IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

17/4/2012
DATE

SIGNATURE

CASE NUMBER: 15921/09
DATE: 16 April 2012

LAMBSON'S HIRE & SALES (PTY) LTD	APPLICANT
V	
WITBANK MARKAGENTE	FIRST RESPONDENT
ANTOINETTE STOFFBERG	SECOND RESPONDENT

WRITTEN REASONS

VORSTER AJ:

1. In this matter I made an order in terms of paragraphs 1 and 2 of the notice of motion. I indicated at the time the order was made that I would furnish written reasons for my decision if requested to do so. Such request has now been made. My reasons for making that order follow below:

2. The applicant applies for an order in terms of which a written deed of settlement entered into between the parties is made an order of court and an order for

judgment in terms of the written deed of settlement. For purposes of my decision the following paragraphs in the written deed of settlement are relevant:

"1. *The defendants undertake to collect and repair the model T350JLG areal work platform room lift which is the subject of the litigation in this action (herein after referred to as "the crane") at their cost and shall return the repaired crane to the plaintiff at premises nominated by the plaintiff by not later than 30 days from date of signature of this agreement by the last party signing."*

"6. *In the event of the defendants failing to comply with any of the provisions of this agreement, then and in that event the defendants shall immediately become liable to the plaintiff for payment of the replacement cost of the crane in the amount of R272 460,00 together with the costs of this action."*

3. The applicant (plaintiff) alleges in its founding affidavit that the settlement agreement also provided for payment by the defendant of an amount of R14 820,00 as contribution to the costs of the plaintiff. No allegation is made that that amount was not paid by the defendant to the plaintiff.

4. The cause of action of the applicant (plaintiff in the main action) is that the settlement agreement has not been complied with by the defendant in as far as the provisions of clause 1 of the agreement were not complied with. I might mention at this stage that the written deed of settlement was not in issue between the parties.

5. In their answering affidavit the respondents alleged that it is still their intention to repair the crane as provided for in the written deed of settlement, but that they were precluded from doing so by the refusal by the personnel of the applicant at the branch where the damaged crane is kept and an allegation that it was found that the crane was even more damaged than what the position was when the damaged crane was originally handed back to the applicant by the respondents.

6. In argument the respondents raised a further point. That point is based on the wording of Rule 41(1) of the Rules of Court. The point raised was that there was no allegation in the founding papers to the effect that the action between the parties which gave rise to the deed of settlement, had not been withdrawn. It is convenient

to deal with this point first. In my opinion the question whether the action between the parties had been withdrawn or not is not a prerequisite for a valid application in terms of Rule 41(1) by a party requesting the court to make a written deed of settlement between the parties an order of court. Clearly, when an action between parties is withdrawn the lis between them falls away. When that happens, there is no dispute remaining between the parties that can be settled between them. If an action has been withdrawn, an order of court making a written settlement between the parties entered into after such withdrawal would be of no consequence - the settlement would relate to issues between the parties which had ceased to exist when the action was withdrawn. Such a purported settlement would have no legal force - it cannot be said to have been a novation of the issues existing between the parties and which had been withdrawn prior to the settlement was entered into. Therefore, if no more is said, a party applying to a court to make a settlement between that party and its opponent an order of court in the case where the action had been withdrawn prior to such settlement was entered into, embarks upon a futile exercise which can be of no legal consequence. Therefore, the requirement in Rule 41(1) of the Rules of Court, that a settlement between parties may be made an order of court where the action has not been withdrawn, is for the benefit and the convenience of the court, and not the litigating parties.

7. In the instant case the action came to trial in this court on the 15th of September 2010, when it was postponed sine die to enable a possible settlement between the parties to eventuate. That in fact happened on the 17th of March 2011 when the written deed of settlement was entered into. I have no reason to suspect that the action was withdrawn by the applicants (plaintiff) in that action prior to the date of settlement in terms of the written deed of settlement. Consequently, in my view, there is no risk that this court might be making an order which is clearly academic and of no legal consequence by declaring the written deed of settlement between the parties to be an order of court.

8. As far as the other issue raised by the respondents are concerned, I am satisfied on the papers that there is no real dispute between the parties as to the question whether the respondents was denied access to the crane in order to effect the necessary work to it which it had contracted to do in terms of the deed of settlement. It was common cause that the crane was not repaired within the

required 30 days. The only issue remaining is whether the applicant precluded the respondent from doing the agreed repair work. In that regard I am satisfied that the applicant did not so preclude the respondent as alleged.

9. For the aforegoing reasons I made an order as prayed for in the notice of motion.

L.I. VORSTER
ACTING JUDGE OF THE HIGH COURT

Appearances:

Applicant's Attorneys:	*DE Jager, Kruger & Van Blerk Attorneys*
Applicant's Counsel:	*Adv. J. De Beer*
Respondent's Attorneys:	*Harvey Nortje Waner & Motimele Attorneys*
Respondent's Counsel:	*Adv. B.P. Geach (SC)*
Date Heard:	*16 April 2012*
Date of Judgment:	*16 April 2012*