REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2015/24931

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

18/3/2020 .....
DATE

MOKOSE SNI

In the matter between:

RMB PRIVATE BANK A DIVISION OF FIRSTRAND BANK LIMITED	Applicant

And

ANDRIES BENJAMIN FREDERIK COETZEE N.O.	1st Respondent
ALETTA JOHANNA COETZEE N.O.	2nd Respondent
GERHARD REINIER COETZEE N.O.	3rd Respondent
(in their capacities as trustees of the AFG Familie Trust)	
ER 75 PECANWOOD ESTATE (PTY) LTD	4th Respondent
ALETTA JOHANNA COETZEE	5th Respondent
SOFTUSA (PTY) LTD	6th Respondent
BROOKLYN CHAMBERS (PTY) LTD	7th Respondent
GERHARD REINIER COETZEE	8th Respondent
LENCOE ENTERPRISES (PTY) LTD	9th Respondent

BLUE CLOUD INVESTMENTS 218 (PTY) LTD 10th Respondent

JUDGMENT

MOKOSE J

Introduction

[1] The applicant seeks to enforce a settlement agreement which was made an order of court by agreement between the parties on 22 February 2016 in terms of which the respondents were required to pay the amount outstanding in instalments failing which the whole amount less fees received, would become immediately due and payable.

[2] The application was opposed by the respondents on the basis that the settlement agreement does not correctly reflect the intention of the parties as far as the seventh respondent is concerned and that the agreement is void, alternatively subject to rectification. These contentions have now been abandoned and the sole remaining basis of the respondents' opposition to the order sought hinges on paragraph 3 of the consent order which provides for the applicant to immediately authorize the cancellation of the mortgage bond over the seventh respondent's immovable property after payment of the fourth instalment by 15 September 2016.

The facts

[3] The dispute between the parties originates from a revolving loan agreement which was concluded between the applicant and the AFG Family Trust ("the Trust") which was represented by the first, second and third respondents. The remaining respondents concluded

suretyship agreements in favour of the applicant, as also mortgage bonds. They also consented to the judgment.

[4] The applicant had instituted proceedings in which a claim for the sum of R10 652 284,00 was made against the first, second and third respondents as principal debtors in terms of a loan facilitation agreement and the remaining respondents as sureties. The applicant also sought interest on the said amount and an order declaring the immovable properties of the fourth, sixth, seventh and ninth respondents specially executable pursuant to the mortgage bonds registered by those respondents as security for their indebtedness under the suretyships.

[5] A settlement agreement was concluded and made an order of court in which the respondents acknowledged their indebtedness to the applicant in the sum of R11 967 298,41 plus interest on the said sum. It was further agreed that the respondents would pay the said amount in instalments from 22 February 2016 to 30 June 2017 inclusive. It was further agreed that upon receipt of the sum of R5.5 million by 15 September 2016, the applicant would authorise the cancellation of the mortgage bonds registered over the immovable property of the seventh respondent. The full outstanding balance, less any payments received, would become due and payable and that the applicant would be entitled to proceed with execution without further notice to the respondents should the respondents breach the settlement agreement.

[6] The respondents made payment of the first four instalments which amounts were due and payable by 15 September 2016. They failed to make full payment of R3 million by 30 December, paying only R1.3 million, thus breaching the agreement. The respondents also failed to take any steps toward the cancellation of the mortgage bond over the seventh

respondent's immovable property after the 15th September 2016 until faced with the current application.

[7] The respondents contend that their obligation to pay the last two instalments in December 2016 and June 2017 was reciprocal to the applicant's obligation to authorise cancellation of the mortgage bond over the seventh respondent's immovable property after receipt of the instalment of 15 September 2016. As the mortgage bond was only cancelled during October 2018 the respondent's contend that this application is premature. As such, their defence remains the *exceptio non adimpleti contractus*.

[8] The respondents contend for reciprocity on the following basis:

(i) the purpose of clause 3 providing for the consent to cancellation of the mortgage bond was to allow transfer of the shares in the seventh respondent to a purchaser thereof enabling them to pay the remaining instalments comfortably;

(ii) the ordinary language of the consent order is unambiguous *"requiring immediate cancellation for purposes of the sale of shares agreement to proceed"*, thus rendering the obligations reciprocal; and

(iii) the consent order does not contain a contrary indication thus rendering the obligations reciprocal.

Issue

[9] The issue on hand is whether on a proper interpretation of the consent order, the obligation to authorise cancellation of the mortgage bond over the seventh respondent's immovable property is reciprocal in the true sense: namely that the absent performance, the

respondent is not obliged to pay the remaining instalments. If it is indeed so, it should be determined whether the applicant was at all material times ready to perform its obligation to authorise the cancellation of the mortgage bond over the seventh respondent's immovable property.

