

SOUTH AFRICA / JUDGMENT

Rippel Effect Systems (Pty) Ltd v Milkor (Pty) Ltd and Another (47896/ 2016) [2018] ZAGPPHC 562 (3 August 2018) [2018] ZAGPPHC 562

COURT

North Gauteng High Court, Pretoria

BEFORE

Poswa-Lerotholi

CASE / FILE NUMBER

47896/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 47896/ 2016

Before: Poswa-Lerotholi , AJ

Heard on: 06 June 2018

Delivered on: 3 August 2018

(1) NOT REPORTABLE

In the matter between

RIPPEL EFFECT SYSTEMS (PTY) LTD

Applicant

and

MILKOR (PTY) LTD

First Respondent

RICHARD POTGIETER

Second Respondent

JUDGMENT

Poswa-Lerotholi, AJ

Introduction

- [1] The applicant, Rippel Effect Systems (Pty) Ltd seeks a declaration confirming that the agreement between applicant and first and second respondents on 13 August 2007 was cancelled and is of no force and effect. Furthermore, the applicant seeks that the order of court dated 4 September 2007 be set aside.
- [2] The first respondent, Milkor (Pty) Ltd opposes the application and, as a preliminary point, objects to the application arguing that the founding affidavit does not disclose a cause of action. The first respondent has also sought, by way of counter-application declaratory relief that the agreement dated the 13th August 2007 and the resultant court order dated 4th September 2007 ("the Court Order") are still in force. The second respondent did not oppose the application.

Background

- [3] The parties are manufacturers and developers of weapons systems. In 2006, the parties were engaged in litigation, which culminated in a settlement agreement concluded on 13 August 2007 ("the 2007 Agreement "). The parties approached this court on 4 September 2007 to make the 2007 Agreement an order of court. As part of the settlement agreement, the applicant undertook to pay to the first respondent a sum of R2,5 million in three instalments: (a) R1 million, payable immediately upon the conclusion of the settlement agreement ; (b) R1 million payable on or before 16 December 2007; (c) R500 000.00 payable on or before 28 February
- 2008. The aforementioned amounts will bear interest at 13% per annum on late payments from due date until the date of payment.
- [4] It is common cause that, applicant paid to the respondent a sum of R1 million on 15 August 2007, the balance of R1,5 million was never paid.
- [5] Seemingly, the parties could not agree on the implementation of the 2007 Agreement as a result, in October 2008 a further settlement agreement was concluded ("the 2008 Agreement"). Notably, the parties took no further steps towards the fulfilment of their obligations as set out in the 2008 Agreement. It was only after nine years that the first respondent sought to enforce compliance with the 2007 Agreement and attendant Court Order. Applicant then approached this court in order to protect its interests.
- [6] The applicant contends that the effect of the 2008 Agreement was to substitute the 2007 Agreement and abandon the attendant the Court Order. Mr Cilliers submitted on behalf of the applicant that this was borne out by the conduct of both parties. Firstly, there was no application for the rescission of the Court Order. Secondly, in terms of clause 3.5 of the 2008 Agreement ("clause 3.5"), the first respondent agreed to write off the payment of the amount of R1.5 million being the balance due on the 2007 Agreement and Court Order. Thirdly, a claim for the payment of the balance was only made by new investors of the first

respondent, nine years later.

- [7] The first respondent denies that there was any intention to cancel the 2007 Agreement. Mr Maritz, on behalf of the first respondent argued that the conclusion of the 2008 Agreement did not vitiate the 2007 Agreement and the Court Order. Furthermore, a proper reading of clause 3.5 reveals that, the first respondent's undertaking to write-off the balance of R1.5 million was conditional.

Clause 3.5 reads-

"MILPTY (first respondent herein) shall write off the payment of the amount of R 1 500 000.00 due to MILPTY by RIPPEL (the Applicant herein), PTA and MILUSA fully comply with this agreement and the agreement which is attached as annexure A."

