

SOUTH AFRICA / JUDGMENT

L.R v P.R (14/2/2018) [2018] ZAWCHC 19; 2018 (3) SA 507 (WCC) (14 February 2018) [2018] ZAWCHC 19

COURT

Western Cape High Court, Cape Town

BEFORE

Andrews AJ

CASE / FILE NUMBER

11463/17

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IN THE HIGH COURT OF

SOUTH AFRICA

(WESTERN CAPE

DIVISION, CAPE TOWN)

REPORTABLE

Case

Numbers: 11463/17

In

the matter between:

L.

R. Applicant

and

P.

R. Respondent

JUDGMENT

DELIVERED 14 FEBRUARY 2018

Andrews AJ

Introduction

- [1] This is an application in terms whereof Applicant seeks an order that Respondent effect transfer of the immovable property situated at [...] R. Road Parkland registered in the names of both Applicant and Respondent, being joint owners in undivided share, within 30 calendar days of the granting of an order to that effect. Alternatively, in the event of the property not being transferred within 30 days of such order being granted, the property is to be sold on public auction within 60 calendar days and the nett proceeds from the sale of the property is to be paid over to Respondent. Applicant also seeks a cost order against Respondent on an attorney and client scale.
- [2] The matter was argued on 12 February 2018. Adv. T Smit appeared on behalf of Applicant and Adv. P Tredoux appeared on behalf of Respondent. The ruling in the matter was reserved until 13 February 2018. On 13 February 2018 Respondent brought a Rule 6 (11) application and judgment was reserved until 14 February 2018.

The Factual Background

- [3] The parties entered into a Consent Paper which was incorporated into a Final Decree of Divorce on 18 May 2007. As at the date of divorce, the parties were the joint owners of 73 Regent Road Parklands (hereinafter referred to as “the property”).

The salient terms of clause 4.1 and 4.2 of the Consent Paper included inter alia that:

- (a) Applicant would transfer her half share in the immovable property to Respondent;
- (b) All costs incurred in connection with the transfer of Applicant’s half-share would be for Respondent’s account;
- (c) The transfer of Applicant’s half-share would be carried out by her attorneys of record or an attorney nominated by her;
- (d) Respondent would procure Applicant’s release from all obligations in terms of the bond and bear any costs which may be applicable in order to do this and in order to register a fresh bond over the property;
- (e) Until such time as Respondent has procured Applicant’s release from these obligations he would indemnify and hold Applicant harmless against any claims which may be made against her arising out of the mortgage bond registered over the property;

- (f) Respondent undertook to forthwith arrange to take transfer of Applicant's half-share of the property and agreed and undertook to pay all amounts which may be due in respect to give effect to this clause, to sign all documentation as he may be required to sign in order to give effect to it.

Principle submissions made on behalf of the parties

- [4] According to Applicant, Respondent had in February 2008, agreed to place the property on the market, in order to give effect to the court order, but same did not materialise. It is common cause that in and during December 2008, Nedbank obtained judgment against both parties pursuant to foreclosing and subsequent proceedings instituted as a result of the parties' failure to pay their bond instalments. The Applicant claimed that Respondent leased the property to third parties, but failed to pay the utility bills in respect thereof.
- [5] The Respondent claims that Applicant is responsible for his failure to comply with the terms of the Consent Paper as Applicant failed to pay him sufficient maintenance after the divorce. According to Respondent, he had to shoulder the burden of raising the children and carried the responsibility of paying the school fees.
- [6] Applicant contends that it is improbable that Respondent would qualify for the bond as final approval is conditional upon a number of criterion which includes inter alia:
- (a) Credit assessment;
 - (b) Valuation of property and
 - (c) Deposit being paid / secured.
- [7] Applicant submitted that it is unlikely that Respondent would overcome these hurdles and secure a bond because of the judgment which was taken against him. Furthermore, Respondent contends that the proposal made by Respondent is a delaying tactic as he has had approximately 10 years to procure the necessary funds and requisite documentation in order to give effect to the Divorce Order and transfer the property.
- [8] Respondent now seeks an indulgence of 3 months for the transfer to be finalised. Respondent submitted that would be required to give his existing bond-holder the requisite 3 month notice as early cancellation would evoke a penalty in the sum of R30 000.00, which Respondent says, would exacerbate his financial position and cause him to suffer extreme hardship.

