

SOUTH AFRICA / JUDGMENT

P.Y.K v T.S.K (077720/2024) [2025] ZAGPPHC 241 (7 March 2025)

[2025] ZAGPPHC 241

COURT

North Gauteng High Court, Pretoria

BEFORE

Botsi-Thulare

CASE / FILE NUMBER

077720/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 077720/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

In

the matter between: P[...]
Y[...]
K[...]
Applicant
And
T[...]
S[...]
K[...]
Respondent

JUDGMENT

BOTSI-THULARE AJ

Introduction

- [1] This is an application in which the applicant seeks a declaratory relief to the effect that clause 3.1.1 to 3.1.8 of a settlement agreement which was concluded between the applicant and respondent on 18 March 2024 (the Settlement Agreement) does not require payment of any sum as a condition to the transfer of the property. In addition, the applicant seeks an extension of a time period which was provided for in the Settlement Agreement. Lastly, the applicant seeks the court to appoint her own conveyancer as that appointed by the respondent has contributed towards the interruption of the period by acting in favour of the respondent (to the applicant's detriment).
- [2] This application is opposed by the respondent on various grounds. The respondent also lodged a counter-application in which he requests this court to amend the wording in clause 3.1.3 to include how the purchase price for the immovable property should be determined. Further, to amend the wording in clause 3.1.4 to grant the applicant six months from date of divorce to purchase his half share in the immovable property.

Factual

background

- [3] The applicant and the respondent were previously married to each other in community of property. On 18 March 2024 they were officially divorced by a decree of divorce which, incorporated the Settlement Agreement, granted by the Kempton Park Regional Court (Regional Court). At the time of divorce, the applicant was not legally represented but the respondent was represented. The Settlement Agreement was drafted by the respondent through his attorneys of record and was presented to the applicant for consideration. The applicant duly accepted and signed the Settlement Agreement and it was made an order of court.

[4] Clause 3.1 of the Settlement Agreement, which is the subject of this application, provides as follows:

“3.1 IMMOVABLE PROPERTY

3.1.1. The parties are joint owners of the immovable property situated at 2[...] R[...] C[...], B[...] A[...], K[...] P[...], Gauteng Province ("immovable property").

3.1.2. The parties record that there is a bond registered over the above-mentioned immovable property in the amount of R655 320.19 in favour of Standard Bank Home Loans Office under home loan account number: 3[...].

3.1.3. It is agreed between the parties that the Defendant's share in the immovable property will be transferred to the Plaintiff, subject thereto that the Defendant will be released from any/all obligations and/or liability towards Standard Bank Home Loans Office in respect of the above-mentioned mortgage bond.

3.1.4. It is agreed between the parties that the Plaintiff will be afforded a period of 3 (three) months, or such other period as agreed to between the parties in writing, after the granting of the divorce order to effect the transfer of the Defendant's 50% share in the immovable property into her name, subject thereto that:

3.1.5. Pending the successful transfer of the Defendant's share in the immovable property into the name of the Plaintiff, the Plaintiff shall be liable for the timeous payment of the current monthly mortgage bond payments, utility charges and rates and taxes as levied against the property.

3.1.6. The Plaintiff shall be liable for payment of all costs associated with the transfer, including but not limited to clearance figures.

3.1.7. The Plaintiff will be responsible for the upkeep and maintenance of the immovable property at her own costs, and it is agreed that no changes may be made by the Plaintiff to the property until the transfer has been completed.

3.1.8. The Parties agree to provide and/or sign all the required documentation and/or information necessary to effect the aforesaid transfer and to give their full co-operation in this regard, failure whereof the Sheriff of the High Court is herewith granted with the mandate and power of attorney to sign on the default party's behalf if any party defaults and/or refuses to sign the necessary documentation within 5 business days from the date which they're requested to do so.

3.1.9. The parties agree that, in the event that the Plaintiff defaults on any of the above-mentioned conditions and/or is unable to proceed with the intended transfer as stated hereinabove, then the immovable property will be sold in the open market, where after the proceeds will first be utilized to settle the outstanding mortgage bond, secondly to cover any costs relating to the sale (i.e. COC Certificates, clearance certificates, etc.) where after the net balance, if any, will be divided equally between the parties.

