IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION GRAHAMSTOWN)

CASE NO: 3915/2012
DATES HEARD: 18/3/14; 20/3/14
DATE DELIVERED: 14/4/14
NOT REPORTABLE

In the matter between:

V[…] K[…] D[…] H[...] **PLAINTIFF**

and

H[…] C[…] L[…] H[...] **FIRST DEFENDANT**

THE REGISTRAR OF THE HIGH COURT
WESTERN CAPE HIGH COURT **SECOND DEFENDANT**

REGISTRAR OF DEEDS, CAPE TOWN **THIRD DEFENDANT**

Deed of settlement in divorce proceedings made order of court – required first defendant to sell his half share in a property to plaintiff – first defendant having purported to cancel contract – whether acceptance by first defendant of irrevocable guarantee of payment on transfer in place of security of mortgage bond struck by non-variation clause – held to be waiver of provision entirely for benefit of first defendant and not subject to non-variation clause – whether plaintiff repudiated – held plaintiff's conduct consistent with intention to complete the sale of the property – first defendant not entitled to cancel – specific performance ordered.

JUDGMENT

PLASKET J

[1] The plaintiff, Ms V […] H[…], and the first defendant, Mr H[…] H[…], were married to each other in Thailand in 1987. They were divorced, by order of the Western Cape High Court, Cape Town, on 26 February 2003. They entered into a deed of settlement that was made an order. It deals with such issues as custody of and access to their then minor children, maintenance in respect of both the plaintiff and the children, and the settlement of their proprietary interests, both movable and immovable. This matter concerns the enforcement of one clause of the deed of settlement which provides for the purchase by the plaintiff of the first defendant's half share of a sectional title property known as 1[…] S[…], K[…], also called B[…] T[…], of which they are co-owners.

[2] Besides the first defendant, two other persons are cited as defendants. They are the Registrar of the Western Cape High Court and the Registrar of Deeds, Cape Town. They play no part in these proceedings.

[3] The following relief is claimed by the plaintiff in her particulars of claim:

'(a) A declaration that the First Defendant is obliged to transfer the First Defendant's share in the property into the name of the Plaintiff against payment of the consideration;

(b) The First Defendant be directed to:

(i) Transfer the First Defendant's share in the property into the name of the Plaintiff, against payment of the consideration, as soon as possible;

(ii) Nominate a conveyancer, in order to transfer the First Defendant's share of the property into the name of the Plaintiff, within 10 (Ten) days of the order being granted;

(iii) Sign all documents and take all steps necessary to transfer the First Defendant's share in the property into the name of the Plaintiff (including making payment to the conveyancer nominated by him of all the costs necessary to effect transfer) within 30 (Thirty) days of the order being granted;

(c) In the event that the First Defendant fails to take all of the steps referred to in prayer (b)(ii) and/or prayer (b)(iii) above within the time periods provided for therein:

(i) The Second Defendant is authorised to take all the steps referred to in prayer (b)(ii) and/or prayer (b)(iii) above as soon as possible, on the First Defendant's behalf; and

(ii) The conveyancer nominated by the Second Defendant is authorised to:

(a) Deduct all the costs necessary to effect transfer of the First Defendant's share in the property into the name of the Plaintiff from the consideration; and

(b) Transfer the First Defendant's share in the property into the name of the Plaintiff, against payment of the balance of the consideration after deduction of the costs of transfer referred to in prayer (c)(ii)(a) above, as soon as possible.

(d) Costs of suit on the scale as between attorney and client.'

When the matter was argued, Mr Sholto-Douglas, who appeared for the plaintiff, together with Mr Ord, informed me that the plaintiff no longer sought an attorney and client costs order and would be satisfied with costs on a party and party scale.