Discussion

- [9] Respondent does not deny that he failed to comply with the terms of the Consent Paper for the past 10 years. Respondent's contention that Applicant is to blame for his failure is however without merit as the parties agreed on the monthly maintenance amount as encapsulated in the Consent Paper. Applicant rightfully points out that if the maintenance amount was insufficient, Respondent could have approached the court for an increase. It

would appear however, that Respondent opportunistically seeks to shift the blame to the Applicant, as he had an opportunity in 2008 to sell the property. Applicant claims that the property was in fact marketed but the sale was not realised due to the refusal by Respondent to have the property marketed at the price suggested by the estate agent.

[10] It was pointed out by Applicant that Respondent's contentions are fraught with contradictions and unrealistic promises, aimed at further delaying the matter. Some of the contradictions highlighted were that Respondent was unable to submit an application

for a loan as he was awaiting the completion of his financial statement before he could apply which juxtaposes the fact that he has now applied for a loan which has in principle been approved; the 'in principle approval', "not being worth the paper it is written on", according to Counsel for Applicant. It is very clear from the pre-approval documentation that his final approval is subject to credit clearance. Apart from this challenge, Respondent proposes that an order be taken to afford him the opportunity to finalise the bond approval procedure which may or may not be successful.

[11] Applicant's contended that there was no certainty in Respondent's proposal, and argued that the said proposal was a delaying tactic in order to afford Respondent more time to the prejudice of Applicant. Respondent had to "forthwith

arrange to take transfer" according to the agreed terms of the Consent Paper. It has to be borne in mind that Respondent has been afforded almost 10 years within which to give effect to the order. In my view, Respondent has been given sufficient

leniency and opportunity by Applicant to take the necessary steps and any further indulgences by this court could certainly be perceived as the court enabling Respondent to disregard the terms of a court order; which terms were agreed to by Respondent. The de facto position is that Respondent does not have the funds available to make the necessary payment. On the documents presented by Respondent, I am of the view that he has failed to satisfy this court of his ability to fulfil his undertaking. Neither am I persuaded on the papers that Respondent will be in a position to do so in light of the outstanding valuation and prerequisites. At the time when the matter was argued, there was no indication that there is any equity in the property should Respondent manage to secure the bond.

[12] Of further concern is that Respondent proposed that if the property is to be sold by auction, that the auction be subject to a reserve price of R2 600 000.00. This proposed reserve price is unsubstantiated. No property appraisal was conducted at the time of hearing the application. In this regard and on Respondent's own version, the property was valued at approximately R 1 250 00.00 in 2016. It is improbable that the value of the property would have doubled since then. I am of the view that Respondent has created an unrealistic expectation which would potentially result in the property not being sold on auction. The fair, reasonable market value of the property has not been determined. In the circumstances, the inclusion of the proposed clause is inappropriate.

- [13] Additionally, although Respondent contended that he would not have to pay the deposit amount as set out in the pre-approval document. Applicant argued that Respondent will not have the cash on hand to be able to pay same and there is no certainty that there will be sufficient equity in the property to ensure that there is sufficient surplus to pay the deposit. I agree with Applicant's contention that Respondent produced no evidence to satisfy the court that he would be able to comply with the conditions imposed by the bank.

Conclusion

- [14] I am not persuaded that the balance of convenience favours Respondent. I am of the view that any further delay will cause further prejudice to Applicant. I find that the delay thus far has been unreasonable and that Respondent cannot expect Applicant to be more lenient than she has already been. Additionally, I am of the view that Respondent has not raised any defences which prima facie is good in law, to the relief being sought by Applicant. In fact, what Respondent is requesting, is an indulgence to afford him more time. In this regard, I find that a 10 year indulgence was more than sufficient and that finality should be had to facilitate the envisaged 'clean break' principle in divorce matters. It is trite that the 'clean break' principle is based on the premise that the parties should after the divorce become economically independent of each other as soon as possible.[1] This principle although generally applied in the context of spousal maintenance can in my view be extended to circumstances pertaining to the proprietary consequences of the parties' joint estate.
- [15] Pursuant to the application launched in terms of Rule 6 (11) on 13 February 2018, an additional affidavit was admitted by agreement which outlined subsequent developments and sought to address certain issues which were not clarified on the day the matter was argued.
- [16] It came to light that after the court had adjourned on Monday 12 February 2018, that Respondent received final bond approval in the amount of R1 600 000.00. An amount of R634 220.43 is owing to Nedbank and the arrear rates and taxes owing to the City of Cape Town amount to R96 730.00. After considering all the disbursements there would be a surplus amount of R898 999.70 according to Respondent's calculations.
- [17] Respondent also clarified that it was correctly pointed out by Applicant that Nedbank took default judgment against both parties but that this judgment was abandoned by Nedbank in 2011 after he had settled the arrears.
- [18] Respondent argued that it would take just over three months for transfer to be effected as Nedbank requires 3 months' notice of cancellation of the mortgage bond as mentioned earlier in this judgment. Respondent requested that the court considers holding the application in abeyance pending finalisation of the transfer until 2 May 2018. This proposal was vehemently opposed by Applicant, submitting that any postponement would further delay matter and that the proposed date in May would signal the 11th year since the finalisation of the divorce. I am of the view that the interest of justice will not be served by