- [8] The implication of clause 3.5 is that, the first respondent would only waive payment of the R 1.5 million if the applicant complied with its obligations in terms of the 2008 Agreement. The applicant failed to comply with clause 3.6 in particular which places an obligation on the applicant to change the name of the company within six months of the date of the conclusion of the 2008 Agreement. Additionally, the applicant has not paid any royalties due to the first respondent per clause 3.4 of the 2008 Agreement. Therefore, the write-off cannot occur unless the condition precedent has been met. The applicant does not plead that the condition has been fulfilled. Moreover, the applicant failed to demonstrate that there was abandonment of the judgment by the first respondent in that the papers do not show a cause of action.

- [9] I will deal with the point in limine first.

No cause of action

- [10] The applicant seeks an order in the following terms:

1. It is hereby declared and confirmed that the agreement between the Applicant and First and Second Respondents entered into between(sic)

on the 13th of August 2007 had been duly cancelled and is of no force and effect at this stage.

2. The order of this Court dated 4th of September 2007 under case number 42300/2006 in terms whereof the agreement dated the 13th of August 2007 had been made an order of Court is hereby set aside.
3. The First Respondent is ordered to pay the costs of this application.
4. The Second Respondent is ordered to pay the cost of this application only in the event that he opposes this application;
5. Further and or alternative relief"

[11] A close examination of the founding affidavit in support of the relief sought, reveals that the applicant's case is predicated on paragraph 15 of the founding affidavit which reads:

"I am advised by the applicant attorney of record, Mr Stockenstrom, that during October 2008 the parties entered into a further agreement that substituted the agreement of 13 August 2007 referred to above. The agreement of 13 August 2007 had clearly been cancelled as a result of this new agreement. A copy of the agreement is annexed hereto as Annexure "FV5". I further annex hereto a confirmatory affidavit by Christo Stockenstrom as Annexure "FV6"."

[12] The rest of the cause of action is developed in paragraphs 16 to 19 of the founding affidavit, with averments to the effect that a further agreement was necessitated by disputes between the parties which resulted in the cancellation of the earlier agreement. The applicant also refers to a letter from its attorney of record, that explains the applicant's position. The said letter makes reference to clause 3.5 above of the 2008 agreement.

[13] The question is whether the applicant's founding affidavit discloses a cause of action. In other words, has the applicant placed sufficient facts before this court to warrant the relief sought. In the founding affidavit itself, the applicant does not allege that the debt fell away due to the fact that the condition in clause 3.5 had been fulfilled.

[14] In the answering affidavit, first respondent avers that the write-off did not occur as the condition had not been met. In the replying

affidavit, the applicant does not deny the first respondent's version. Instead, the applicant seeks to make out a new case of a

breach and repudiation, which had not been argued in the founding affidavit. This is impermissible in law. Furthermore, the new

allegations and the initial claim made by the applicant in the founding affidavit are mutually exclusive. Evidently, the applicant

could not decide whether, the 2007 settlement Agreement had been cancelled by means of substitution, repudiation or breach of contract.

[15] The letter of cancellation upon which the applicant relies in support of the contention that the agreement was indeed cancelled, and Mr Cilliers conceded during argument, is not relevant to these proceedings as the Milkor USA Incorporated is not a party to these proceedings.

[16] The first respondent contends that the above pleading is insufficient to sustain a cause of action. In the first instance: the applicant does not plead abandonment, repudiation and waiver in the founding affidavit but purports to do so in the replying affidavit. It is trite that a litigant stands or falls by its founding affidavit. The Supreme Court of Appeal noted in *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at paragraph 28 that due to the nature of applications, the affidavit plays a dual role in the application in that they form both pleadings and the evidence upon which the applicant relies. Consequently, the applicant

must set out sufficient facts in the founding affidavit to disclose a cause of action, that is, the founding affidavit must be self-contained. The replying affidavit cannot be used to augment the applicant's case.

- [17] Citing the case of *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 336B, Mr Cilliers argued that this Court can tolerate the failure to make out a prima facie case in the founding papers where there is no prejudice to the respondent. However, in Bowman's case, Kirk-Cohen, J after reviewing decided authority in which such condonation was granted, concludes thus-[1]

" But none of these cases goes to the length of permitting an applicant to make a case in reply where no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply. In my view, it is essential for applicant to make out a prima facie case in its founding affidavit."