[4] The relief that I have set out above relates to clause 6.3 of the deed of settlement and its enforcement. Clause 6.3.1 records that the plaintiff and the first defendant (referred to as the defendant in the deed of settlement) are the joint owners in equal shares of B[…] T[…] and clause 6.3.2 provides that the defendant sells his right, title and interest in it to the plaintiff for a purchase price of R375 000. Clause 6.3.3 states:

'Defendant shall expeditiously take all such steps which are necessary to have his interest in B[…] T[…] registered in the name of Plaintiff by a conveyancer appointed by him for this purpose. If either party fails to sign the necessary transfer documentation within 14 days of written demand, the Registrar of this Court shall be authorised to sign the necessary documentation on such party's behalf. The cost of transferring Defendant's right, title and interest in B[…] T[…] to Plaintiff, including the conveyancer's fees and transfer duty, shall be paid by Defendant within twenty one (21) days of request by the conveyancer attending to the registration of transfer.'

[5] Clause 6.3.5 provides for how payment of the purchase price is to be made. The following sub-clauses are relevant:

'(a) If the Plaintiff does not sell the property before 31 December 2006, the purchase price of R375 000.00 shall be paid on 31 December 2006;

(b) Should Plaintiff sell B[…] T[…] before 31 December 2006, she shall pay to Defendant the sum of R375 000.00 plus 50% of the amount by which the net purchase price . . . exceeds the sum of R750 000.00 which amount shall be payable upon transfer being effected into the name of the purchaser, or within four (4) months of date of sale whichever is the earlier date.

(It is specifically recorded that the purchase price of R375 000.00 aforementioned does not attract interest and that Defendant is not entitled to any profit-share if Plaintiff does not sell the property before 31 December 2006.)
(c) Defendant shall not have any right to occupy or use B[…] T[…] without Plaintiff's prior written consent, which she may withhold at her sole discretion.
(d) . . .
(e) As security for the purchase price payable by Plaintiff to Defendant . . . Plaintiff hereby authorises the simultaneous registration of a covering mortgage bond of R550 000 in favour of Defendant over B[…] T[…. The parties shall sign all the necessary documentation within fourteen days of written demand, and failing either of them so signing, the Registrar of this Court shall be authorised to sign such documentation on behalf of the party who has failed to sign such documentation. Defendant shall bear the costs of registering such covering mortgage bond.
(f) . . .
(g) . . .'

[6] Clause 8.4 is a non-variation clause in the usual terms: that no variation of the agreement 'shall be of any force and effect unless reduced to writing and signed by both parties'.

[7] The first defendant has pleaded various defences. I shall deal with them later in this judgment as they would make little sense to a reader unfamiliar with the dispute without an understanding of the facts, which I shall now set out.

The facts

[8] The facts that I detail below illustrate very clearly that this matter has a long and unfortunate history. Not surprisingly, it has generated a high level of acrimony and mistrust between the plaintiff and first defendant more than ten years after their divorce. This much was clear from the evidence of the plaintiff. Where the fault lies is not for me to say and is, more importantly, not relevant to the issues I am required to decide.

[9] Only one witness testified in the trial. That was the plaintiff. Her evidence is to a large extent common cause, although inferences to be drawn and probabilities that

arise from her evidence are not. A large bundle of correspondence between the attorneys of the plaintiff and the first defendant detail the history of the matter. Once again, there is no dispute about what the correspondence says but the conclusions to be drawn from it are sometimes in issue.

[10] I shall refer to the plaintiff's attorney, Ms Veronica Douglas of Veronica Douglas Inc as 'Douglas' and the first defendant's attorney, Mr Andrew Miller of Andrew Miller & Associates as 'Miller'.

[11] Relatively soon after the divorce was granted, Douglas and Miller turned their attention to the sale of B[...] T[...]. By mid-2003 transfer and mortgage bond documents had been prepared by the first defendant's conveyancers and sent to Douglas. As the documents contained errors, they were not signed. They were corrected and sent back to Douglas. They were signed by the plaintiff and sent back to Miller.

[12] More problems were found with the signed documents. They were again amended. A further problem was found and, after the first defendant's conveyancers had corrected it, the documents were yet again sent to Douglas for the plaintiff's signature. This was on 20 January 2004.

