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Case No 110/91
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

REGINA MILA WALLACH — Appellant

and

LEW GEFFEN ESTATES C C — Respondent

CORAM: Hoexter, Milne, F H Grosskopf, Goldstone JJA et Howie AJA

DATE OF HEARING: 22 March 1993

DATE OF JUDGMENT: 25 March 1993

J U D G M E N T

/MILNE JA.....

MILNE JA:

On 5 March 1990 an action between the respondent corporation and one Peter Wallach was settled. I shall refer to the respondent as "the corporation" and to Peter Wallach as "Wallach".

The agreement was in the handwriting of the corporation's attorney. It was signed on behalf of the corporation and signed by Wallach. It was also signed by Wallach's mother, who is the appellant. The agreement was made an order of court. In terms thereof Wallach was to pay R25 000 to the corporation, as to R4 000 on 6 March 1990 and R2 200 per month on the first day of each month thereafter commencing on 1 April 1990 until the total amount had been paid. The capital of R25 000 was to bear interest at 18,5% per annum, payable in advance on 6 March 1990 for the period 6 - 31 March 1990 and thereafter monthly, in advance, from 1 April 1990 on the

balance outstanding from time to time. Post-dated cheques for the instalments and interest drawn by Wallach and endorsed by the appellant as surety and co-principal debtor, were to be handed to the corporation's attorneys on 6 March 1990. If any instalment was not paid on due date or Wallach committed any breach of the terms of the agreement, he would be liable to the corporation for the amount of R24 750 less any instalments paid, plus interest, plus costs of suit on the attorney and client scale. As security for the indebtedness of Wallach the appellant bound herself as surety and co-principal debtor in favour of the corporation and she undertook "forthwith" to cede to the corporation as collateral security all her rights in a certain mortgage bond registered in the Deeds Registry in her favour. She was, on demand, to sign all documents and pay all fees and disbursements for the cession which was to be registered by the corporation's attorney. The acceleration clause referred to above was to come into effect immediately

upon breach, no notice being required.

Wallach was in breach of the agreement and, accordingly, of the Order of Court, in at least two respects, namely:

(a) the interest due on 6 March 1990 was not paid on due date; and

(b) the instalment of R4 000 due on 6 March 1990 was not paid on due date.

A cheque for R4 000 dated 6 March 1990 was furnished by the appellant, but on 13 March 1990 it was dishonoured by non-payment as there were insufficient funds to meet it. Subsequently, on 19 March 1990 the appellant paid an amount of R4 000 in cash to the corporation's attorneys. According to the receipt annexed to the appellant's affidavit the payment was accepted "without prejudice to client's rights". A further payment of R4 000 was made on 2 May 1990.

Quite apart from Wallach's breaches the appellant was herself personally in breach of the agreement and of the Order of Court because she took no steps to cede the bond to the corporation.

None of the facts set out above is in dispute (though the appellant contends that neither her - nor Wallach's - admitted conduct constituted breaches of the agreement).

On 9 April 1990 the corporation, relying upon these breaches and the acceleration clause brought motion proceedings against the appellant for payment of R24 750, interest and costs.

The appellant opposed the application on various grounds. She sought to excuse the failure to pay the amounts referred to above on the grounds that:

(a) The judge who made the settlement an Order of Court

had thereafter "ordered" the corporation or its attorneys to provide her with a typed copy of the agreement of settlement and she had not received such a copy;

(b) It was the obligation, so she submitted, of the corporation to present for payment the cheque for R4 000 on its due date i.e. 6 March and that had it done so then and not on 13 March, the cheque for R4 000 would have been paid.

With regard to the first point the replying affidavit filed on behalf of the corporation states:

> "The learned Judge stated that he presumed that the applicant's attorneys will have the agreement typed and he requested them to forward to respondent and Peter (Wallach) a copy thereof. This was duly done on 8 March 1990. (See Annexure LG 5 to applicant's founding affidavit). He did not, as alleged later by respondent, order that a transcript be given to her."

