IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 214/14

In the matter between:

KEVIN JOHN EKE Appellant

and

CHARLES HENRY PARSONS Respondent

APPELLANT'S HEADS OF ARGUMENT

INTRODUCTION

1. The facts of this matter have been summarised in the Appellant's statement of facts and it is not necessary to repeat same in these heads of

argument.

2. In essence, the Respondent applied for summary judgment in the court *a quo*, and the parties entered into an agreement, the salient points of which were the following:

2.1. The summary judgment application was postponed *sine die*.

2.2. In settlement of the Respondent's claim the Appellant (both in his personal capacity and on behalf of a Trust) would pay a sum of money to the Respondent in instalments.

2.3. Should the Appellant fail to comply with his payment obligations, the Respondent would be entitled to enrol the summary judgment application for hearing forthwith.

2.4. The outstanding sum payable for purposes of the application would be proven by way of supplementary affidavit.

2.5. The Appellant agreed not to oppose the application for summary judgment.

3. The agreement was made an order of court.

4. This Honourable Court granted the Appellant leave to appeal on the following issues:

4.1. the status and effect of making a settlement agreement an order of court;

4.2. the permissibility in terms of Rule 32 of the Uniform Rules of Court to have brought a second summary judgment application based on the settlement agreement; and

4.3. whether the provision in the settlement agreement which provided that the Appellant is not to oppose the second summary judgment application, is enforceable having regard to Section 34 of the Constitution.

THE STATUS AND EFFECT OF MAKING A SETTLEMENT AGREEMENT AN ORDER OF COURT

5. The Respondent's case is that the effect of making a settlement an order of court is that it brings about a change in the status of the rights and obligations of the parties to the settlement. According to the Respondent

the reason for this lies in the fact that the terms of the agreement are incorporated in an order of court. It is the Respondent's view that the granting of the consent judgment is a judicial act, vesting the settlement agreement with the authority, force and effect of a judgment.[1]

6. It is clear from the Le Grange judgment that the order of court which formed the subject matter of subsequent proceedings related to a settlement in divorce proceedings which was subsequently made an order of court, the reason for this being that only the court can dissolve a marriage and has to approve any agreement in relation to the custody and maintenance of the children born of the marriage. This, according, to the judgment, has two consequences:

6.1. as a rule negotiated settlements in divorce proceedings also deal with other issues arising from the consequences of the dissolution of the marriage, such as proprietary rights of the parties and the payment of maintenance by the one party to the other; and

6.2. like any other negotiated settlement, the parties will inevitably also give consideration to the question of the enforcement of the terms

[1] Ex Parte Le Grange and Another; Le Grange v Le Grange 2013 (6) SA 28 (ECG) at paragraph [32]

thereof in the event of any future non-compliance therewith by any of the parties thereto.[2]

7. The principle enunciated in the Le Grange judgment is, of course, correct where the purpose of taking judgment is to enable the judgment creditor to enforce his right to payment of a debt by means of execution.[3]

8. In Thutha v Thutha[4] Alkema J deals with the issue of whether or not settlement agreements should be made orders of the court. Although this judgment was not followed in Le Grange it is submitted that the reasoning of Alkema J, namely that a court should distinguish between orders of court and their enforcement on the one hand, and deeds of settlement and their enforcement on the other,[5] is sound and he expresses the view that the former is concerned with procedural principles and the protection of the court's dignity and honour, and the latter with the law of contract.

9. Alkema J goes on to distinguish between what he terms "*valid court orders*" and recordals of settlement agreements without an element of a

[2] See Le Grange judgment at para [2]
[3] See, for example Swadif (Pty) Ltd v Dyke N.O. 1978 (1) SA 928 (AD) at 944F-G; Trust Bank of Africa Ltd v Dhooma 1970 (3) SA 304 (N) at 310C and Dadel Vlak Boerdery v Greyling & Another [2007] JOL 19050 (T) at para [9]
[4] 2008 (3) SA 494 (TkH)
[5] Para [48]

court requiring obedience with its terms as a court order.[6]

10. The question of whether making an agreement an order of court is equivalent to a judgment was dealt with in some detail by Tuchten J (with Van der Merwe DJP and Kollapen J concurring) in the matter of Tasima (Pty) Ltd v Department of Transport and Others[7] who deals, *inter alia*, with the question as to what the position is when, through less than careful formulation or otherwise, an order of court records an agreement but does not make clear whether the agreement recorded is of the species that entitles the "*obligee to proceed direct to execution*"[8]. After reviewing a number of authorities, the court came to the conclusion that the proper approach is that the provisions of each court order which makes reference to an agreement between the parties must be examined to determine whether the order, properly interpreted, imposes obligations **toward the court** and, if so, what the content of those obligations is.[9]

11. In Tasima's case, the terms of an interim order which were relied upon were held to do no more than record the terms of an agreement between parties, and did not constitute a direction by the court that one of the

[6] Para [53], sub-para 9
[7] 2013 (4) SA 134 (GNP)
[8] At para [62]
[9] At para [71]

parties must implement that agreement on pain of contempt.[10]

12. It is further submitted that the court's intention must be ascertained primarily from the language of the order as construed according to the usual rules for interpreting documents. It must be read as a whole by reference to its context and objects. If the meaning is clear and not unambiguous (*sic*), no extrinsic factor or evidence is admissible to contradict, vary, qualify or supplement it.[11]