[13] No one knows what became of these documents. The plaintiff cannot state positively that she signed them and returned them to Douglas. She testified that if Douglas had advised her that they were in order she would have signed them and returned them to Douglas. I am of the view that it is more probable than not that the plaintiff did sign the documents and return them to Douglas. She had done precisely that on previous occasions when given the go-ahead by her attorney. She struck me as a person who would have attended to a matter of importance to her, such as this. It was, without question, in her interest to sign the documents and return them.

[14] For various reasons, the process stalled for over two years. It was only in 2006 that the transfer of B[…] T[…] enjoyed the attention of the attorneys again. It is clear from the evidence of the plaintiff that she assumed that transfer had been attended to and was taken aback to find that it had not. Douglas demanded an

explanation of Miller as to why transfer had not been effected. He, in turn, said that she had not sent him the signed documents. As with most of the correspondence in this case, matters were not assisted by the increasingly acrimonious exchanges between the two. From the correspondence between Douglas and Miller, however, it is clear that Douglas believed she had sent the documents to Miller while he, in turn, was adamant that he had not received them.

[15] The issue was put back on track (after a fashion), amid allegations and counter-allegations as to who was to blame and who was obstructing whose legitimate interests, by Miller asking for 'an appropriate guarantee for the payment which is due to Mr H[…] on 31 December 2006'. Although this was not immediately forthcoming, the case took a step in the right direction when Mr Anthonie Troskie of the firm Cliffe Dekker Inc was instructed as the plaintiff's 'supervising conveyancer'. He wrote to Miller on 14 November 2006 as follows:

'To the extent that repetition thereof is required, we hereby convey Ms H[…]'

1. tender to comply with all her obligations contained in the relevant clause, in particular payment of the purchase price, and
2. demand that your client similarly complies with all his obligations in terms of that clause, in particular that he procures transfer to her.

It is evident that earlier transfer was contemplated against the security of a mortgage bond (kustingsbrief) in respect of the purchase price, which is the only security to which your client is/was contractually entitled. We suggest that the reasons for the delay have become academic and that the process be resumed or commenced forthwith with a view to procure transfer before the end of the year.

. . .

Her intention is to pay the purchase price in trust to this firm, at the latest when you confirm that you (or your correspondent) are ready to lodge the transfer in the relevant Deeds Registry. For purposes hereof client will concede your client's common law right to require a guarantee at that stage and proposes instructing us then to issue the guarantee.'

Troskie went on to give the undertaking that the plaintiff would comply with her obligations 'immediately and certainly within 14 days of request'.

[16] Miller responded on 17 November 2006. In his letter to Troskie he stated:

'Your client's tender to comply with her obligations, particularly those contained in sub-clause 6.3.3 of the Deed of Settlement (dated 25 February 2003), is noted and accepted,

subject to a reservation of our client's rights arising from your client's breach of her obligations under this sub-clause during 2003 and 2004.
Subject to what is set out below, our client repeats his intention to transfer his right, title and interest in "B[…] T[…]" to Mrs H[…] for the stipulated purchase price of R375 000.00.
Our client is willing to forego the registration of the kustingsbrief, subject to your client accepting the arrangement proposed hereunder.
. . .
Your client's factual obligation is to pay the purchase price of R375 000.00 to our client by no later than 31 December 2006. However in order to facilitate this obligation and the transfer of our client's half-share in the property/ies our client will agree to receiving payment of the above amount against registration of transfer, provided that:

> 5.1. the required funds have been deposited into your Trust Account by Mrs H[…], and the appropriate Payment Guarantee has been received by us from you;
> 5.2. the transfer documentation required from our client will be signed and forwarded for lodgement against your notification that the funds have been received into your Trust Account from your client, and that you will be issuing the required Guarantee in our favour.'

[17] This letter was followed by another letter, dated 27 November 2006, in which Miller said, with reference to an earlier telephonic conversation with Troskie:
'We confirm that we will redraw the documents in due course and forward same to you for signature by your client. We are just waiting for our client to let us have certain information (he is out of the country at the moment) before we draw our documents.
We further confirm that you will let us have a bank guarantee for the purchase price of R375 000.00 prior to us lodging the transfer documents.'