- [18] Thus, whilst it is understood that the court has a discretion to allow an applicant to vary or explain its founding affidavit,[2] a distinction has to be made between a litigant who makes out a prima facie case and a litigant who makes out no case at all in the application, as a result of which the application is totally defective and seeks to rectify the defect in the reply.

- [19] It is within the discretion of the court to determine whether the applicant's founding affidavit contains sufficient allegations to sustain a cause of action; see *Titty's Bar and Bottle Store (Pty) Ltd v A.B.C Garage (Pty) Ltd and others* 1974(4) SA 362(T) at 3698.

"Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the reply affidavit."

- [20] In this matter, the applicant presented a rather sketchy founding affidavit without placing all the facts before the court. Instead, the applicant sought to augment its case in the replying affidavit introducing totally new facts. Consequently, taking into consideration the founding affidavit alone, I find that the allegations in the founding affidavit even if accepted as established facts, are insufficient to warrant a finding in favour of the applicant.

- [21] The point in limine succeeds.

- [22] Having dispensed with the point in limine, it remains to consider the counter- application filed by the first respondent.

The Counter-Application

- [23] In the counter application, first respondent seeks the following order:

1. A declaratory order the settlement agreement dated 13th of August 2007 and Court Order dated 4 September 2007(Annexure "FV3" to the Founding Affidavit) are still in force;

2. A declaratory order that applicant is, in terms of the Court Order aforesaid, liable to First Respondent for payment of the sum of R1,5 million plus interest on the sum of R1 000 000,00 at the rate of 13% per annum from 16 December 2007 to date of payment and on R500 000,00 from 28 February 2008 to date of payment;
3. A declaratory order that First Respondent is entitled to issue a writ of execution for payment of the aforesaid amounts;
4. Alternative relief,·
5. An order that Applicant is to pay the costs of the counter-application.

[24] The first respondent seeks the confirmation and enforcement of the settlement agreement dated 13th of August 2007 and Court Order dated for September 2007 in the counter-application. It is common cause that the settlement agreement

was made an order of court. The background facts to the settlement agreement have been discussed comprehensively above and need not be repeated. The basis of the first respondent's claim is that the settlement agreement remains in force and could not have been vitiated , substituted or abandoned as alleged by the applicant. The applicant stands by its founding affidavit and replying affidavit on this aspect.

[25] The primary issue is whether a Court Order exists which is the subject matter of the claim.

[26] The practice of making settlement agreements orders of courts are commonplace in our law. See *Van Schalwyk v Van Schalkwyk* 1947 (4) SA 86 (0) at 95. There are multiple benefits to making settlement agreements orders of court. Firstly, this mechanism is used to bring

an expedited end to litigation, thus serving the interests of justice. Secondly, as far as the courts are concerned, the case-load

is reduced thereby conserving limited resources in the judicial system, thus increasing the efficiency of the courts. The efficacy of the rule is that, in the event of non-compliance, the party in whose favour it operates should be in a position to enforce it through execution or contempt proceedings.

[27] Although there has been much debate in our courts, about the status of settlement agreements in *Eke v Parsons* 2016 (3) SA 37 (CC) at paragraph 29, the Constitutional Court ruled that the status of a settlement agreement which has been made an order of court has the same effect as that which is made after the determination of the merits of case by the Court. However, in the context of these proceedings the question is whether such an order is executable or enforceable. The basic principles are that for an order to be executable or enforceable, its wording must be clear and unambiguous[3]. Furthermore, the order should as soon as it is made, be readily enforceable.[4] In other words, the order must give finality to the dispute between the parties and not leave compliance therewith to the discretion of the party who is expected to comply with such an order.

- [28] However, decided authority has held that Courts should not slavishly agree to parties' request, without scrutinising the settlement agreement. In *Eke supra* at paragraphs [25] to [26], the Constitutional Court held that at least three requirements should be met before a court can grant the request of the parties to make a settlement agreement an order of court. (a) The settlement agreement must be competent and proper. (b) The agreement must not be objectionable, that is its terms must be capable, both from a legal and practical point of view, of being included in a court order. (c) Thirdly, the agreement must hold some practical and legitimate advantage.
- [29] The effect of making a settlement agreement an order of court is that it changes the status of the rights and obligations between the parties; the terms of the settlement agreement become an enforceable order; it brings to finality the dispute between the parties and the dispute becomes *res judicata*; the manner of enforcement may be execution or contempt of court proceedings. The settlement agreement is final

in its terms and the defendant is entitled to approach the court to enforce the order.

