

SOUTH AFRICA / JUDGMENT

L.L v H.L (DIV210/2011) [2018]

ZANWHC 29 (15 February 2018)

[2018] ZANWHC 29

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

DIV210/2011

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IN THE NORTH WEST HIGH

COURT, MAFIKENG

CASE

NO: DIV 210/2011

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

CIRCULATE TO
MAGISTRATES:

NO
CIRCULATE TO REGIONAL
MAGISTRATES: NO
NOT
REPORTABLE
In

the matter between:

L
L Applicant
and
H
L Respondent
DATE

OF HEARING:

1 FEBRUARY 2018
DATE

OF JUDGMENT:	15 FEBRUARY 2018 COUNSEL
FOR THE PLAINTIFF:	ADV. ROSSOUW SC COUNSEL
FOR THE DEFENDANT:	ADV. CILLIERS SC with ADV. MAREE

JUDGMENT

HENDRICKS J

Introduction

- [1] This matter concerns the effect and status of a deed of settlement which was made an order of court. The question arises as to whether the terms of the deed of settlement can be repudiated by a party to the agreement after it was made an order of court. Furthermore, whether such repudiation can be accepted by the other party when the court order that embodies the deed of settlement is not rescinded or varied.
- [2] Mr. L L and Mrs. H L were married to each other in community of property. Showing no disrespect towards the parties, I prefer to refer to them with their first names to avoid any possible confusion. The marriage relationship between them broke down irretrievably, resulting in H instituting divorce proceedings against L. Summons was issued out of this Court. Negotiations between them resulted in a settlement being reached. A deed of settlement was drafted and entered into between them. On 19th December 2011 this Court granted a decree of divorce incorporating the terms of the deed of settlement.
- [3] Clause 4 of the settlement agreement is relevant for the purpose of this judgment and it reads thus:

"4.1. Die Eiseres sal 'n netto lumpsom van R5 000 000.00 (Vyf miljoen rand alleen) betaal word vir haar deel van die bestaande onroerende eiendom in die gesamentlike boedel. Die lumpsom sal betaal word wanneer die Verweerder sy ontwikkelingsprojek in Brits voltooi het, of binne 5 (vyf) jaar, welke tydperk eerste geskied.

4.2. Addisioneel tot die betaling van die lumpsom hierbo, sal die Eiseres voor/op datum van betaling van voormelde koopsom 'n drie slaapkamer woonstel in Anje Hof Rustenburg, welke onbeswaard is, as haar uitsluitlike eiendom kry. Die Verweerder onderneem om die nodige stappe te neem om die eiendom in haar naam te registreer.

4.3. Die Verweerder sal verantwoordelik wees vir alle oordragkoste, moontlike belasting betalings of enige ander uitgawes wat mag voortspruit uit transaksies in terme van paragraaf 4.1 en 4.2 hierbo. Die Eiseres sal bovermelde bedrag en bates ontvang vry van enige aftrekkings van watter aard ookal.

4.4. Indien die volle bedrag van R5 000 000.00 soos in paragraaf 4.1 hierbo aan die Eiseres betaal is en die drie-slaapkamer woonstel in haar naam geregistreer is, sal die Eiseres haarself afteken as trustee, kapitaal en inkomste begunstigde van die Lombaard Trust. Vanaf hede tot datum van betaling van voormelde R5 miljoen sal die Eiseres nie geregtig wees op hetsy kapitaal of inkomste voordele van die trust nie buiten vir voormelde verblyfreg op die eiendom van die trust."

[4] L and H are co-owners of 50% undivided shares in immovable properties and a certain Mr Boshoff was the owner of the remaining

50% undivided shares in the said properties. L and H are also co-trustees of the Lombaard Trust. In terms of clause 4.1 and 4.2 of the settlement agreement H is entitled to payment of an amount of R 5 million plus a three (3) bedroom flat.