[18] The transfer was not effected before the end of 2006. On 16 January 2007, Troskie informed Miller that the 'required bond has been registered and if I have firm information on when the funds will be in our trust account for purposes of issue of the guarantee before the end of the day I shall confirm with you'. By 20 February 2007, however, the guarantee had still not been provided so Miller wrote to Troskie and put the plaintiff to terms to provide the guarantee within 14 days 'failing which we shall seek our client's instructions as to whether or not the sale of our client's half-share is to be cancelled due to Mrs H[…]' failure to provide the guarantee and/or her further breaches of the Contract of Sale'.

[19] Troskie gave an undertaking soon thereafter as the plaintiff had, apparently, paid the funds into Cliffe Dekker's trust account. On 27 February 2007, Miller noted in a letter to Troskie that his undertaking did not provide for interest on the purchase price from 31 December 2006 to date of registration of transfer, and on 1 March 2007, he wrote to Troskie to say that notwithstanding the entitlement to interest and the reservation of his client's rights concerning the plaintiff's alleged breaches of clause 6.3 of the deed of settlement, his instructions were 'to accept the undertaking contained in your letter of 26 February 2007 and to proceed with the transfer'.

[20] On 1 March 2007, Cliffe Dekker issued the guarantee in the form of an irrevocable undertaking to pay R375 000 against confirmation of registration of transfer of B[...] T[...]. By 2 April 2007, the transfer documents had been lodged in the Deeds Office in Cape Town by Miller's Cape Town correspondent, Fairbridges.

[21] With payment guaranteed, the documents signed and transfer imminent, the four year saga of B[…] T[…] took another turn that was to propel the parties headlong into this litigation and to frustrate, yet again, the fulfilment of clause 6.3 of the deed of settlement.

[22] On 5 April 2007, Douglas sent a letter to Miller concerning settled litigation between the plaintiff and the first defendant in Botswana in which the first defendant had agreed to pay the plaintiff's costs, but had apparently not done so yet. Douglas wrote:

'Our client requires that, as she is entitled to these costs, a portion of the monies currently held in trust by Cliffe Dekker Inc. with respect to the transfer of your client's half share of B[…] T[…] to our client be retained as security for these costs once transfer is effected. Obviously, in the event that the parties reach an agreement as to a reduction in these costs or the bills are taxed in a lesser amount, the difference will be paid to your client.'

She followed this up with a second letter on the same day in which she purported to quantify the costs (R89 479.94) and asked Miller to agree to the proposal by 12h00 on 11 April 2007 'failing which we shall have no choice but to apply to the High Court for the appropriate relief'.

[23] On 10 April 2007, Miller responded in unequivocal terms. He said that 'under no circumstances will our client agree to the funds or any portion thereof, which are presently held in Messrs Cliffe Dekker Inc's trust account and in respect of which we hold Messrs Cliffe Dekker's irrevocable payment guarantee, being appropriated for this purpose'. He expressed astonishment that the plaintiff 'should now make such a request' and threaten litigation too.

[24] The threatened urgent application was launched against both the first defendant and Cliffe Dekker. An order was sought that R89 479 from the proceeds of the sale of B[...] T[...] be retained in Cliffe Dekker's trust account pending the taxation of the bills of costs in Botswana, and that Cliffe Dekker provide the plaintiff with an 'immediate irrevocable undertaking' that the amount would not be paid other than in terms of a court order or an agreement between the parties.

[25] The inevitable flurry of correspondence followed. Miller informed Douglas that he had instructed Fairbridges not to proceed with the transfer of B[...] T[...] without his express instruction. He also gave an undertaking, to defuse the urgency of the application, I presume, that Fairbridges would not proceed with the transfer until the application had been determined.

[26] On the next day – the day the application was due to be heard – Miller informed Douglas that the point would be taken that the court lacked jurisdiction over the first defendant as he was both a citizen and a resident of Botswana. He offered her an opportunity to withdraw the application, in which event no costs order would be sought against the plaintiff. Wisely, Douglas availed herself of this offer and withdrew the application.