13. In circumstances where an undertaking was given by certain respondents and made an order of court in interdict proceedings which had been postponed, the undertaking being to the effect that the respondents would not interfere or hinder the members of the applicant in the conduct of their business and was given by the respondents without their acknowledging any of the allegations made by the applicant and "*with the reservation of all rights*", the court held that on an interpretation of the undertaking and the circumstances of the case that the applicant was not entitled to have the respondents committed for contempt as the order was what the parties had contracted for and was not one with which the court,

[10] At para [54]
[11] See Simon N.O. & Others v Mitsui and Co Ltd & Others 1997 (2) SA 475 (W) at 497A-B
See also Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) at 304D-G

for reasons of the administration of justice, would require compliance.[12]

14. In the present instance, the intention of the parties is clear, namely that the agreement which was reached did not constitute a final judgment or order upon being recorded in an order of court, more especially since the Respondent, upon any breach of the agreement by the Appellant, was entitled to do no more than proceed with his application for summary judgment which had been postponed *sine die*. The Respondent was not entitled to execute on the order as same constituted no more than a recordal of their settlement.

PERMISSIBILITY TO HAVE BROUGHT A SECOND SUMMARY JUDGMENT APPLICATION IN TERMS OF RULE 32 OF THE UNIFORM RULES OF COURT

15. The agreement upon which the Respondent relied (and which was made an order of court) postponed the summary judgment application *sine die* and gave the Respondent leave to enrol that summary judgment application for hearing in the event of the Appellant defaulting on the

[12] Johannesburg Taxi Association v Bara-City Taxi Association and Others 1989 (4) SA 808 (W) at 811E (See also Public Servants Association of SA obo Members v Gwanta N.O. and Another [2012] JOL 28262 (LC) at para [15]; Lujabe v Maruatona [2013] JOL 30619 (GSJ) at para [17])

payment arrangements in terms of the agreement.

16. The Respondent's application for summary judgment was supported by a verifying affidavit, verifying the cause of action as set out in the original particulars of claim (prior to amendment) and based on an agreement of sale.

17. The Respondent re-enrolled the application for summary judgment but the verifying affidavit verified the original cause of action, and not the cause of action upon which the Respondent subsequently relied.

18. In terms of the agreement of settlement which was made an order of court, the Respondent was granted leave to deliver a supplementary affidavit reflecting the outstanding sum payable for purposes of the summary judgment application, which the Respondent did. That affidavit, however, did not verify the new cause of action as contained in the amended particulars of claim.

19. The Respondent then delivered a further affidavit, entitled a supplementary affidavit, which the Respondent was neither entitled to place before the court in terms of the aforesaid order of court, nor in terms of Rule 32 of the Uniform Rules of Court. But even if regard was

had to this further affidavit, the Respondent failed to verify the cause of action and only verified "*the outstanding sums owing to me*".

20. The rules of court specifically provide that an application for summary judgment must be supported by an affidavit which must comply with Rule 32(2). The plaintiff must not go into the merits of the matter; he must confine himself to what the rule allows; nor may he file a replying affidavit.[13]

21. In order to comply with Rule 32(2) the verifying affidavit must be made by the plaintiff or by another person who can swear positively to the facts, contain a verification of the cause of action **and** the amount, if any, claimed, as well as contain a statement by the deponent that in his opinion there is no *bona fide* defence to the claim and that appearance to defend has been entered solely for the purposes of delay.[14]

22. If *ex facie* the verifying affidavit the requisite verification has not occurred, the court would have no jurisdiction to grant summary

[13] Venter v Cassimjee 1956 (2) SA 242 (N); Owen v Miller 1928 CPD 61
[14] Flamingo Knitting Mills (Pty) Ltd v Clemans 1972 (3) SA 692 (D)

judgment.[15]

23. All the facts supporting the cause of action must be verified.[16]

24. The deponent must verify a completed (perfected) cause of action, and a deponent cannot be said to "*verify*" a cause of action which is not a complete cause of action.[17]

25. Rule 32 does not provide for "*amplification*" of the cause of action as set out in the summons, be it a simple summons or combined summons, in the verifying affidavit, and neither does Rule 32 permit the filing of any affidavit by a plaintiff seeking summary judgment other than the affidavit described in sub-rule (2). [18]

[15] Absa Bank Ltd v Coventry 1998 (4) SA 351 (N) at 353D-E; Mowschenson and Mowchenson v Mercantile Acceptance Corporation of SA Ltd 1959 (3) SA 362 (W) at 366C-D; Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC 2010 (5) SA 112 KZP at 122F-I

[16] All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer 1970 (3) SA 560 (D) at 563; Northern Cape Scrap & Metals Edms Bpk v Upington Radiators and Motor Graveyard (Edms) Bpk 1974 (3) SA 788 (NC); Dowson & Dobson Industrial Ltd v Van der Werf 1981 (4) SA 417 (C) at 426-8.

[17] Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd 1967 (1) SA 466 (D); LS Enterprises (Pty) Ltd v Couck 1971 (1) SA 438 (D); Dowson & Dobson Industrial Ltd v Van der Werf (*supra*) at 423; Trust Bank of Africa Ltd v Hansa 1988 (4) SA 102 (W)

[18] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 422A-D; Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A) at 346B-C; Steeledale Reinforcing (Cape) v Ho Hup Corporation SA (Pty) Ltd 2010 (2) SA 580 (ECP) at 584A-B

26. Rule 32 also does not envisage any amplification of either form of the summons in some or other way.[19]

27. Furthermore, no annexures to a plaintiff's verifying affidavit are allowed except if the claim is founded on a liquid document, in which instance a copy of the document must be annexed to the affidavit, although inclusion of evidence in the affidavit, or the annexing of a letter thereto, will not invalidate the application but will simply be ignored by the court.[20]

28. The third affidavit failed to comply with the requirement of Rule 32(2) that not only the amount owing be verified, but also the cause of action.