There was accordingly a dispute of fact on the papers in this regard, but the learned judge in the court a quo,

Lazarus J, dealt with it as follows:

> "Firstly, she (referring to the appellant) said of her failure to pay the interest from 6 to 31 March 1990 that she had overlooked her obligation to do so. She tied this to a contention that the agreement was illegible and that she had not yet received a typed copy as at the time when she was obliged to perform. She of course had a handwritten copy, and I find no difficulty in deciphering clause 3 thereof which requires her to pay the interest. But if it is indecipherable, and if she did not know what she was signing, she should not have signed it. Having signed it the rule is **caveat subscriptor**. Nor can it be contended, as she appeared to contend, that the operation of the settlement was suspended pending the receipt of a transcript. The learned judge could not possibly have made such an order as it would amount to a variation of the parties agreement which had been made an order of court. Moreover, the suggestion of a suspension is not made in respondent's affidavit and it cannot be said that it is a fact in dispute."

I agree. The appellant said that the learned judge had erred in saying that she had had a handwritten copy in her possession and indeed in his judgment on the application for leave to appeal the learned judge conceded that he may have been wrong in making such an assumption. He held that to be irrelevant. I agree. It was common cause on the affidavits that these were the

terms of the agreement, that the appellant signed it and indeed she stated quite unequivocally (in a subsequent affidavit to which I shall refer presently), that she had entered into this agreement and that it had been made an Order of Court. Its terms were accordingly binding on her.

The second point is plainly without substance. There was no obligation on the corporation to present the cheque on the day on which it was received. It was in fact presented a week later. In his judgment Lazarus J said with regard to the appellant's failure to cede the bond:

> "... her only answer was that during the course of argument of the reference to evidence counsel for the applicant conceded that the bond was not really relevant. I do not know whether this is so because it is not in the affidavits and even if there had been a concession it must have been a concession of law. There is no factual basis as far as I can see for that concession."

Once again I agree; and even if such a concession had

been made and it had been a concession binding upon the corporation, the other two breaches already referred to remain undisputed.

After the corporation's replying affidavit had been filed the appellant in an affidavit apparently sworn on 1 August 1990 sought an order "... to have the case transferred to trial court to allow the leading of evidence." On 9 August 1990 the matter came before Coetzee J. He delivered a judgment in which he said with reference to the cheque for R4 000 which had been dishonoured:

> "No effort was made to present the cheque for payment on 6 March 1990, and it seems as if the applicant's attorney deliberately sought a way to call into effect the acceleration clause on 8 March. I have come to the conclusion that I cannot properly decide this case on affidavit and this is a matter in which I should exercise my discretion in terms of Rule 6(5)(g)."

He accordingly postponed the application to a date to be arranged for the hearing of viva voce evidence on the

issue of whether the appellant was "... in breach of the agreement of settlement".

With due respect to Coetzee J, there was not any proper factual basis for the view that the applicant's attorney had acted in the manner referred to, nor was there any good reason for finding that the matter could not properly have been decided on affidavit. As pointed out by Lazarus J:

> "... presenting the cheque for R4 000 on 6 March 1990 would not have cured the breach, which was that there was no payment of the interest for the period 6 - 31 March 1990, either included in the cheque for R4 000 or separately from it."

The appellant, who appeared before us in person, sought to argue the case on a different basis. She said that it was orally agreed between her and the corporation's attorney that Wallach would not be able to make any payments and that the first instalment of interest would be included in the sum of R4 000 to be

paid on 6 March 1990, and that this should have been reflected in the written agreement of settlement. In fact, she stated that the real (and only) issue which she wished to have canvassed in oral evidence was the question as to why the terms of this alleged oral agreement were not reflected in the written agreement of settlement. This issue was not raised anywhere in the affidavits and indeed it is inconsistent with admissions made by the appellant in her affidavit. Nor does it appear to have been raised at the level of argument since it was not the issue which Coetzee J referred for the hearing of oral evidence. It is therefore not open to the appellant to raise it now.