[27] That, however, was not the end of the matter because in the letter agreeing to withdraw the application, Douglas suggested that counsel on brief for both sides in the urgent application be given a mandate to resolve an outstanding maintenance issue. She then said:

'Any amount which it appears thereafter is due to our client could then be settled by your client from the Pula amount held in trust or by any other means which he may prefer. Once

agreement has been reached in this respect then the transfer can proceed and the balance if any of the Pula amount held in trust may be released to your client.'

[28] In a further letter to Miller that day she requested that 'your client provide our client with an undertaking that the transfer not proceed until the terms of the Botswana agreement have been complied with by both parties'. On 16 April 2007, Miller refused to give the undertaking. On 18 April 2007, he wrote to Fairbridges to give an instruction to immediately arrange for the transfer of B[...] T[...] to be withdrawn from the Deeds Office.

[29] On 24 April 2007, Miller wrote to Douglas. In this letter, he spoke in the first instance of the plaintiff's breach of clause 6.3.5(e) of the deed of settlement in the form of her failure to return the bond and transfer documents that had gone missing in 2004. Then, with reference to the chain of correspondence from Troskie's letter that had revived the sale to the furnishing of the undertaking by Cliffe Dekker, he said:

'No sooner had these arrangements for the transfer of our client's half share of B[...] T[...] been concluded, when your client then apparently saw fit to launch the urgent application . . . The subsequent disastrous history of your client's ill-founded Application is recorded in our telefax to you of 16 April 2007. This action on your client's part has resulted in our client having to incur substantial further (and unnecessary) legal expenses.

In these circumstances we are instructed to advise you and your client, as we hereby do, that your client's conduct in launching the aforesaid application is considered to our client to be **"the last straw that broke the sale's back"**, as well as yet a further unlawful repudiation by your client of her obligations under subparagraph 6.3 of the Deed of Setlement.

You are accordingly hereby advised that in these circumstances, our client now elects to accept the previous and aforesaid further repudiations of the Sale Contract, and accordingly cancels the Sale Contract. Our client is therefore no longer bound by the sale provisions of sub-paragraph 6.3 of the Deed of Settlement.

To this end, our Cape Town Correspondents (Messrs Fairbridges) have been instructed to withdraw the transfer from the Deeds Office.'

[30] On 19 September 2007 Troskie wrote a letter to Miller in which stated that the plaintiff's tender and demand recorded in his letter of 14 November 2006, supplemented by Cliffe Dekker's 'irrevocable undertaking', had not been waived or

withdrawn and that the funds to pay the purchase price remained in its trust account. After referring to the first defendant's stopping of the transfer, he said that '[d]isagreement between the parties relating to severable aspects of the settlement agreement does not render lawful the refusal to comply with reciprocal obligations to give effect to the provisions of paragraph 6.3 thereof'. He then demanded an undertaking that the first defendant give his conveyancers a mandate to continue with the transfer failing which the plaintiff would approach the Registrar of the Western Cape High Court to sign the necessary transfer documents. On the same day, Miller responded. He did not give the undertaking but insisted that the cancellation was justified in the light of the plaintiff's 'breach of her obligations under the Sale Agreement since as long ago as January 2004 (if not, indeed, prior to that date)' and that the cancellation arose 'directly from' the plaintiff's 'continuous breaches of the Sale Agreement, culminating in an unlawful attempt directed to the Cape High Court to interdict the sale proceeds'.

[31] The further exchanges of correspondence that followed took the matter no further, except to ensure that the possibility of settlement became ever more remote. Eventually, in October 2012, a few months short of ten years after the decree of divorce was issued, these proceedings were instituted.

The issues

[32] The plaintiff's case is that once the first defendant had accepted the tender made by Troskie in November 2006, the plaintiff had paid the purchase price into Cliffe Dekker's trust account and Cliffe Dekker had issued the guarantee, the first defendant was obliged to transfer his half share of B[...] T[...] to the plaintiff – and he remained so obliged.

[33] It is also the plaintiff's case that she never repudiated the agreement and so the first defendant was not able to cancel it. Furthermore, to the extent that she may have failed to perform in 2004 (when the transfer and bond documents went missing) – and may have been precluded from demanding performance on the part of the first defendant – the structure and context of clause 6.3 of the deed of settlement makes it clear that no obligation, in the conventional sense, was placed on her to perform.