29. The Respondent's suggestion in paragraph 7 of the said affidavit, that the application was "*not a typical summary judgment application where I would be called upon to verify the underlying cause of action*" was simply without substance. The status of the relief which the Respondent sought was initially by way of a summary judgment application, and such

[19] Steeledale Reinforcing (Cape) v Ho Hup Corporation SA (Pty) Ltd (*supra*) at 585A-F
[20] Wright v McGuinness 1956 (3) SA 184 (C); Kosak & Co. (Pty) Ltd v Keller 1962 (1) SA 441 (W); Triple Jay Equipment (SWA) (Pty) Ltd v Muller 1962 (3) SA 115 (SWA); South African Trade Union Assurance Society Ltd v Dermot Properties (Pty) Ltd 1962 (3) SA 601 (W); Trust Bank of Africa Ltd v Hansa (*supra*); Venter v Kruger 1971 (3) SA 848 (N) at 851; AE Motors (Pty) Ltd v Levitt 1972 (3) SA 658 (T)

procedure remained a summary judgment application.

30. The reason for the aforesaid difficulties is that, whilst the agreement of settlement purports to provide a mechanism for the re-enrolment of the original summary judgment application, the effect of same was that it provided for the Respondent to bring a second summary judgment application on a new cause of action.

31. Rule 32 of the Uniform Rules of Court does not permit a plaintiff to bring a second summary judgment application and it is submitted that, since this rule confers jurisdiction on the court to hear a summary judgment application, the parties were not able to extend that jurisdiction by agreement between them.

32. Whilst it is conceded that the court has inherent power to regulate procedure in terms of Section 173 of the Constitution, which may include the power to grant procedural relief where the rules of court make no provision for it, where a particular matter is provided for in the rules the scope of the court's exercise of its inherent powers is limited.[21]

[21] Western Bank Ltd v Packery 1977 (3) SA 137 (T); Collective Investments (Pty) Ltd v Brink 1978 (2) SA 252 (N)

33. The rules are there to regulate the practice and procedure of the court and strong grounds have to be present before a court may act outside the powers provided for specifically in the rules.[22]

34. The statement that the court will exercise an inherent jurisdiction whenever justice requires that it should do so applies only to the rules of court where an accommodating approach is often countenanced.[23]

35. Courts have on occasion adopted what would seem to be a rather accommodating approach in the interpretation or application of rules of court, well-illustrated by the statement of Gardiner JP[24], that "*(j)ust as the Court has the power to make a Rule, so it has an inherent power, when just cause is shown, to do something which is not provided for by the Rule*".

36. The aforesaid principles need to be considered in the context of a summary judgment application. Our courts have laid down three rules for summary judgment applications:

[22] Moulded Components & Rotomoulding SA (Pty) Ltd v Coucourakis 1979 (2) SA 457 (W) at 462D-E
[23] Sefatsa v Attorney-General, Transvaal 1989 (1) SA 821 (A) at 832-834
[24] in Cohen & Tyfield v Hull Chemical Works 1929 CPD 9 at 11

36.1. there is a *numerus clausus* of instances in which a plaintiff may apply for summary judgment in the sense that no application is possible which falls outside the strict ambit of Rule 32(1);

36.2. before a court will entertain an application for summary judgment, a plaintiff must present a clear case on technically correct papers while complying strictly with the rule; and

36.3. in cases which are doubtful, summary judgment must be refused.[25]

37. In dealing with the provisions of Sections 129(1) and 130 of the National Credit Act, No. 34 of 2005 in the context of a summary judgment application, the Supreme Court of Appeal held that Rule 32(4) limits a plaintiff's evidence in summary judgment proceedings to the affidavit supporting the notice of application and that reliance on a document not annexed to the summons but handed up at the hearing without complaint, was simply inadmissible.[26]

[25] Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd (*supra*) at 366C-D; Maharaj v Barclays National Bank Ltd (*supra*) at 423; Gulf Steel (Pty) Ltd v RackRite Bop (Pty) Ltd 1998 (1) SA 679 (O) at 683I-684B; Absa Bank v Coventry (*supra*) at 353D-E; Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another (*supra*) at paras [25] and [26]

[26] Rossouw and Another v First Rand Bank Ltd 2010 (6) SA 439 (SCA) at paras [35] and [46]

38. The Respondent's failure to comply with the requirements of Rule 32(2) should have precluded the Respondent from obtaining summary judgment against either the Appellant or the Trust.

39. The Respondent concedes that Rule 32 of the Uniform Rules of Court does not permit a second summary judgment application[27] but contends that the initial summary judgment proceedings became settled between the parties and that the cause of action in respect of the subsequent proceedings was Schoeman J's order of 16 July 2013.[28]

40. The court *a quo* came to a similar conclusion.[29]

41. It is submitted, however, that what served before the court *a quo* was in fact a summary judgment application. In making this submission the following factors bear mention:

    41.1. In terms of the agreement, the summary judgment application was postponed *sine die*.[30]

[27] Record: p 155, para 25.2
[28] Record: p 146, para 24.1
[29] Record: p 147, para 24.2
[30] Record: p 84, para 2

41.2. In terms of the agreement the Respondent was "*entitled to enrol the summary judgment application for hearing forthwith, claiming from both the Defendant and the Trust*".[31]

41.3. The court *a quo* granted summary judgment against the Appellant and the Trust.[32]

41.4. The Respondent amended his particulars of claim to include the new cause of action premised on the settlement agreement, and summary judgment was granted on the amended particulars of claim.[33]

ENFORCEABILITY OF PROVISION IN SETTLEMENT AGREEMENT THAT APPELLANT NOT ENTITLED TO OPPOSE "*SECOND*" SUMMARY JUDGMENT APPLICATION

42. The agreement provided that, should the summary judgment application be re-enrolled, the Appellant agreed not to oppose same (in both his

[31] Record: p 86, para 16
[32] Record: p 52, para [22]
[33] Record: p 96, para 13

personal capacity and on behalf of the Trust).[34]

43. Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before, *inter alia*, a court.