[5] L was obliged to pay to H this amount of R5 million upon finalization of a certain building project alternatively within five

(5) years from date of the court order (-19th December 2011-), whichever date occurred first. Furthermore would L transfer a three (3) bedroom flat situated in Rustenburg into the name of H. H would resign as trustee of the Lombaard Trust and also forfeit all her rights as beneficiary of the trust. The five (5) year period mentioned in clause 4.1 expired on 20th December 2016.

[6] L failed to comply with the aforementioned obligations in terms of the settlement agreement which was made an order of court. A writ of execution was issued out of this Court. L now approach this Court in the present application for an order to set aside the writ of execution and to stay of execution of the court order pending the outcome of an action to be instituted regarding the status of the settlement agreement, which was made an order of court.

[7] In this application, L allege that H indicated to him that she is no longer interested in the flat or any other immovable property but instead demand payment equal to the value of the flat. This, so it is contended by L, amounts to a repudiation of the agreement which made it impossible for him to perform and which repudiation he accepted.

[8] These allegations made by L are denied by H who stated that she even laid a criminal charge against L because of his failure to comply with a court order. Strict compliance with the court order is what H wants. I will deal later on in this judgment with the evaluation of the evidence tendered and these disputes of fact. I prefer to deal at first with the status and effect of the settlement agreement, which was made an order of this Court.

The Law

- [9] In *Swardif (Pty) Ltd v Dyke* No 1978 (1) SA 928 (A) (“Swardif case”) the following is stated on page 944 F-G:

“In a case like the present, where the only purpose of taking judgment was to enable the judgment creditor to enforce his right to payment of the debt under the mortgage bond, by means of execution, if need be, it seems realistic, and in accordance with the views of the Roman-Dutch writers, to regard the judgment not as novating the obligation under the bond, but rather as strengthening or reinforcing it. The right of action, as FANNIN, J., puts it, is replaced by the right to execute, but the enforceable right remains the same.”

Adv. Rossouw SC, acting on behalf of L, with reference to the aforementioned quotation from the Swardif case, submitted that there is a difference in dealing with the conclusion of an agreement on the one hand and the execution of an agreement on the other hand. In the present case, so it was submitted, we are dealing with the execution / executory part of the agreement. The right of action is replaced by the right to execute but the enforceable right remains the same. Therefore, one doesn't have to rescind the judgment / order.

- [10] In the case of *MV Ivory Tirupati and Another v Bandan Urusan Logistik (aka Bulog)* 2003

- (3) SA 104 SCA (“MV Ivory Tirupati case”) the following is stated in paragraphs [26] to [30]:

“[26] In the Swadif case a liquidator of a company in liquidation had sought orders (1) rescinding a judgment which had been granted against the company

before the liquidation, based on a second bond the company had caused to be registered over its immovable property, for which it had received no value, and (2) cancelling the bond. This Court held that no legal basis had been made out for an order rescinding the judgment and an exception to the particulars of claim in this respect was upheld. As far as the claim for an order cancelling the bond was concerned it was argued on behalf of the excipient that the registration of the bond could not be set aside because the judgment on the bond novated the debt thereon. This argument was rejected and it was held that the effect of the judgment had not been to novate the obligation under the bond but to strengthen or reinforce it (at 944F - G).

- [27] It was not necessary for the Court to pronounce on the question as to whether the judgment which provided the strengthening or reinforcement (to use the two metaphors employed by the Court) in itself constituted an additional obligation or was somehow absorbed into the original obligation which had been strengthened by such absorption. It follows that the passage relied on by Mr Hofmeyr was obiter and not necessary for the decision.

- [28] One of the Roman-Dutch writers whose views were cited with approval by the Court was Van der Keessel. In commenting in his *Praelectiones Juris Hodierni* on Grotius's *Inleiding* 3.43.3, he discussed whether Grotius, who had said in 3.43.1 that 'novation takes place when an obligation is released upon the terms that simultaneously another obligation

takes its place' (Lee's translation), had been correct in saying in 3.43.3 that a novation may be concluded 'door rechtspleging' (which Lee translates as 'by taking legal proceedings'). Having stated that it was clear that a novatio necessaria takes place on litis contestatio, Van der Keessel J said that it was equally clear that it does not terminate the antecedent obligation or those things that were accessory to it, such as pledges, sureties or interest. He proceeded:

'Daarom kan daar twyfel oor die vraag ontstaan of die omskrywing wat in para 1 gegee is by hierdie noodwendige soort [ie novatio necessaria] aangepas kan word aangesien daar hier geen kwytskelding van die skuld geskied nie, hoewel daar boonop 'n nuwe verbintenis aangegaan word.'