This is so because the parties provided a 'remedy' for any failures to perform: the Registrar could be approached to sign the necessary documents in terms of clause 6.3.3.

[34] The defences raised by the first defendant refer to two agreements – the deed of settlement and its 'repackaging' in November 2006. I shall deal later with whether this is a correct categorisation. The defences that are raised are that: (a) the plaintiff was in breach of clause 6.3 of the deed of settlement (in either its 'original' or 'repackaged' forms) as a result of her failure to perform her obligations and is consequently not entitled to enforce the first defendant's performance; (b) to the extent that clause 6.3 has been varied, it was varied contrary to the non-variation clause contained in clause 8.4 of the deed of settlement; (c) whether or not clause 6.3 was varied effectively, the agreement has been lawfully cancelled by the first defendant, following the plaintiff's repudiation; (d) the claim has prescribed; and (e) the agreement is of no force or effect on account of it being in conflict with s 2(1) of the Alienation of Land Act 68 of 1981.

[35] I shall deal with the issues as follows: first, the nature of the 'repackaging' of November 2006, including whether there are one or two agreements, and whether it amounted to a variation of the agreement; secondly, what obligations, if any, clause 6.3 of the deed of settlement imposes on the parties, and the effect of non-compliance by either, whether the plaintiff repudiated the agreement and whether the first defendant's cancellation was effective; and thirdly, whether the plaintiff's claim has prescribed. During the course of dealing with these issues, I shall also deal with the other defences raised by the first defendant.

The nature of the November 2006 'repackaging'.

[36] Troskie's tender of 14 November 2006 and Miller's acceptance of it on 17 November 2006 related explicitly and unambiguously to performance by both parties of their obligations in terms of clause 6.3 of the deed of settlement. This exchange of correspondence did not create a new agreement. It was either a variation of the original agreement or a tender to perform, an acceptance of the tender and a waiver

on the part of the first defendant of the requirement that a bond be registered, in favour of a payment guarantee.

[37] Troskie described the guarantee as a 'common law right'. The nature of such a guarantee was dealt with in *Koumantarakis Group CC v Mystic River Investments 45 (Pty) Ltd & another*,[1] in which the court said the following:

'The nature of bank guarantees in relation to the sale of immovable property is explained in various authorities as follows: In a sale of movables payment and transfer should take place *pari passu*. In a sale of land, where large sums of money are usually involved, it is obviously desirable to achieve the same result, since the seller will be reluctant to part with ownership of his land until he has the money and the purchaser will be reluctant to part with his money until he has ownership of his land. It is thus necessary to resort to a device in order to achieve as nearly as possible, the desired reciprocity of payment and transfer. The standard device is the furnishing by the purchaser, when called upon to do so by the seller's conveyancers who are ready to lodge the necessary documentation, of a bank guarantee payable on registration of transfer, normally a revocable guarantee unless the contract expressly calls for an irrevocable guarantee. Generally guarantees are required to be provided by a date in advance of registration because the date of registration is not precisely predictable.'

[38] It was argued by Mr Sholto-Douglas that the acceptance of the payment guarantee in the place of the mortgage bond contemplated by clause 6.3.5(e) of the deed of settlement was no more than a waiver on the part of the first defendant, rather than a variation of the agreement that was subject to the non-variation clause. A waiver is an 'abandonment or surrender (with the necessary knowledge) of a right'[2] and 'does not *per se* result in the contract being altered'.[3] Whether a waiver that is brought about contrary to a non-variation clause will be effective depends on what is waived. The position has been summarised thus by Christie and Bradfield:[4]

'A non-variation clause will effectively prevent waiver in the general sense of an informal agreement to vary or cancel the contract, but it will not prevent one party waving a provision

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[1] *Koumantarakis Group CC v Mystic River Investments 45 (Pty) Ltd & another* 2008 (5) SA 159 (SCA) para 24.

[2] *Van As v Du Preez* 1981 (3) SA 760 (T) at 764G.