44. It has been held that any legislative provision which entitled a bank to require the messenger of the court to sell a defaulting debtor's property without recourse to a court fell foul of Section 34 of the Constitution.[35]

45. It is furthermore submitted that it would be *contra bonos mores* to refuse to permit a party to oppose a summary judgment application in circumstances where such person has a *bona fide* defence to the action, or where a plaintiff has failed to comply with the provisions of Rule 32 of the Uniform Rules of Court.

46. An agreement not to oppose an application for summary judgment would, in some ways, be similar to a confession to judgment, or would at least have the same consequences albeit that a confession to judgment would

---

[34] Record: p 86, para 18

[35] Lesapo v North West Agricultural Bank and Another 1999 (12) BCLR 1420 (CC) at para [29] (See also First National Bank of South Africa Limited v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another 2000 (8) BCLR 876 (CC) at paras [2] and [6])

give a plaintiff a stronger right to proceed to obtain judgment. In respect of a confession to judgment a defendant, whilst not being entitled to arbitrarily revoke or withdraw such a confession, would be entitled to repudiate such consent for good and valid reason. [36]

47. If a defendant who confesses to judgment is entitled to repudiate such consent for good and valid reason, more so would a defendant be entitled to oppose an application for summary judgment where the plaintiff is not entitled to same, even if he has agreed not to oppose such application.

48. The Respondent's view is that this issue is moot for the following reasons:

48.1. The Respondent did not take this point or contend that the Appellant should be prevented from opposing the subsequent proceedings.

48.2. The Appellant in fact opposed the subsequent proceedings.

---

[36] Moshal Gevisser (Trademarket) Ltd v Midlands Parafin Co. 1977 (1) SA 64 (N) at 68D-H; De Vos v Calitz & De Villiers 1916 CPD 465 at 470; Harvey v Croyden Union Rural Sanitary Authority 26 Ch.D 249 at 255

48.3. The remarks in paragraph [17] of the judgment of the court *a quo* did not form part of the *ratio decidendi* of the judgment and order.[37]

49. Upon a perusal of the judgment of the court *a quo* it would appear that the defences raised by the Appellant were rejected, but that such rejection was premised upon an acceptance by the court that the embodiment of the settlement agreement in an order of court elevated same to a status higher than an agreement, and that the Appellant's agreement not to oppose the summary judgment application was not *contra bonos mores*, and was binding on the Appellant.

50. It is submitted that the defences raised by the Appellant should have been considered on the basis that the court *a quo* was dealing with a summary judgment application, and that the Appellant was entitled to deliver an opposing affidavit setting out his defences to the Respondent's action. It is further submitted that, had the court *a quo* adopted this stance, the Appellant would have been granted leave to defend the action.

RELIEF SOUGHT BY THE APPELLANT

[37] Record: p 155, para 25.3

51. It is consequently submitted that the appeal should be upheld, and that the summary judgment granted by the court *a quo* against the Appellant should be set aside, the Appellant should be granted leave to defend the action and that the costs of the summary judgment application should be costs in the cause. Insofar as the costs of the appeal are concerned, it is submitted that the Respondent should be ordered to pay the Appellant's costs occasioned by the appeal.

P.W.A. SCOTT SC

Chambers
PORT ELIZABETH
7 April 2015

LIST OF AUTHORITIES

---

1. Ex Parte Le Grange and Another; Le Grange v Le Grange 2013 (6) SA 28 (ECG)

2. Swadif (Pty) Ltd v Dyke N.O. 1978 (1) SA 928 (AD)

3. Trust Bank of Africa Ltd v Dhooma 1970 (3) SA 304 (N)

4. Dadel Vlak Boerdery v Greyling & Another [2007] JOL 19050 (T)

5. Thutha v Thutha 2008 (3) SA 494 (TkH)

6. Tasima (Pty) Ltd v Department of Transport and Others 2013 (4) SA 134 (GNP)

7. Simon N.O. & Others v Mitsui and Co Ltd & Others 1997 (2) SA 475 (W)

8. Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A)

9. Public Servants Association of SA obo Members v Gwanta N.O. and Another [2012] JOL 28262 (LC)

10. Lujabe v Maruatona [2013] JOL 30619 (GSJ)

11. Johannesburg Taxi Association v Bara-City Taxi Association and Others 1989 (4) SA 808 (W)

12. Venter v Cassimjee 1956 (2) SA 242 (N)

13. Owen v Miller 1928 CPD 61

14. Flamingo Knitting Mills (Pty) Ltd v Clemans 1972 (3) SA 692 (D)

15. Absa Bank Ltd v Coventry 1998 (4) SA 351 (N)

16. Mowschenson and Mowchenson v Mercantile Acceptance Corporation of SA Ltd 1959 (3) SA 362 (W)

17. Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC 2010 (5) SA 112 KZP

18. All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer 1970 (3) SA 560 (D)

19. Northern Cape Scrap & Metals Edms Bpk v Upington Radiators and Motor Graveyard (Edms) Bpk 1974 (3) SA 788 (NC)

20. Dowson & Dobson Industrial Ltd v Van der Werf 1981 (4) SA 417 (C)

21. Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd 1967 (1) SA 466 (D)