(Gonin's translation, my emphasis.)

[29] There is nothing unusual about an obligation being confirmed or reinforced by the incurrance of another obligation which is in effect an alternative to an antecedent one, such as where a cheque is given in payment of an existing debt without any intention to novate the existing debt.

[30] It is furthermore correct, as Mr Wallis, who appeared with Mr Wragge for the respondent, contended, that although an original cause of action may continue to exist in a reinforced and strengthened form a judgment (or an arbitration award) may also give rise to a new and independent cause of action enforceable between the same parties in another court: see *Bulsara v Jordan and Co Ltd (Conshu Ltd)* [1995] ZASCA 106; 1996

(1) SA 805 (A) at 808I - 809B and 811A - B, *E A Gani (Pty) Ltd v Francis* 1984

(1) SA 462 (T) at 466B - 467A and *Wright v Westelike Provinsie Kelders Bpk* 2001

(4) SA 1165 (C) at 1175D - G."

[11] In *Eke v Parsons* 2016 (3) SA 37 (CC) ("Eke case") it was stated by Madlanga J, writing the majority judgment:

"[29] Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court

orders:

'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'

[30] This is equally true of court orders following on settlement agreements, of course with a slant that is specific to orders of this nature:

'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. . . .

The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the genesis of the transaction or its factual matrix. Its aim is to put the court in the armchair of the author(s) of the document. Evidence of surrounding circumstances is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide sufficient certainty.'

[31] The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes *res judicata* (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a *mandamus*.

[32] Litigation antecedent to enforcement is not necessarily objectionable. That is so because ordinarily a settlement agreement and the resultant settlement order will have disposed of the underlying dispute. Generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute, which — depending on the nature of the litigation — might have entailed many days of contested hearing.

[36] In sum, what all this means is that, even with the possibility of an additional approach to court, settlements of this nature do comport with the efficient use of judicial resources. First, the original underlying dispute is settled and becomes *res judicata*. Second, what litigation there may be after the settlement order will relate to non-compliance with this order, and not the original underlying dispute. Third, matters that culminate in litigation that precedes enforcement are fewer than those that don't.

[38] Accordingly, I can find no basis to disagree with the High Court's finding that the settlement agreement is final in its terms and that Mr Parsons is entitled to approach a court for enforcement of that order in accordance with the procedure set out in it."

[12] In the *Eke* case, *supra*, Jafta J, writing the minority judgment, states:

“[53] I have read the judgment prepared by my colleague Madlanga J (main judgment). I agree with most of what is said in it and the order it proposes. In particular I agree with the conclusion that a 'settlement order' brings about finality to litigation and gives rise to res judicata. I also agree that such an order is enforceable just like any order issued by a court, and that the route followed to enforce it depends on the nature of the order granted. But my approach differs from the main judgment in relation to the applicability of rule 32 of the Uniform Rules to the present proceedings, as well as on whether the provision that Mr Eke was prohibited from opposing the application was enforceable against him.

[68] Mr Eke further argued that the settlement agreement was not enforceable because the clause that prohibited him from opposing the summary judgment was inconsistent with s 34 of the Constitution. This argument too was misconceived. When Mr Parsons re-enrolled the summary judgment he did not act in terms of the parties' settlement agreement. Instead he acted in terms of the court order. The parties' agreement had been converted by the High Court into its own order when the order was issued. The parties' settlement was novated by operation of law.

[This was said with reference to the Swardif case.]

[70] Here it is apparent that Mr Eke misconstrued the basis on which Mr Parsons re-enrolled the summary judgment application. Mr Parsons acted in terms of the court order and not the underlying settlement agreement which had been novated by the order of 16 July 2013.”