[3] *Van As v Du Preez* (note 2) at 764G-H.

[4] R H Christie and G B Bradfield *Christie's the Law of Contract in South Africa* (6 ed) at 466. See too *Hilsage Investments (Pty) Ltd v National Exposition (Pty) Ltd & others* 1974 (3) SA 346 (W) at 354A-F; *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) at 277C-G; *Barnett v Van der Merwe* 1980 (3) SA 606 (T) at 611F-H.

of the contract that is entirely for his benefit or waiving the right to pursue his remedy for a breach that has already occurred. The reason is that waiver in this sense does not amount to a variation of the contract but is either a *pactum de non petendo* that can stand alongside it or a unilateral act that does not require the consent of the other party.'

[39] In this case, the first defendant abandoned reliance on the requirement that the plaintiff had to register a bond as security for the purchase price, in favour of the issue of a guarantee and payment against transfer. This amounts to a waiver of a provision in the deed of settlement that was entirely for his benefit. As such, it is not a variation that is subject to the non-variation clause.[5] Ms Gordon-Turner, who appeared for the first defendant, did not suggest that clause 6.3 of the deed of settlement was in conflict with s 2(1) of the Alienation of Land Act.

[40] If I am wrong and the 'repackaging' of November 2006 constituted a variation of the deed of settlement, then it does not fall foul of the non-variation clause, because it was reduced to writing – by Troskie on 14 November 2006 and Miller on 17 November 2006 – and was signed by them on behalf of their respective clients. Similarly, and for the same reason, the deed of settlement as 'varied' is not in conflict with s 2(1) of the Alienation of Land Act.

Did the plaintiff repudiate in 2004 and 2007 and was the first defendant's cancellation justified?

[41] There appear to me to be three answers to the contention made by Ms Gordon-Turner that the plaintiff could not enforce clause 6.3 because she was, herself, in default of her obligations in terms of clause 2.3.3 as a result of her failure to sign the transfer and bond documents in 2004. The first is that even if this was so in 2004, she was no longer in default when she sought to enforce clause 6.3, having tendered performance and an irrevocable guarantee of payment, and having signed the necessary documents which were lodged by the first defendant's conveyancers in the Deeds Office. The second answer is that I have found that, on a balance of probabilities, the plaintiff did sign the transfer and bond documents in 2004.

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[5] See, for a similar situation to this, *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A) at 244E-G. See too *Kovacs Investments 724 (Pty) Ltd v Marais* 2009 (6) SA 560 (SCA) para 20.

[42] The third answer concerns the nature of the obligations created by clause 6.3. That clause must be interpreted within the wider context of the deed of settlement as a whole. The preamble to the deed of settlement states, inter alia, that the parties had 'resolved all differences currently pending between them and wish to record same in writing'.

[43] The deed of settlement then records what the parties had agreed to in respect of the following: custody of and access to their children; the plaintiff's waiver of her right to maintenance; maintenance for the children; increases in maintenance; the disposition of their proprietary interests, including the division of joint investments and shares, the sale of the first defendant's half share of B[...] T[...] to the plaintiff and the division of movables.

[44] In addition, clause 8 deals with various issues, including the waiver of any rights each party may have had in respect of the other party's pension, retirement benefits and social security benefits. Clause 8.3 provides:

'The aforegoing constitutes a full and final settlement of all outstanding disputes between the parties, and save as aforesaid, neither party shall have any claims against the other from whatsoever cause arising.'

[45] The deed of settlement was intended to embody a comprehensive and complete settlement of every issue between the parties. When it regulated the proprietary interests of the parties, it did so on a 'give and take' basis and as part of the facilitation of the divorce.

[46] The sale of B[...] T[...] was but one aspect of the deed of settlement. Clause 6.3 was crafted in such a way that, in the event of one party becoming intransigent and frustrating the transfer, a fail-safe was put in place so that the process of transferring the half share in the property from the first defendant to the plaintiff would not fail and would be completed.