22. LS Enterprises (Pty) Ltd v Couck 1971 (1) SA 438 (D)

23. Trust Bank of Africa Ltd v Hansa 1988 (4) SA 102 (W)

24. Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)

25. Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A)

26. Steeledale Reinforcing (Cape) v Ho Hup Corporation SA (Pty) Ltd 2010 (2) SA 580 (ECP)

27. Wright v McGuinness 1956 (3) SA 184 (C)

28. Kosak & Co. (Pty) Ltd v Keller 1962 (1) SA 441 (W)

29. Triple Jay Equipment (SWA) (Pty) Ltd v Muller 1962 (3) SA 115 (SWA)

30. South African Trade Union Assurance Society Ltd v Dermot Properties (Pty) Ltd 1962 (3) SA 601 (W)

31. Venter v Kruger 1971 (3) SA 848 (N)

32. AE Motors (Pty) Ltd v Levitt 1972 (3) SA 658 (T)

33. Western Bank Ltd v Packery 1977 (3) SA 137 (T)

34. Collective Investments (Pty) Ltd v Brink 1978 (2) SA 252 (N)

35. Moulded Components & Rotomoulding SA (Pty) Ltd v Coucourakis 1979 (2) SA 457 (W)

36. Sefatsa v Attorney-General, Transvaal 1989 (1) SA 821 (A)

37. Cohen & Tyfield v Hull Chemical Works 1929 CPD 9

38. Gulf Steel (Pty) Ltd v RackRite Bop (Pty) Ltd 1998 (1) SA 679 (O)

39. Rossouw and Another v First Rand Bank Ltd 2010 (6) SA 439 (SCA)

40. Lesapo v North West Agricultural Bank and Another 1999 (12) BCLR 1420 (CC)

41. First National Bank of South Africa Limited v Land and Agricultural Bank of South Africa and Others;

42. Sheard v Land and Agricultural Bank of South Africa and Another 2000 (8) BCLR 876 (CC)

43. Moshal Gevisser (Trademarket) Ltd v Midlands Parafin Co. 1977 (1) SA 64 (N)

44. De Vos v Calitz & De Villiers 1916 CPD 465

45. Harvey v Croyden Union Rural Sanitary Authority 26 Ch.D 249

CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 214/14

In the matter between:

KEVIN JOHN EKE Appellant

and

CHARLES HENRY PARSONS Respondent

RESPONDENT'S HEADS OF ARGUMENT

Introduction:

1. During May 2014 the Respondent issued summons against the Appellant for payment of a contractual debt of R5 000 000,00.

2. The Appellant defended the matter, whereafter the Respondent brought an application for summary judgment.

3. The Appellant filed an opposing affidavit in the application for summary judgment.[1]

4. The application was enrolled for hearing on 16 July 2013.

5. At the hearing of the application, the parties settled the application, after extensive negotiations, on the basis set out in the order of Schoeman J.[2]

6. In concluding the settlement, the Appellant acted both in his personal capacity as well as in his representative capacity as trustee of the Kevin Eke Family Trust ("the Trust"), while the Respondent acted personally.[3]

7. After the granting of the order by Schoeman J, the Appellant initially co-operated with the implementation of the order. In doing so, a covering bond was registered in terms of paragraph [10] of the order and the Appellant made several payments to the Respondent, totaling some R3 000 000,00, in terms of paragraphs [5] to [8] of the order.

---

[1] See Record, Volume 2 – Annexure "A", pages 158 to 165
[2] See Record, Volume 2 – Annexure "B", pages 166 to 168
[3] See Record, Volume 2, paragraph 1, page 172

8. In terms of paragraph [3] of the order, the Respondent subsequently amended the particulars of claim to join the trustees of the Trust as further defendants in the matter, as well as to incorporate the order of Schoeman J as part of the Respondent's cause of action.[4]

9. The Appellant made no further payments to the Respondent after 31 October 2013.

10. The Respondent accordingly filed a supplementary affidavit on 20 February 2014 in terms of which he requested that "***Judgment be granted***" against the Appellant and the Trust jointly and severally, in the sum of R7 300 000,00, being the total outstanding balance due to the Respondent, plus interest and costs.[5]

11. On 27 February 2014 the Respondent filed a further supplementary affidavit.[6]

12. On 3 March 2014 the Appellant and the Trust, represented by new attorneys, filed an extensive "***Affidavit in Opposition to the Application***

[4] See Record, Volume 1 – Annexure "E", pages 87 - 119
[5] See Record, Volume 2 – Annexure "C", pages 169 - 175
[6] See Record, Volume 2 – Annexure "D", pages 176 to 183(a)

for Summary Judgment", in which they raised a number of new defences.[7]

13. It was common cause between the parties that, apart from the new defences raised by the Appellant and the Trust in the said supplementary opposing affidavit:

13.1 there has been no application to set aside the order of Schoeman J, which stands;

13.2 the Appellant was in default in terms of the said order, in the accelerated sum of R7 300 000,00, plus interest;

13.3 there has been no tender from the Appellant or the Trust to make any further payment to the Respondent to cure the Appellant's breaches in terms of the said order;

13.4 the Respondent has complied with all his obligations in terms of the order.