Legal Principles

[10] It is a question of interpretation whether obligations are so closely connected as the principle of reciprocity applies in contracts which create rights and obligations on each side. The ordinary rule with regard to bilateral contracts is that in the absence of a special agreement to the contrary, neither party can enforce them unless he has performed or is ready to perform his or her own obligations.

[11] Reciprocity of debt does not exist merely because the obligations which are claimed to be reciprocal arise from the same contract and each party is indebted to the other in some way or the other. A far closer and more immediate correlation than that is required.[1] Obligations will not be held to be reciprocal where a contrary intention appears from the contract.[2]

The sale of shares agreement

[12] On 10 September 2015 and long before the conclusion of the settlement agreement, the first to third respondents in their capacities as trustees of the trust, concluded an agreement for the sale of shares in the seventh respondent with Ms Steyn. The agreement was not subject to any suspensive or resolutive conditions. The purchase price was the sum

[1] Minister of Public Works and Land Affairs & Another v Group Five Building Ltd 1996 (4) SA 280 (A) at 288F
[2] MAN Truck & Bus D (SA) Ltd v Dorbyl Transport Products & Busaf 2004 (5) SA 226 (SCA) at 226A

of R7 050 000,00, payable in monthly instalments of R400 000,00 commencing on 1 November 2015. The payments would remain in trust until the full amount had been paid as security for the transfer of the shares. No warranties were given by the seller. The total purchase price would have been paid in full by 1 April 2017.

Argument

[13] The applicant contends that the agreement was not negotiated with a view to afford the seventh respondent an opportunity to sell its share. Furthermore, the mere fact that the two obligations arise from the same agreement and that a situation of mutual obligation exists is not sufficient to infer reciprocity. As stated above, a much closer connection is required. A thorough reading of clause 3 of the settlement agreement, viewed in isolation does not give rise to an inference of reciprocity.

[14] The applicant contends further that the obligation to authorise cancellation of the mortgage bond over the seventh respondent's immovable property therefore had nothing to do with the respondents generating funds to pay the instalment which was due and payable on 30 December 2016. Accordingly, it is not sustainable on the facts to contend that the purpose of clause 3 of the consent order was to allow the transfer of the shares in the seventh respondent to the purchaser.

[15] The respondents, on the other hand, are of the view that it is apparent from the express wording of the settlement agreement that the express purpose of Clause 3 was to allow transfer of shares to a third party immediately upon payment of the instalment of 15 September 2016. As this was the most valuable property in the respondents' portfolio, the respondents would then be able to pay the remaining instalments comfortably.

[16] The seventh respondent contends that as such, it is entitled to the benefit of the *exceptio non adimpleti contractus*. The *exceptio* is available as a defence to a party from whom performance is demanded by the other contracting party whose own reciprocal performance has not been rendered precisely or in full. The *exceptio* accordingly applies even if the defect in the plaintiff's performance is not so serious as to justify its rejection or the cancellation of the contract by the respondent.[3]

[17] In order to infer reciprocity, the consent order must be interpreted as a whole to ascertain whether in fact two obligations arise from the same agreement and that a situation of mutual obligations exists. The ordinary language of clause 3 of the consent order must give rise to an inference of reciprocity.

[18] The respondents point out that clause 3 of the consent order makes provision for the 'immediate' cancellation of the mortgage bond, thus fixing the time for performance. As such, they were of the view that it was unnecessary for the respondents to have placed the applicant in *mora*. The respondent contends further that it is clear from the surrounding circumstances and the terms of the consent order that 'immediate cancellation' was required with the result that the seventh respondent's immovable property would no longer serve as security and the sale of shares could then proceed.

[19] The interpretation of the consent order to ascertain whether from the two obligations arising from the same agreement enables one to infer reciprocity, it is evident that a closer connection is required. I am of the view that the ordinary language of clause 3 of the consent order, viewed in isolation, does not give rise to an inference of reciprocity. This is evident from

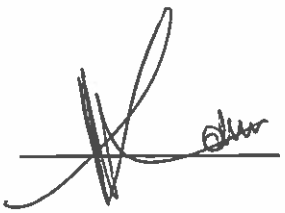
[3] Motor Racing Enterprises (in Liquidation) v NPS (Electronics) Ltd 1996 (4) SA 950 at 964G

the acceleration clause contained therein and an unconditional confession to judgment. This is clearly irreconcilable with reciprocity. Furthermore, it is evident from the consent order that all the respondents are liable to settle their indebtedness to the applicant in agreed instalments. Their obligation to pay all other amounts after September 2016 continued albeit, the indebtedness would no longer be secured by a mortgage bond over the seventh respondent's immovable property. This too is irreconcilable with reciprocity.