[13] In *Moraitis Investments (Pty) Ltd And Others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) (“Moraitis case”) the following was stated:

“[10] In my view that was not the correct starting point for the enquiry, because it ignored the existence of the order making the agreement an order of court. Whilst terse the order was clear. It read:

‘The Agreement of Settlement signed and dated 05 September 2013 is made an order of court.’

For so long as that order stood it could not be disregarded. The fact that it was a consent order is neither here nor there. Such an order has exactly the same standing and qualities as any other court order. It is res judicata as between the parties in regard to the matters covered thereby. The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with s 165(5) of the Constitution, which provides that an order issued by a court binds all people to whom it applies. The necessary starting point in this case was therefore whether the grounds advanced by the applicants justified the rescission of the consent judgment. If they did not then it had to stand and questions of the enforceability of the settlement agreement became academic.

[16] Counsel for the respondents, Mr Symon SC, very properly drew our attention to the judgment of Van Zyl J in *Kruisenga*, where he said that:

‘The principle is that when a judgment is not passed on the merits of a dispute ... but rather derives its existence from an agreement, its continued existence is subject to the validity of the agreement.’

There are two difficulties with this statement. First, the distinction it draws, between judgments ‘not passed on the merits of a dispute’ and other judgments, lacks any foundation in our jurisprudence. There is no difference in law between an order granted in the case of a default judgment; an order pursuant to a settlement prior to the conclusion of opposed proceedings; or the order in a judgment pronounced at the end of a trial or opposed application. As the Constitutional Court has said it is an order ‘like any other’. Second, the proposition is over-broad and inconsistent with the authorities discussed above. Were it correct a material, but non-fraudulent,

misrepresentation justifying rescission of the agreement of compromise would also justify the rescission of the judgment granted

pursuant to that compromise, but that is not the case. Its defect lies in approaching the question from the direction of the agreement

instead of from the direction of the judgment. The latter is the correct approach, because the judgment operates as *res judicata* and precludes a claim based on the agreement. Unless and until the judgment has been set aside, there can be no question of attacking

the compromise agreement. It follows that the necessary starting point for the enquiry must be whether there are grounds upon which to seek rescission of the court order. Only then can there be any issue regarding the rescission of the compromise.”

[14] The Moraitis case of the SCA follows the Eke case of the Constitutional Court. In the Moraitis case the SCA had another opportunity to pronounce on this aspect of the law after it had already done so in the MV Ivory Tirupati case. As stated by Wallis JA in the Moraitis case, the law is settled in that “unless and until the judgment has been set aside, there can be no question of attacking the compromise agreement.”

[15] There is no application by L, for rescission or variation of the court order either in terms of Rule 42 of the Rules of Court or at common law. No such relief is prayed for and therefore no case for such relief is made out. This clearly put paid to this application as correctly submitted by Adv. Cilliers SC acting on behalf of H. The relief or order prayed for is not competent in law.

Interim Interdict

[16] Adv. Rossouw SC contended that the relief as prayed for in the notice of motion is for the granting of an interim interdict. He submitted that the requirements for the granting of an interim interdict has been met. According to him, L has made out a *prima facie* case that the settlement agreement has terminated, although it is open to some doubt. As far as this aspect is concerned, the law is clear. As already alluded to earlier on in this judgment, there

is no evidence that the court order is rescinded or varied. There can therefore be no argument that the agreement has terminated. No prima facie case has been made out in this regard and it is not open to any doubt.

- [17] It was furthermore contended by Adv. Rossouw SC that there is a well-grounded apprehension that L will suffer irreparable harm if the interim interdict is not granted and the order is allowed to be executed and L ultimately succeeds in establishing his right in the subsequent action. I am holding a different view. Unless and until the court order is rescinded and set aside, it stands and can be executed upon. Court orders should not be disregarded at whim but must be complied with.
- [18] Insofar as the balance of convenience is concerned it was contended by Adv. Rossouw SC that it favours L because if the order is not executed H will still be the owner of her undivided 25% shareholding in the properties whereas if the order is executed L will be minus R5 million and a flat and without any form of security that the money would be repaid in the event that L is successful in the action to be instituted. I am unconvinced that the balance of convenience favours the granting of an interim interdict in favour of L. As an alternative remedy, L can still institute the intended action and can find redress in due course, in the event that he be successful. In my view, no case has been made out by L for the granting of an interim interdict in the form as prayed for in the notice of motion. On this basis too, the application must fail.