Be that as it may, the matter was pursuant to the order of Coetzee J, set down for the hearing of oral evidence before Lazarus J on 4 December 1990.

By letter dated 7 November 1990 the

corporation's attorneys advised the appellant that at the hearing an application would be made for the matter to be decided on the papers without the hearing of oral evidence. Such an application was duly made by the corporation's counsel. No affidavit was filed in support of that application, but I agree with the finding of Lazarus J that in the particular circumstances of this case there was no need to do so. He held that the appellant and Wallach had been in breach in the two respects referred to above and granted judgment for the amount claimed less the amount of R8 000 which had been paid by that stage.

The matter now comes before us with leave of the court a quo. The basis upon which leave was granted was that although the learned judge took a firm view that it was legally competent for him to have declined to hear oral evidence and therefore to have departed from the order made by Coetzee J, it is a step which courts do not

"lightly" take, and that there was a reasonable prospect that this court might find that he had taken it in circumstances which did not warrant his doing so.

It is plain that the order referring the matter for the hearing of oral evidence was an interlocutory order and that it was a simple interlocutory order of the kind referred to in **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd** 1948(1) SA 839 (A) at 870A. Furthermore this is not a case where "... the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed ..." as in **Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Administration** 1987(4) 569 (A) at 585 F-G. The "order" given by Coetzee J did not decide the merits. It was merely a direction that further evidence be given before deciding on the merits. It was no more than a ruling. This is clear from a long line of cases decided

in this Court and in the provincial divisions. See **Dickinson & Another v Fisher's Executors** 1914 AD 424 at 427-8, **Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo** 1916 AD 50 at 51-2, **Klep Valves (Pty) Ltd v Saunders Valve Co Ltd** 1987(2) SA 1 (A) at 40H - 41H. See also **Engar & Others v Omar Salem Essa Trust** 1969(2) SA 423 (D) at 425 G-H and the judgment of the Full Bench in the same matter reported in 1970(1) SA 77 (N) at 80 E-H and **Pfizer Inc v South African Druggists Ltd** 1987(1) SA 259 (T) at 262C - 263I.

The subsequent history of the litigation in the **Pfizer** case affords a practical illustration of the principle. The order that Pfizer sought to appeal against in the judgment referred to, was an order by Stegmann J that the deponents to certain of Pfizer's affidavits should appear to be examined. After the appeal had been struck off the matter came before Eloff DJP. Application was then made on behalf of Pfizer for

an order setting aside the order of Stegmann J and directing that the issue be resolved on the papers as they stood. Eloff DJP granted that order and decided the matter on the affidavits. See **Pfizer Inc v SA Druggists Ltd** Burrells Patent Law Reports (1986) Vol XI p 713 at 725C. His judgment was upheld on appeal by the Full Bench and this judgment is reported in Burrells Patent Law Reports (1987) Vol XII 368. See also **Zweni v Minister of Law and Order of the Republic of South Africa** (a judgment of this Court delivered on 20 November 1992 which is not yet reported). It is clear that according to the criteria there laid down the order of Coetzee J amounted to a non-appealable ruling.

That being so, it was open to the court a quo to hold, as it did, that it was unnecessary to hear oral evidence and to decide the matter on the papers. I do not consider that it did so lightly. Indeed there were considerations of the most weighty why it should do so.

To have heard oral evidence in circumstances where that would not and could not have affected the outcome of the claim for substantive relief would have been to incur wholly unnecessary costs and to involve wholly unnecessary delay.

The appeal is dismissed with costs including the costs of the application for leave to appeal. For the guidance of the taxing master I record that though heads of argument were duly filed on behalf of the corporation it was not represented by counsel before us.

A J MILNE
Judge of Appeal

HOEXTER JA]
F H GROSSKOPF JA]
GOLDSTONE JA] CONCUR
HOWIE AJA]