[7] See Record, Volume 2 – Annexure "E", pages 184 to 194

14. At the hearing of the application in the court *a quo* Nhlangulela ADJP found in favour of the Respondent.[8]

15. The Appellant applied for leave to appeal to His Lordship Mr Justice Nhlangulela, but his application was dismissed on 5 September 2014.[9]

16. The Appellant subsequently applied to the Supreme Court of Appeal for leave to appeal, which application was dismissed on 13 November 2014.

17. During December 2014 the Appellant applied for leave to appeal to the above Honourable Court.

18. On 18 February 2015 the above Honourable Court granted an order in, *inter alia*, the following terms:

"***The Chief Justice has issued the following directions:***

1. The application is set down for hearing on Tuesday, 26 May 2015 at 10h00.

[8] See Record, Volume 2 – Annexure "F", pages 195 to 215
[9] See Record, Volume 2 – Annexures "G" & "H", pages 216 to 218

2. Leave to appeal is granted on the following issues:

a) the status and effect of making a settlement agreement an order of court;

b) the permissibility in terms of rule 32 of the Uniform Rules of Court to have brought a second summary judgment application based on the settlement agreement; and

c) whether the provision in the settlement agreement which provided that the applicant is not to oppose the second summary judgment application, is enforceable having regard to section 34 of the Constitution.

. . ."[10]

19. The three questions posed by the above Honourable Court will be dealt with below *a seriatim*.

[10] See Record, Volume 2 – Annexure "I", pages 219 to 221

<u>The status and effect of making a Settlement Agreement and Order of Court:</u>

20. In *<u>Van Schalkwyk v Van Schalkwyk 1947 (4) SA 86 (O)</u>* Van Heerden J sketched the historical background to the practice of making settlement agreements orders of court and came to the conclusion, at page *95* that "***the tradition of such orders is very strong in our legal system***".

21. In *<u>Schierhout v Minister of Justice 1925 AD 417</u>* at *423*, the Appellate Division (Kotze JA) confirmed the existence of this practice as part of our law and said that "***… if there exists no objection in the nature or terms of such compromise or other agreement between the parties, embodied in a consent paper, the practice of the Courts is to confirm it, and make the agreement arrived at a rule or order of Court***".

22. The consequences of making an agreement of settlement an order of court was authoritatively dealt with on appeal in the case of *<u>Le Grange and Another in re Le Grange v Le Grange [2013] JOL 30645 (ECG)</u>*, on which case the Respondent strongly relied in the court *a quo*.

23. The relevant principles, as extracted from *Le Grange*, can be summarized as follows:

23.1 A court order brings about a change in the status of the rights and obligations of the parties to a settlement;[11]

23.2 A court order has the effect of converting the parties' contractual rights into an executory order;[12]

23.3 A court order brings finality with regards to the rights of the parties;[13]

23.4 Our law places a compromise or settlement on an equal footing with a judgment. It puts an end to the law suit and renders the dispute between the parties *res judicata*;[14]

23.5 Through the operation of the *res judicata* principle, the consent order constitutes a bar to any actionable proceedings on the underlying settlement agreement;[15]

---

[11] See *Le Grange*, para [34]
[12] See *Le Grange*, para [40]
[13] See *Le Grange*, para [33]
[14] See *Le Grange*, para [34]
[15] See *Le Grange*, para [46]

23.6 The provisions of the settlement agreement (made an order of court) are instead to be enforced by the remedies available to a judgment creditor;[16]

23.7 The court retains jurisdiction over the matter in the sense that it has an inherent power and authority to ensure compliance with its own orders;[17]

23.8 This entitles the parties, in the event of a failure to comply with the order, to return directly to the court that made the order, to seek enforcement, without the need for a new action;[18]

23.9 Accordingly, by agreeing to make a settlement agreement an order of court, both parties commit themselves to complying with the terms of the settlement and be subjected to the sanction imposed by the court, should they fail to do so.[19]

---

[16] See *Le Grange*, para [46]
[17] See *Le Grange*, para [10]
[18] See *Le Grange*, para [10]

24. As far as the status of the consent order is concerned, and referring to the Appellant's contention that the order did not entitle the Respondent to execute thereon, the above Honourable Court is again referred to the *Le Grange* case, where the court held, *inter alia*, as follows:

24.1 "***… The Court is … not compelled to commit a party for contempt. It may not only refuse to grant an order for committal, it may choose to grant such other relief as it may find to be appropriate in the circumstances. By reason of the quasi-criminal nature of, and emphasis on, the penal nature of contempt proceedings, the Court may choose a less cohesive method to enforce the order…***"[20] and

24.2 "***… The ability of the Court to grant orders other than committal for contempt, or the levying of execution, leaves it the scope to be innovative in a manner in which it compels compliance with its own orders. It is therefore not uncommon for the Court to first make an order compelling the judgment debtor to comply with the terms of the consent judgment on which order the judgment creditor may then subsequently base proceedings for contempt in the event of non compliance… The advantage of placing the parties to a settlement agreement in a position to make use of such a procedure in the event of non-compliance by one of them with the terms of the***

[19] See *Le Grange*, paragraph [32]

consent order, is that it enables them to approach the Court in the same proceedings for relief without the need to institute a fresh action on the settlement agreement as envisaged in the Thutha Judgment."[21]

25. In paragraph [41] of the *Le Grange* case, the court held that the determination whether the terms of a consent order are to be afforded the status of an order of the court, will depend on the facts of the particular case.