[20] The respondents paid R1.3 million to the applicants in December 2016 contrary to terms of the consent order. On 8 January 2017 an email was sent by the respondents to the applicant wherein an indulgence was sought for only paying the sum of R1.3 million of the R3 million that was due citing 'an unforeseen difficulty'. This was an admission of the fact that the instalment of R3 million was due despite the mortgage bond over the seventh respondent's immovable property not having been cancelled.

[21] I am satisfied that the conduct of the respondents is an indication of the fact that there was never an intention for the obligation of reciprocity to apply. The sale of shares was not conditional upon the settlement of the suit between the applicant and the respondents and the transfer of the shares was only due in April 2017. Accordingly, the respondents' reliance on the *exceptio non adimpleti contractus* is misplaced and as such, they have not shown any basis for escaping liability under the consent order.

[22] Accordingly, the order attached hereto and marked "X" is made an order of court.



MOKOSE J

Judge of the High Court
of South Africa Gauteng
Division, Pretoria

For the Applicant:

Adv NJ Horn

instructed by

Werksmans Attorneys

For the Respondents:

Adv SW Davies

instructed by

Wiese & Wiese Attorneys

Date of Hearing:	10 October 2019
Date of judgement:	18 March 2020

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DRAFT ORDER/#6233015v1

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 24931/2015

PRETORIA, ~~10 JUNE 2019~~ 10 October 2019
BEFORE THE HONOURABLE JUDGE ~~TOLMAY~~ Mokose

In the matter between :

RMB PRIVATE BANK A DIVISION OF FIRSTRAND BANK LIMITED	APPLICANT
and	
ANDRIES BENJAMIN FREDERIK COETZEE N.O.	FIRST RESPONDENT
ALETTA JOHANNA COETZEE N.O.	SECOND RESPONDENT
GERHARD REINIER COETZEE N.O.	THIRD RESPONDENT
(IN THEIR CAPACITIES AS TRUSTEES OF THE AFG FAMILIE TRUST)	
ERF 75 PECANWOOD ESTATE (PTY) LTD	FOURTH RESPONDENT
ALETTA JOHANNA COETZEE	FIFTH RESPONDENT
SOFTUSA (PTY) LTD	SIXTH RESPONDENT
BROOKLYN CHAMBERS (PTY) LTD	SEVENTH RESPONDENT
GERHARD REINIER COETZEE	EIGHTH RESPONDENT

LENCOE ENTERPRISES (PTY) LTD NINTH RESPONDENT

BLUE CLOUD INVESTMENTS 218 (PTY) LTD TENTH RESPONDENT

DRAFT ORDER

Having read the papers filed of record, heard counsel for the applicant and the respondents and having considered the matter the following order is made:

1 Judgment is granted against the respondents, jointly and severally, the one paying the other to be absolved for payment of:

1.1 the sum of R6,092,271.47;

1.2 interest on the amount of R6,092,271.47 at the rate of 8.50% per annum from 16 January 2017 to date of final payment, calculated daily and compounded monthly;

1.3 costs of the application on attorney and client scale.

2 The following immovable properties are declared specially executable:-

2.1 A unit consisting of (a) Section 5 as shown and more fully described on Sectional Plan No SS808/2009 in the scheme known as Le Bastide in respect of the land and building or buildings situate at Erf 245

Queenswood Township and Erf 246 Queenswood Township, Local Authority City of Tshwane Metropolitan Municipality of which section the floor area, according to the said sectional plan is 110 square metres in extent; and (b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the sectional plan held by Deed of Transfer No ST82596/2009 ("Unit 5, Le Bastide") registered in the name of the fourth respondent;

2.2 Erf 1449, Highveld Extension 7 Township, Registration Division J.R., Province of Gauteng, in extent 750 square metres held under Deed of Transfer T94199/1996 ("Erf 1499 Highveld") registered in the name of the sixth respondent;

2.3 A unit consisting of (a) Section 3 as shown and more fully described on Sectional Plan No SS808/2009 in the scheme known as Le Bastide in respect of the land and building or buildings situate at Erf 245 Queenswood Township and Erf 246 Queenswood Township, Local Authority City of Tshwane Metropolitan Municipality of which section the floor area, according to the said sectional plan is 97 square metres in extent; and (b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the sectional plan held by Deed of Transfer No ST82594/2009 ("Unit 3, Le Bastide") registered in the name of the ninth respondent.

3 The registrar of this Court is directed to issue the relevant warrants of execution as to enable the Sheriff to attach and execute upon the abovementioned immovable properties in satisfaction of the judgment debt.

BY THE COURT

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REGISTRAR

Advocate N Horn

Maisels Group

078 991 0279

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