master could not in his official capacity have approved or sanctioned the final settlement agreement the parties would have said at the time of entering the final settlement agreement that the suspensive condition would then not apply. In my view, this matter, on its fact and context, can be distinguished from the Freysen matter.
- [37] A further issue needs consideration, as an alternative basis for my finding above. Could and did the applicant, now acting on behalf of the estate of deceased, waive compliance with the suspensive condition? This question is dependent on whether the condition was exclusively inserted for the benefit of the curator bonis, acting in an official capacity for deceased, and whether it was waived with notice to the respondent before the contract lapsed.
- [38] On behalf of the applicant, it was argued, in the alternative, that the final settlement agreement never lapsed after the reply of the Master as he did not refuse approval but merely declined to approve or sanction the final settlement agreement. It was argued that by launching this Rule 41(4) application the applicant waived compliance with the suspensive condition, which condition was inserted for the exclusive benefit of the curator bonis.
- [39] I am of the view, that the suspensive condition, which was inserted on the initial request of the curator bonis, was inserted for the benefit of the curator bonis. He, acting in a representative capacity, wanted to play it safe to avoid action being taken against him personally, if it later

transpired that he was not empowered to have entered into the final settlement agreement. The respondent could not have similar concerns as he was acting in person.

- [40] I am satisfied that notice of the waiver was given when this application was filed.[8]
- [41] The relief which the applicant is seeking is to give effect to this final settlement agreement. The applicant is entitled to the relief sought in the notice of motion. The relief sought was recorded in a draft court order handed to the court. This order would be attached to this judgment.
- [42] The following order is made:

1. The draft order which I mark with an “X” is made an order of court.

R STRYDOM

JUDGE OF THE HIGH COURT

Heard on:

18 March 2024

Delivered on:

27 March 2024

Appearances:

For the Applicant:

Adv. H.B. Marais SC

Instructed by:

Frank, Botha & Vickers

For the Respondent: Adv. H.R. Liphosa

Instructed by:

Mr. Wycliffe Thipe Mothuloe

[1] See Design and Planning Services v Kruger 1974 (1) SA 689 (T) at 697G-H.

[2] Alfred McAlpine & Son (Pty) Limited v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531H – C.

[3] Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk 1987 (2) SA 932 (A) pp 948 – 9).

[4] Mota & Companhia Limitada v South West Africa Water And Electricity Corp. (Pty) Ltd 1981 (1) 45 (Prentice-Hall Weekly Service 7 March,1981).

[5] George Municipality v Freysen NO 1976

(2) SA 945 (A) (“Freysen”).

[6] Id.

[7] 24 of 1913.

[8] Van Jaarsveld v Coetzee 1973(3) SA 241 AD at 244G-H

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