26. It is respectfully submitted that the facts of this particular matter discloses the following:

26.1 The litigation between the parties originated from an action for a claim sounding in money against the Appellant for the payment of an agreed indebtedness;

26.2 The action was settled between them at the summary judgment stage on the basis that:

(a) The application was postponed *sine die*;

---

[20] See *Le Grange*, paragraph [39]
[21] See *Le Grange*, paragraph [40]

(b) The Respondent (as Plaintiff) was granted leave to amend his particulars of claim;

(c) The Appellant (as Defendant) agreed to pay to the Respondent the sum of R10 300 000,00;

(d) The Appellant was ordered to pay ("***shall pay***") the said sum to the Respondent in agreed instalments;

(e) The Appellant would procure security for the said payments;

(f) Should the Appellant fail to comply with his obligations, both in respect of the payments to be made and in respect of the securities to be supplied, the Respondent would be entitled to enroll the summary judgment application for hearing forthwith, claiming from the Appellant and the Trust, the then outstanding balance, interest and costs;

(g) The settlement agreement would be made an order of court.

27. As stated above, the agreed sanction imposed by the order of Schoeman J for non-compliance by the Appellant, was that the Respondent could re-enroll the matter for an accelerated judgment. The order of Schoeman J was therefore plainly an order that could be enforced.

28. In the *Le Grange* judgment His Lordship correctly held, with respect, that a court can be innovative in the manner in which it compels compliance with its own orders.[22]

29. It is, with respect, not uncommon for our courts to first make an order compelling the judgment debtor to comply with the terms of the consent judgment on which order the judgment creditor may then subsequently approach to the court in the same proceedings for relief without the need to institute a fresh action on the settlement agreement.

30.

30.1 See eg, *Fedsureparticipa Tiomortgage Bond Managers (Pty) Ltd & Another v Refilon Investments (Pty) Ltd & Another [2006] JOL 17995 (T)*, where a similar arrangement was entered into;

30.2 The relevant paragraph in the settlement, which was made an order of court in the *Fedsureparticipa* matter, reads as follows:

"***In the event of the Defendants committing a breach of this agreement the Plaintiff shall be entitled immediately and without further notice to apply for judgment against the Defendants and a certificate filed by the Managing Director of Fedbond Nominees (Pty) Ltd, which states the amount owing as at the date of the breach shall be regarded as prima facie proof of such fact.***"

30.3 In paragraph 23 of the said judgment the court held as follows:

"***The ordinary meaning of the words employed in the above stated paragraph is very clear and lucid. The Plaintiffs have been***

[22] See *Le Grange*, paragraph 40

given a right to apply for judgment for the whole outstanding amount upon breach of any of the clauses…"

30.4 This is, with respect, also what happened in this matter.

31. It is respectfully submitted that the facts in the *Tasima (Pty) Ltd v Department of Transport and Others*-case[23], on which the Appellant relies are clearly distinguishable from the facts in the present matter. A few examples of the distinguishable facts are the following:

31.1

(a) The *Tasima*-case dealt with an interim order "***pending the finalization of this application or final settlement of the dispute between the parties***";[24]

(b) In the present matter the Respondent's action against the Appellant has been finally settled between the parties as recorded in the order of Schoeman J.

[23] See 2013 (4) SA 134 (GNP)

31.2

(a) The quoted provisions in the *Tasima*-case[25] is the mere recordal of an underlying written agreement between the parties in terms of which the Applicant would be paid for services, which services still had to be rendered by the Applicant;

(b) In the present matter the Appellant was ordered to pay an agreed indebtedness which had already been finally determined, without any obligation on the part of the Respondent to render any services to the Appellant in return for such payments.

31.3

(a) In paragraph [52] of the *Tasima*-case the court held that "***the quoted provisions do not reflect any direction by the Court that any of the cited Respondents is to do or refrain from doing anything. The provisions of the agreement concluded between Tasima and the DOT are merely noted***";

---

[24] See *Tasima*-matter, paragraph [9]
[25] See Ad paragraph 9

(b) In the present matter the agreed order does reflect a definite direction by the court that the Appellant should make certain payments, failing which a specific sanction for an accelerated payment would become enforceable.

31.4

(a) In paragraph [58] of *Tasima* the court held that "***… before a Court considers the drastic step of committal for contempt, the content of the obligation to the Court should have been specified in a Court Order***";

(b) In the present matter the content of the Appellant's obligations are specifically recorded on pain of an agreed sanction.

31.5

(a) In the *Tasima*-case the court held that it weighed with it "***that the Respondents may be able to place facts before the Court to demonstrate that a particular failure***

or refusal in the future to authorise or approve a payment or to make a payment, may be justifiable".[26]

(b) In the present matter there was no room for the Appellant to place any facts before the court to demonstrate that his failure to pay was justified, nor has the Appellant attempted to do so, save for the belated introduction of a number of technical defences, which should have been introduced at the initial hearing of the summary judgment application.

32. In conclusion, and whilst it is conceded that there may well be matters where, depending on the facts, a consent order is not to be afforded the status of an order of court, this is, with respect, plainly not such a matter.

[26] See *Tasima*, paragraph [59]

<u>The permissibility in term of Rule 32 of the Uniform Rules of Court to have brought a second Summary Judgment Application based on the Settlement Agreement</u>:

33. The issue to be decided in this regard is whether the proceedings which served before Nhlangulela ADJP constituted a "***second Summary Judgment Application***" or was merely the enforcement of the order of Schoeman J, with Her Ladyship's order constituting the cause for such proceedings.

34. The Respondent concedes that Rule 32 does not permit a "*second*" summary judgment application pursuant to a summary judgment application that had already been settled between the parties.

35. However, it is respectfully submitted that the application which served before Nhlangulela ADJP was <u>not</u> a second summary judgment application.