- [30] In this matter, it is common cause that the order the decision to make the settlement agreement an order of court has already been made by the court on 4 September 2007 order, this obviates the need for this court to make a determination on the competency, or otherwise of the order. The validity and enforceability of the order in and of itself is not in question. On the facts, the parties had already partly fulfilled their obligations with regard thereto. At issue is whether the enforceability of the order has been overtaken by events. The applicant argued that the order has been vitiated, substituted or abandoned, by a subsequent agreement. The applicant's answering affidavit to the counter- application contained the same

arguments raised and dismissed as disclosing no cause of action, in the main application.

- [31] Be that as it may, it is trite that a court order remains valid until set aside by a competent court. Wallis, J in *Moraitis Investments (Pty) Ltd and Others v Montie Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at paragraph 10, restated the principle that court orders cannot be ignored.

"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 section 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."

- [32] Furthermore, the applicant argued that it relies on common-law abandonment. The facts as presented by the applicant compared to the version of the respondent, do not constitute abandonment by conduct. The 2008 Agreement makes no provision for the waiver or abandonment of the 2007 Agreement, to the contrary it seeks to reinforce same through clause 3.5 referred to above. The applicant has not alleged that it complied with its obligations in terms of the 2008 Agreement and therefore was entitled to waiver of the balance due. The fact that the first respondent did not pursue payment of the balance for over nine years does not assist the applicant in that it is evident that none of the parties sought to enforce the obligations created by the 2008 Agreement either.
- [33] Nevertheless, in light of the principle espoused by the Constitutional Court in *Eke* above, the court judgment cannot be ignored. The conduct of the parties simply points to a disregard of the Court Order rather than abandonment. Therefore, I find that there was no abandonment by conduct as alleged by the applicant.
- [34] Even if I am wrong in my conclusion, Rule 41(2) prescribes the procedure for the abandonment of a judgment. There was no evidence that either of the parties took steps in that regard. It is common cause that the Court Order and settlement agreement were properly concluded between the parties. During the course of argument, neither party questioned the validity of the settlement agreement and the Court Order. There is no dispute as to the validity of the Court Order and settlement agreement.
- [35] Counsel were *ad idem* that costs should follow the result. In the circumstances, I make the following order:
1. The point in limine is upheld;
 2. The application is dismissed;
 3. The counter application is upheld:
 - a. The settlement agreement dated 13th of August 2007 and Court Order dated 4 September 2007 are still in force;
 - b. The applicant must pay to the first respondent, in terms of the aforementioned Court Order the sum of R1,5 million plus interest on the sum of R1 000 000,00 at the rate of 13% per annum from 16 December 2007 to date of payment and on R500 000,00 from 28 February 2008 to date of payment;
 - c. The first respondent is entitled to issue a writ of execution for payment of the aforesaid amounts;
 4. The applicant should pay the costs of the application and counter- application, including the costs of two counsel.

S POSWA-LEROTHOLI

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

Appearances:

Heard on:

06 June 2018

Delivered on:

03 August 2018

For the Applicant: Adv. J.G. Cilliers SC

Instructed by:

Stockenstrom Fouche Inc., Pretoria

For the First Respondent: Adv C Maritz SC, Adv G. Scheepers

Instructed by:

Van Der Merwe Van Den Berg Attorneys, Pretoria

- [1] At 3360 quoting the passage by Broome, J in Poseidon Ships Agencies(Pty) Ltd v Africa Coaling and Exporting Co (Durban) (Pty) Ltd and Another 1980 (1) SA 313 (D) at 315.
- [2] Fick v Walter & Another 2005 (1) SA 475 (C) at 4788.
- [3] See Joss v Barclays Western Bank Ltd 1990 (1) SA 575 (T) at 579E.
- [4] Weiner NO v Broekhysen 2001 (2) SA 716 (C) at 722J-723A.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2018/562.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/rippel-effect-systems-pty-ltd-v-milkor-pty-ltd-and-others-unknown-topic-agpphc-2018>

Prepared on 12 October 2026 · Esheria