allowing a postponement in this matter, given the history attached. Furthermore, it is trite that public interest and the rule of law require finality in litigation as the law is not without certainty, more especially in circumstances where there have been delays which have been unreasonable. Consequently the application for a postponement is refused.

- [19] Both parties have indicated that the impasse cannot be settled. I have perused the proposed settlement orders of both the parties from which it is clear that the parties are ad idem on most of the issues and that the only remaining issues in contention evolve around the time period within which Respondent is to effect transfer of the immovable property and costs. Therefore in the exercise of my judicial discretion I will incorporate the orders agreed to by the parties and only decide on the remaining issues in dispute. I wish to add that the terms of the Consent Paper which was made an order of court on 18 May 2007, were agreed to in settlement of any accrual which might have occurred in the marriage between the parties.
- [20] I am alive to the fact that Applicant has waited for a considerable period in order for Respondent to comply with the terms of the Final Divorce order and that she is desirous to bring this matter to a close. On a conspectus of the evidence, it is my view that Respondent should be given a reasonable amount of time in order to take transfer of the property. Whilst Applicant is desirous for

this to happen within 30 days and Respondent has requested a period of 90 days, I am of the view that a period of 60 days should be sufficient time for the transfer of the property to be finalised. Should Respondent require more time, he will be at liberty to approach the court for a further indulgence.

- [21] I am given to understand that the transferring attorneys have already been paid a sum of R30 000.00 to effect transfer and that R10 000.00 is owing to said attorneys in fees. It therefore follows that the attorneys currently instructed to attend to the transfer should continue as the appointment of fresh attorneys would inevitably further delay the transfer. The only issue

remaining relate to the aspect of costs.

Costs

- [22] Applicant has argued that as Respondent has done nothing for more than 10 years, and argued that costs should be awarded on an attorney and client scale. Respondent argued that as Respondent has not conducted himself dishonestly, a punitive cost order would be unnecessarily harsh. Respondent tenders party and party costs. Although Respondent tendered the costs occasioned pursuant to the Rule 6 (11) application, Applicant argued that costs should be awarded on an attorney client scale in light of the fact that Respondent not only sought to place crucial information before the court pertaining to developments in the matter since the court adjourned on 12 February, but sought to use the opportunity to supplement his papers, which Applicant argued, did not take the matter any further.

[23] It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs. The general rule is that costs follow the event, which is a starting point. The guiding principle is that ‘...costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly

compelled either to initiate or to defend litigation, as the case may be,. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.’[2]

[24] In *Nel, Appellant v Waterberg Landbouwerkers Kooperatiewe Vereniging Respondent*[3], the following was stated in relation to costs on an attorney and client scale:

‘The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action from the conduct of the losing party, the court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. See *Hearle and McEwan v Mitchell’s Executor* (1922 TPD 192). Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say ‘as far as it can’ because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party ...’[4]

[25] It is also an accepted legal principle that cost is in the discretion of the court.[5] The basic rules were stated as follows by the Constitutional Court in *Ferreira v Levin NO and Others*[6]:

‘The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.’

[26] I considered granting a punitive cost award in favour of Applicant, given the history of the delays occasioned by Respondent in this matter. However, in the exercise of my judicial discretion, I am not inclined to make a punitive cost order as requested by Applicant.

Order

[27] In the result, the court having heard Counsel on behalf of both parties and having read the documents filed of record, it is ordered that:

- (a) The Respondent is directed to effect transfer of the immovable property situated at [...] R. Road, Parklands (the property) registered in the names of the Applicant and Respondent as joint owners in undivided share, in accordance with the terms set out

in clause 4.1 of the Consent Paper which was incorporated into a Final Decree of Divorce granted by Motala J on 18 May 2007 (the

Consent Paper) within 60 calendar days of the date of the granting of this order.