3.1.10 Should the immovable property be sold in the open market or Defendant's half share of the immovable property will be purchased by Plaintiff, the conveyancing attorneys appointed by the parties are Botha Nel Inc. with the following mandate:

3.1.10.1 The collection of the full purchase price;

3.1.10.2 The cancellation and discharge of the mortgage bond, such amount to be deducted from the Parties' share in the property:

- a. The discharge of any further obligations on the property in respect of rates, taxes, estate agent's commission and the like;
- b. The distribution to both Parties in equal shares of the net residue;
- c. That both Parties are ordered to sign all documentation necessary to effect transfer and registration pursuant to the said sale within three days of presentation to them of the said documentation by the conveyancer appointed to effect the registration of the transfer; and
- d. That in the event that any of the Parties fail to adhere to the order in paragraph 3.1.8. above within 4 (four) business days, the Sheriff of the High Court within the jurisdiction of the immovable property are herewith given power and mandate to sign any such documentation on behalf of the party refusing to sign the documentation."

Issues

[5] Against this background, this application turns on the following

issues.

- a. Whether the applicant made out a case for granting a declaratory order to the effect that clause 3.1.1 to 3.1.8 does not require payment of any sum as a condition to transfer of the property.
- b. Whether a new conveyancer can be appointed in the circumstances.
- c. Whether the wording in clause 3.1.3 should be amended to include how the purchase price for the immovable property should be determined.
- d. Whether the extension for a time-period of 3 months provided for in clause 3.1.4 of the Settlement Agreement should be granted.

Applicant's submission

- [6] The applicant submits that it was agreed that respondent's half share was to be transferred to the applicant on the basis that she was to be the primary caregiver of the children. The applicant contends that she has performed and is entitled to an order of specific performance in that she has made the bond readily available; has commenced in removing the respondent from the bond; has cleared municipal account and is ready to pay cancellation figures.
- [7] The applicant argues that the Settlement Agreement provides for transfer of the property to the applicant subject to the respondent being released from the bond as well as the applicant being responsible for the payment of the property expenses during such period. According to the applicant, this is provided for in clauses 3.1.1 to 3.1.8 of the Settlement Agreement. Accordingly, the applicant seeks specific performance order from the respondent in order to fulfil these terms of the Settlement Agreement.

Respondent's submission

- [8] In opposition of the application, the respondent contends that the applicant has brought this application as if there was never any intention for her to purchase the respondent's half share in the property but to merely be vested with ownership rights without any monetary amount attached thereto. The respondent alleges that the applicant is wholly untruthful, and she omitted to play open cards with this court when dealing with the true intention of the parties whilst they were negotiating the terms of the Settlement Agreement.
- [9] The respondent argues that the applicant attempts to portray that the immovable property was to be awarded to her due to the fact that she has been vested with primary residence of the minor children, yet there is no such evidence in any form or manner presented before this court.
- [10] The respondent contends that the Settlement Agreement should be read as a whole and not fragmented parts, if and when it suits a certain party in their favor. In this regard, the respondent argues that the applicant cannot rely on clauses 3.1.1 to 3.1.8 in isolation, specifically for the purpose that the immovable property is dealt with in detail under clause 3.1 in its entirety.
- [11] The respondent further contends that it must be borne in mind that the parties were married in community of property, and it automatically follows that the immovable property should either be purchased by one party through reimbursing the other, alternatively, that the property be sold in the open market, the bond be settled, and the remainder be divided equally between the parties. According to the respondent, this is also how clause 3.1.10 reads.

The law

[12] Under common law, the High Court did not have jurisdiction to grant declaratory relief[1]. Such power was conferred upon the High Court by the provisions of section 102 of the General Law Amendment Act 46 of 1935 (Currently it is governed by section 21 of the Superior Courts Act 10 of 2013 (Superior Court Act)).

[13] In terms of the provision of Section 21(1)(c) of the Superior Courts Act, 10 of 2013, the High Court may grant a declaratory order without any consequential relief sought. The section provides as follows:

“21(1) A Division has jurisdiction over all persons resident or being in, and in relation to all causes arising and all offence triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –

(a)

(b)

(c) In its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination”.