Repudiation

- [19] L contended that the agreement was repudiated by H. According to him, during October 2016, H indicated that she would prefer two units in another development and was no longer interested in the flat referred to in the agreement. This was allegedly agreed to between them. H then apparently took the contracts to her own attorneys and thereafter informed L's attorneys that she is no longer interested in these properties. This is not confirmed by L's attorneys and is thus uncorroborated.
- [20] Allegedly during March 2017 H reiterated that she is no longer interested in the flat in terms of the agreement and she demanded

payment of the value of the flat. These allegations are denied by H. On her version, she laid a criminal charge of contempt of court against L already in February 2017 because of his failure to comply with his obligations in terms of the agreement, which is now a court order. This clearly shows that H demanded specific performance in the terms of their agreement. This also flies in the face of all the allegations made by L.

- [21] In a letter dated 06th June 2017, H's attorneys demand specific performance in terms of the agreement. This too is a clear indication of H's intention to persist with her request for specific performance in terms of their agreement, which is now an order of this Court.
- [22] On the probabilities, the objective facts clearly support H's version.

- She waited for the five (5) year period to expire.
- She demanded compliance with the terms of the agreement.
- She was willing to take payment of the value of the flat in the event that the flat is no longer available to be transferred into her name.
- She laid a criminal charge against L for contempt of court for failing to comply with a court order.
- She caused her attorneys of record to send a letter of demand to L.

[23] The onus is on L to prove the allege repudiation of the settlement agreement. In *Culverwell & Another v Brown* 1990

(1) SA (7) (A), the following is stated as the test for repudiation:

“The test whether conduct amounts to repudiation of a contract is similar. In Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou 1978

(2) SA 835 (A) at 845A - C, Rabie JA referred with approval to statements by Williamson J in *Street v Dublin* 1961

(2) SA 4 (W) at 10B:

'(T)he test as to whether conduct amounts to such a repudiation is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound.'

And by Lewis J in *Schlinkman v Van der Walt and Others* 1947

(2) SA 900 (E) at 919:

'Repudiation is in the main a question of the intention of the party alleged to have repudiated. As was said by Lord Coleridge LCJ in *Freeth v Burr*

(1874) LR 9 CP at 214:

'the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract'

a test which was approved by the House of Lords in *Mersey Steel Co v Naylor* 9 AC 434.”

[24] Repudiation is based on the intention of the party alleged to have repudiated. Based on the aforementioned probabilities, I am unconvinced that H intended to repudiate the settlement agreement. This should however not be construed that the terms of the settlement agreement which is now embodied in a court order, can be repudiated and such repudiation may be accepted by the other party without the court order being rescinded or varied. The law in this regard is unequivocal and clear: unless and until the judgment (order) has been set aside, there can be no question of attacking the compromise agreement.

See: Eke v Parsons, supra.

Moraitis case, supra.

[25] I am of the view that L has failed to make out a case in terms of the prayers of the notice of motion. The application should therefore be dismissed. In as far as costs are concerned, it should follow the result. I am not incline to grant costs on a punitive scale as submitted by Adv. Cilliers SC. L's conduct in my view is not deserving of a punitive costs order. Because of the importance of this matter to both parties, the employment of senior counsel was warranted. The costs to be awarded should also include the costs consequent upon the employment of two counsel (senior and junior), where applicable.

Order

[26] Consequently, the following order is made:

- (i) The application is dismissed with costs on a party and party scale.
- (ii) Such costs to include the costs consequent upon the employment of two counsel (senior and junior).

R D HENDRICKS

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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Prepared on 12 October 2026 · Esheria