36. In brief motivation of the aforesaid it is respectfully submitted:

    36.1 That the initial summary judgment proceedings have become finally settled between the parties;

36.2 That as part of the settlement, the application was postponed *sine die*[27];

36.3 That the subsequent application was a mere re-enrollment of the initial application for purposes of enforcing the sanction agreed to between the parties for purposes of the Appellant's non-compliance with the terms of the order of Schoeman J;

36.4 That it is common cause that the Appellant is in breach of the order[28];

36.5 That the Appellant and the Trust do not raise any defence in respect of their failure to effect the agreed payments in terms of the order;

36.6 That the Respondent was therefore entitled to seek the sanction imposed in paragraph [16] of the agreed order of Schoeman J; and

---

[27] See Record, Volume 2 – Annexure "B", page 166

[28] See Record, Volume 2 – Annexure "C", paragraph 4, page 170 read with the Opposing Affidavit, Annexure "E", page 184 to 194

36.7 That the Appellant was, in raising all the new defences in its further opposing affidavit, and in contending that the provisions of Rule 32 should have been complied with once more, elevating form above substance.

37. In paragraph [20] of the judgment of Nhlangulela ADJP in the main application, His Lordship held as follows in relation to the nature of the proceedings which served before him:

> "***[20] … I am in agreement with Mr Huisamen's contention that since the relief sought in the application is based on a cause of action arising from respondents' default in respect of their obligations as set out in the Consent Order, there would have been no need to verify the Order…***"[29]

38. In his judgment in the application for leave to appeal, His Lordship held as follows:

> "***In my view the debate which I am confronted with is one of form rather than substance.***"[30]

---

[29] See Record, Volume 2 – Annexure "F", page 213
[30] See Record, Volume 2 – Annexure "H", page 217

39. His Lordship was, with respect, correct in his aforesaid views.

***Whether the provisions in the Settlement Agreement which provided that the Appellant is not to oppose the second Summary Judgment Application, is enforceable having regard to Section 34 of the Constitution*:**

40. It is respectfully submitted that this issue is moot for the following reasons:

40.1 The Respondent did not take this point or contended that the Appellant should be prevented from opposing the subsequent proceedings;

40.2 The Appellant and the Trust did in fact oppose the subsequent proceedings, and fully ventilated all their new defences before Nhlangulela ADJP;

40.3 His Lordship's remarks contained in paragraph [17][31] of his judgment did not form part of the *ratio decidendi* of his judgment and order.

40.4 It is respectfully submitted that His Lordship's remarks were, in any event, correct in the particular circumstances of the present matter.

41. Despite the aforesaid contention that the point is moot, the following brief submissions are made to address the above Honourable Court's concerns in relation to paragraph [18] of the order of Schoeman J:[32]

41.1 There was, with respect, in the context of this particular matter, nothing sinister or *contra bonos mores* about the provision of the said paragraph [18];

41.2 The Appellant has been afforded his Constitutional right and the opportunity to have his dispute resolved in a fair public hearing before a court of law at the hearing of the initial summary judgment application. The matter was then settled on the basis that the Appellant was ordered to make certain

[31] See Record, Volume 2 – Annexure "F", page 210 to 211

payments, failing which he would be at the risk of an agreed sanction in the form of a judgment in respect of the outstanding balance of the debt;

41.3 The undertaking not to oppose the application would, needless to say, only have arisen in the event of a breach of the order on the part of the Appellant, because it would only be then that the matter could be re-enrolled for hearing in terms of paragraph [16];[33]

41.4 If the Appellant and the Trust were up to date with their payments, the Respondent would not have been entitled to enroll the matter for hearing, and the undertaking not to oppose the application would certainly not have precluded the Appellant and the Trust from raising the defence that they were up to date with their payments;

41.5 It is respectfully submitted that the intention of this provision (paragraph [16])[34], read in context, was simply to prevent the Appellant, in the event of a breach of the order,

---

[32] See Record, Volume 2 – Annexure "A", page 174
[33] See Record, Volume 2 – Annexure "A", page 174
[34] See Record, Volume 2 – Annexure "A", page 174

to raise technical defences, which should have been raised in his opposing affidavit in the summary judgment application, for no other purpose than to delay the inevitable, which is exactly what the Appellant and his Trust are purporting to do herein.

Conclusion:

42. If the Appellant and the Trust were given leave to defend the matter, it would be interesting to know how they could possibly file a non-excipiable plea to the Respondent's amended particulars of claim. The order of Schoeman J stands and the Appellant is in admitted breach of the order.

43. The only conceivable defences would have to be that the order is unenforceable, and can therefore be ignored, on the basis of one or more of the purported technical defences raised in the Appellant's supplementary opposing affidavit, in respect of which defences the Appellant was not granted leave to appeal.

44. Leave to defend would, with respect, in these circumstances, merely create an unfortunate and costly further delay of the inevitable.

45. It is therefore respectfully submitted that the appeal should be dismissed, with costs.

_____

JD HUISAMEN SC

Chambers
Port Elizabeth
9 April 2015

LIST OF AUTHORITIES

---

1. *Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O)

2. *Schierhout V Minister of Justice* 1925 AD 417 at 423

3. *Le Grance and Another in re Le Grange v Le Grange* [2013] JOL 30645 (ECG)

4. *Fedsureparticipa Tiomortgage Bond Managers (Pty) Ltd and Another v Refilon Investments (Pty) Ltd and Another* [2006] JOL 17995 (T)

5. *Tasima (Pty) Ltd v Department of Transport and Others* 2013 (4) SA 134 (GNP)