[14] The correct approach to section 21(1)(c), the wording of which is similar to the erstwhile power conferred upon the court under section 10(1)(a)(iii) of the now repealed Supreme Court Act 58 of 1959, was summed up by Corbett CJ in *Shoba v OC, Temporary Police Camp, Wagendrift Dam*[2]as follows:

“An existing or concrete dispute between persons is not a pre-requisite for the exercise by the Court of its jurisdiction under this

subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise its

jurisdiction in a particular case (see *Ex parte Nell* 1963 (1) SA 754 (A), at 759H - 760B). But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (*Nell's case*, at 760B - C). In *Nell's case*, supra, at 759A - B, Steyn CJ referred with approval to the following statement by Watermeyer JA in *Durban City Council v Association of Building Societies* 1942 AD 27, fit 32, with reference to the identically worded sec 102 of Act 46 of 1935:

"The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, this Court must decide whether the case is a proper one for the exercise of the discretion conferred on it."

- [15] The Supreme Court of appeal in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*[3] confirmed the two-stage approach adopted by the then Appellate Division in *Durban City Council v Association of Building Societies*[4] and held that:

“..., the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the court must be satisfied that the applicant has an interest in an ‘existing, future or contingent right or obligation’. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court’s discretion exist. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry.”

- [16] When considering the grant of declaratory relief, the court will not grant such order where the issue raised before it is hypothetical, abstract and academic, or where the legal position is clearly defined by statute.[5]
- [17] A declaratory order is an order where a dispute over the existence of some legal right or entitlement is resolved. There must be a legal basis upon which the declaratory order in favour of the applicant can be made, it would not ordinarily be appropriate where one is dealing with events which occurred in the past, such events, if they give rise to a cause of action, would entitle the litigant to an appropriate remedy. The interest that the applicant should have, is at least akin to the interest that a party has to intervene in the proceedings in the High Court, i.e., have a direct and substantial interest in the subject matter[6].
- [18] The applicant has demonstrated that the court order (decree of divorce) granted by the Regional Court has not been set aside. The Regional Court became functus officio after granting the order. This factor is indicative that the applicant has no remedy other than to seek the intervention of this court is accessing what she alleges is due to her. The submission made by the first respondent that this application is premature is in my view incorrect. Apart from the fact that the Regional Court is functus officio, it is trite that once a court has pronounced a final order, the matter is res judicata. This closes the door to the applicant to litigate on the same matter. The essence of the current application (whether in terms of mandamus or declaratory) is nothing more than enforcement of the applicant’s right.

Analysis

Whether the declaratory order should be granted

- [19] The applicant has approached this court seeking a declaratory order to the effect that clause 3.1.1 to 3.1.8 does not require payment of any sum as a condition to transfer of the property. Conversely, the respondent argues that the applicant cannot rely on clauses 3.1.1 to 3.1.8 in isolation, specifically for the purpose that the immovable property is dealt with in detail under clause 3.1 in its entirety.

[20] It is common cause that the applicant's alleged right to the respondent's share in the immovable property is based on a Settlement Agreement which was made a court order which remains binding and valid unless set aside. Accordingly, to establish whether the Settlement Agreement does not require payment of any sum from the applicant as a condition to transfer of the property of the respondent's share in the immovable property, this court must, as a point of departure, engage in an interpretation of the Settlement Agreement, in particular clause 3.1 in its entirety.

[21] The legal rule regarding the interpretation of contracts in South Africa is that the subjective intention of the parties at the time of contracting, leaving aside the remedies of rectification and estoppel, is irrelevant to the court's determination of the meaning of the contract.[7] The contractual interpretation exercise must be objective. The objective approach to contractual interpretation is that the words used remain the first source of reference.

[22] The approach to interpretation was laid down in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[8] as follows:

"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 of 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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. 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." (My emphasis)

[23] In *Novartis v Maphil*[9] the Supreme Court of Appeal stated the following regarding the interpretation to be adopted by court:

"A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing."

[24] This court is required to look at the words used and the ordinary rules of grammar and syntax in the contract in order to ascertain the meaning of the language used in the contract. At the same time always reading the provisions of the contract in context and having regard to the purpose of the provision and the background to the preparation and production of the document/s that form part of the contract.