- (b) The Respondent shall be liable for any and / or all outstanding amounts which may be due in respect of municipal accounts, clearance certificates, outstanding bond amounts, transfer duties (if applicable), Conveyancing costs and or any other amount payable in order to effect such transfer into Respondent's name.
- (c) In the event of Respondent failing to effect transfer of the property into his name within 60 calendar days of the date of granting of this order, the property shall be sold on public auction within 60 calendar days of the lapsing of the 60-day period referred to in paragraph (a) supra, and the net proceeds from the sale of the property shall be paid over to Respondent.
- (d) Respondent shall be liable for the payment of all costs of whatsoever nature payable by the seller(s) in order to effect transfer of the property into the name(s) of the new owner(s) and shall, in addition thereto be liable for the auctioneer's commission, unless otherwise stipulated in the Deed of Alienation or Conditions of Auction.
- (e) Any outstanding payments in respect of the utility bills (water and electricity, rates and taxes, home owner's insurance) shall be deducted from the proceeds from the sale of the property in accordance with paragraph 4.2 of the Consent Paper.
- (f) It is recorded that the Conveyancing Attorney has already been appointed in terms of clause 4.1 of the Consent Paper. The Conveyancing Attorney is hereby authorised to make such deductions and or payments, as the case may be, from the proceeds of the sale of the property.
- (g) In addition to the aforesaid deductions or payments, and read with paragraph (c) supra, the Conveyancing Attorney is to retain the sum of R40 000.00 in trust for the payment of Applicant's legal costs as taxed or agreed with the balance, to be paid over to Respondent.
- (h) The Respondent is ordered and directed to sign all documentation required to give effect to the aforesaid within 5 (five) calendar days of receipt of a written request to do so, failing which the Sheriff or the Registrar of the High Court, Cape Town shall be authorised to sign such documentation on the Respondent's behalf.

- (i) The Respondent shall pay the costs of this application, which costs shall include the costs tendered by Respondent in respect of the Rule 6 (11) application brought on 12 February 2018.

P ANDREWS, AJ

Acting Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 11463/17/2016

In the matter between:

L R Applicant

P R Respondent

CIVIL JUDGMENT - 'CLEAN BREAK' EXTENDED TO PROPRIETARY CONSEQUENCES

JUDGE: Andrews AJ

JUGDMENT DELIVERED BY: Andrews AJ

FOR APPLICANT: Adv. T Smit

INSTRUCTED BY: Wolpes Inc.

FOR RESPONDENT: Adv. P Tredoux

INSTRUCTED BY: Cornell Stander Attorneys

DATES OF HEARING: 12 and 13 FEBRUARY 2018

DATE OF JUDGMENT: 14 FEBRUARY 2018

[1] Van Zyl, L 'Handbook of the South African Law of Maintenance' 2nd Ed, Lexis Nexis page 27.

[2] Cilliers AC 'Law of Costs' Butterworths page 1-4; Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others; In re: Anton Piller and Interdict Proceedings

[2016] JOL 34325 (FB) par 1 and 2; Thusi v Minister of Home Affairs and 71 Other Cases

(2011) (2) SA 561 (KZP) 605-611.

[3] 1946 AD 597 at 608.

- [4] Cadac (Pty) Ltd v Weber Stephen Products Co and Others [2011] 1 All SA 343 (SCA) at para 24, also reported at 2011 (3) SA 570 (SCA); Jeebhai and Others v Minister of Home Affairs and Another (139/08)
- [2009] ZASCA 35; [2009] 3 All SA 103 (SCA), where, in a dissenting judgment, Cameron and Cachalia JJA, suggested that the non-compliance with the Court's rules could be dealt with by means of a punitive costs order. See also Gauteng Gambling Board and Another v MEC for Economic Development: Gauteng Provincial Government Corporation Ltd (01563/2012) [2012] ZAGPJHC (8 May 2012), where on appeal, the respondent was ordered to pay the costs of the application on the attorney and client scale.
- [5] Ibid page 2-16(1); Fusion Hotel and Entertainment Centre CC v eThekweni Municipality and Another [2015] JOL 32690 (KZD) '[12] It is common cause that in this matter the issues at hand remained undecided and the merits were not considered. When the issues are left undecided, the court has a discretion whether to direct each party to pay its own costs or make a specific order as to costs. A decision on costs can on its own, in my view, be made irrespective of the non-consideration of the merits. I am stating this on the basis that an award for costs is to indemnify the successful litigant for the expense to which he was put through to challenge or defend the case, as the case may be...'
- [6]
- [1996] ZACC 27; 1996
- (2) SA 621 (CC) at 624B—C (par [3]).

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