- [25] In my view, clause 3.1 should be read as the one clause following the other, not separately because it provides for ways in which the parties' shares in the immovable property should be dealt with. In this regard, clauses 3.1.1 and 3.1.2. provide that the parties are joint owners of the immovable property which has a bond registered over it in favour of Standard Bank Home Loans Office.
- [26] Clause 3.1.3 provides that the parties agree that the respondent's share in the immovable property will be transferred to the applicant and for the respondent to be released from the bond. Clause 3.1.4 then provides the time-period within which the transfer provided for in clause 3.1.3 should be completed.
- [27] In my view, as much as clause 3.1.3 deals with the parties' intention to effect the transfer of the respondent's share in the immovable property to the applicant, the clause cannot be interpreted to mean that the Settlement Agreement does not require payment of any sum as a condition to transfer of the respondent's share in the immovable property.
- [28] Instead, it is clause 3.1.10 which is clear regarding the condition for the transfer of the immovable property. In this regard, clause 3.1.10 envisaged that the parties intended for the transfer of the immovable property to take place either by the applicant purchasing the defendant's share in the immovable property or selling the immovable property on the open market.
- [29] It is clear from the contextual reading of clause 3.1 that the intention of the parties was for the applicant to purchase the respondent's half share in the immovable property. In my view, it is incorrect for the applicant to rely on clauses 3.1.1 to 3.1.8 in isolation to the exclusion of other provisions that form part of clause 3.1. Clause 3.1 should therefore be read as one clause following the other, not separately.
- [30] It is clear that the intention of the parties was that the applicant had to purchase the respondent's half share in the property in the form of a monetary amount, otherwise the Settlement Agreement would not have made provision for the property to be sold and the proceeds thereof to be equally shared between the parties as per clauses 3.9 and 3.1.10.

Whether a new conveyancer can be appointed in the circumstances.

- [31] In addition to the declaratory order, the applicant also seeks the court to appoint her own conveyancer as that appointed by the respondent has contributed towards the interruption of the period by acting in favour of the respondent (to her detriment) and has misconstrued the Settlement Agreement, intentionally to drive a notion for buy-out contrary to the Settlement Agreement.

[32] Since I have already concluded that the intention of the parties was that the applicant had to purchase the respondent's half share in the property in the form of a monetary amount, I think that this ground of the applicant application should fail. Now that this court has made a finding on the status of the Settlement Agreement, the issue of the conveyancer has now become a non-issue.

Respondent's counter-application

[33] The respondent submits that the purpose of the counter-application is to amend the wording that specifically deals with the immovable property, and specifically clause 3.1.3. to include how the purchase price for the immovable property should be determined. Further, to amend clause 3.1.4 to the extent that the applicant is granted 6 months from date of divorce to purchase the respondent's share in the immovable property.

[34] The respondent submits that due to the applicant's failure to purchase the respondent's share in the immovable property within 3 months, it remains that the property ought to be placed on the open market for sale and the proceeds be divided equally between the parties, alternatively that the counter application be granted, which will lead to a fair and just outcome.

[35] The applicant submits that there is no counter-application before court. In this regard, the applicant argues that the counter-application ought to have been brought on notice and the rules applicable to motions are applicable to the counter-application. Accordingly, this court ought to ignore the respondent's purported counter-application.

[36] Counter-applications are provided for in Rule 6(7)(a) of the Uniform Rules of the High Court. [10] Counter-applications are subject to the general principles applicable to applications.[11] A counter-application need not be served by the sheriff since there is already an attorney of record for the applicant.[12] Further, a notice of motion would seem to be unnecessary when the respondent brings a counter-application.[13] However, if there are more parties than one to the main application, a counter-application should be brought on notice of motion and served on all the other parties.[14] In fact, rule 6(7)(a) read with rule 24(1) permits the respondents to deliver their counter-application together with their answering affidavit.[15]

[37] The respondent's counter-application was delivered together with his answering affidavit. In my view, it was not necessary for the counter-application to be accompanied by a notice and/or served on the applicant because the applicant is the one and only party litigating the main application against the respondent and, further, the applicant's attorneys of record were already known by the respondent. On this basis, it is my considered view that the counter application is properly before this court.

Whether wording in clause 3.1.3 should be amended to include how the purchase price for the immovable property should be determined.

[38] As the first ground for the counter-application, the respondent requests this court to amend the wording in clause 3.1.3 to include how the purchase price for the immovable property should be determined. It is my view that the parties agreed.

[39] It is common cause that the Settlement Agreement was made an order of court by the Regional Court. In other words, clause 3.1.3 of the Settlement Agreement remains binding unless varied or set aside by the court. Having said that, I am of the view that it will not be appropriate for this court to amend clause 3.1.3 of the Settlement Agreement because this court cannot, as the court of first instance, vary an order which it did not grant.

Reasons

for Order

[40] It is my considered view that the lack of detail with regard to the determination of the purchase price in this respect is clearly a drafting error but it is not for this court to attempt to remedy the situation by putting in words not justified by the wording of the Settlement Agreement, especially the Settlement Agreement which has been made an order of court.

[41] In my view, it is for the parties to the agreement and not for the court to remedy.[16] In the absence of any consensus between the parties, the Settlement Agreement may be varied by a formal application to court in

circumstances where the order through error or oversight do not correctly reflect the true intentions of the parties. However, I am of the view that this court is, at the moment, not the correct forum to adjudicate on this issue.

[42] Accordingly, the respondent's request for this court to amend clause 3.1.3 of the Settlement agreement should fail.

Whether the extension for a time-period of 3 months provided for in clause 3.1.4 of the Settlement Agreement should be granted

[43] Both parties request this court to extend the time period provided for in clause 3.1.4 of the Settlement Agreement. In this regard, the applicant argues that the lapsing of the time period did not occur because of applicant's wrongdoing but as a result of

the respondent's interruption and interference. On the other hand, the respondent submits that this court must amend clause 3.1.4 to the effect that the applicant is granted 6 months from date of divorce to purchase his half share in the immovable property.

[44] For the reasons advanced above in relation to clause 3.1.3, I am of the considered view that it is not in the jurisdiction of this court to remedy the Settlement Agreement but it is for the parties to do so.

Costs

[45] The applicant seeks costs on the basis that it is clear that the respondent will not comply with the Settlement Agreement unless

compelled to do so. The applicant argues that it is because of the respondent's conduct that she found herself having to seek legal assistance. On the other hand, the respondent prays for a cost order on Scale A including costs of counsel.

[46] The general rule in matters of costs is that the successful party should be given his costs. In determining who the successful party is the court looks to the substance and not the form of the judgment. Where a defendant, who has been predominantly successful, has failed on certain of his defences he will not, as a rule, be deprived of his costs of the unsuccessful defences unless he acted unreasonably in raising these defences.

[47] The respondent in this matter is partially successful on the main application but failed on the counter-application. Accordingly, and in the exercise of my discretion, I am of the view that each party should pay their own costs incurred in the main application and counter-application.

Order

[48] In the result, I make the following order:

1. The applicant's application for the declaratory order is dismissed.
2. The respondent's counter-application is dismissed.
3. Each party is ordered to pay their own costs in the main application and counter-application.

MD BOTSI-THULARE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Applicant: Unknown

Instructed by:

Ngoetjana Attorneys

Counsel for Respondent: Adv Lindi Liebisch

Instructed by:

Boshoff Smuts Inc.

Date of Hearing: 04 December 2024

Date of Judgment: 07 March 2025

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- [1] Geldenhuys and Neethling v Beuthin 1918 AD 426.
- [2] 1995
- (4) SA 1 (AD) at 29.
- [3] 2005
- (6) SA 205 (SCA) at para 18.
- [4] 1942 AD 27 at 32.
- [5] Ex parte Noriskin 1962
- (1) SA 856 (D).
- [6] Milani et al v SA Medical and Dental Council et al 1990
- (1) SA 899 (T) at 902G.
- [7] Wallis 2010 at 679.
- [8] 2012
- (4) SA 593 (SCA) at para 18.
- [9] 2016 (1) SA 518 (SCA) at para 28.
- [10] The rule provides that any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action.
- [11] Livanos NO v Oates 2013
- (5) SA 165 (GSJ).
- [12] Rule 4(1)(a) of the Uniform Rules of the High Court.
- [13] Commissioner, South African Revenue Service v Public Protector 2020 (4) SA 133 (GP).
- [14] Public Protector v Commissioner for the South African Revenue Service 2022
- (1) SA 340 (CC).
- [15] Nicolosi NO and Others v Rose and Others
- [2023] ZAGPJHC at 1240.
- [16] Du Bruyn and Others v Karstens 2019 (1) SA 403 at para 27 & 28.

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