[47] That mechanism is incorporated into clause 6.3.3 and clause 6.3.5(e). The relevant part of the former provides that if either party 'fails to sign the necessary

transfer documentation within 14 days of written demand, the Registrar of this Court shall be authorised to sign the necessary documentation on such party's behalf'. Clause 6.3.5(e) creates the same mechanism in respect of the signing of the mortgage bond documentation.

[48] In my view, these provisions read in context indicate that the parties had fashioned a way of ensuring that the sale would be effected, come what may. In so doing, they were ensuring that the deed of settlement could effectively take to finality the settlement of all proprietary issues connected to the divorce. This has a bearing on whether the refusal or failure on the part of one of the parties to sign the transfer documents constitute a major breach, precluding that party from enforcing performance by the other party or entitling the other party to cancel. Clause 6.3.3, read in the broader context of the deed of settlement, placed no positive obligation on the plaintiff to sign the transfer documents.

[49] When, as here, the complaint of the first defendant is that the plaintiff failed to sign the transfer documents in 2004, he was not entitled to treat this – belatedly, it must be said – as a breach precluding the plaintiff from enforcing the agreement or, indeed, a repudiation entitling him to cancel. His remedy was specifically provided for in clause 6.3.3. He should have called upon the plaintiff to sign the documents within 14 days and, if she failed to do so, he should have approached the Registrar to sign the documents on her behalf.

[50] I turn now to the crux of the case – the 'last straw that broke the sale's back' – the ill-advised and misconceived urgent application. The first defendant's case is that the bringing of the urgent application, on its own, amounted to a repudiation – the manifestation of a 'deliberate and unequivocal intention' on the part of the plaintiff 'no longer to be bound by the agreement'[6] – and that, as a result, the first defendant was entitled to cancel.

[6] *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) para 1; *Street v Dublin* 1961 (2) SA 4 (W) at 10A-C.

[51] In *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd*,[7] after making the point that the test for whether a party has repudiated is objective, Nienaber JA went on to say:

'The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.'

[52] The question I now have to answer is whether, objectively speaking, a reasonable person in the position of the first defendant would construe the bringing of the urgent application as a repudiation of the agreement for the purchase and sale of the first defendant's half share of B[...] T[...].

[53] The purpose of the urgent application was to obtain the leave of the court to preserve a portion of the purchase price of B[...] T[...], to be held in Cliffe Dekker's trust account, 'pending the taxation of Bills of Costs under Case No. 88/2004 in the Botswana High Court . . .'.

[54] I am of the view that a reasonable person in the first defendant's position would not arrive at the conclusion that the launching of the urgent application was a repudiation of the plaintiff's obligations in terms of clause 6.3 of the deed of settlement for the simple reason that the urgent application was predicated on the *completion* of the sale: if the sale of B[...] T[...] did not proceed, the urgent application (assuming it had any merit) would be of no use to the plaintiff, and be still-born, because she would not have been able to retain part of the purchase price for the payment of her costs in Botswana. In other words, far from indicating an intention on the part of the plaintiff no longer to be bound by clause 6.3, it evinced, and was consistent with, the intention to proceed with the sale. And all of this occurred in the

[7] Note 6 para 16. See too *Tucker's Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 653E-G.

broader context of the parties finally having got to the point when the registration of transfer was imminent and beyond, one would have thought, the point of no return.

[55] In the result, as the plaintiff did not repudiate, the first defendant was not entitled to cancel.

Prescription

[56] The first defendant argued that the plaintiff's claim against the first defendant had prescribed as this action was instituted more than three years after the debt (in the sense of the obligation to deliver the property) arose. There is no merit in this argument. The first defendant's obligations are embodied in an order of court, even if it took the form of an agreement. In *PL v YL*[8] Van Zyl ADJP, for a full bench of this court, said the 'making of an order in terms of an agreement as envisaged in s 7(1) [of the Divorce Act 70 of 1979] brings about a change in the status of the rights and obligations of the parties to the settlement agreement' because 'the terms of the agreement are incorporated in an order of court' and that, because the granting of a 'consent judgment is a judicial act', it 'vests the settlement agreement with the authority, force and effect of a judgment'.

[57] In terms of s 11(a)(ii) of the Prescription Act 68 of 1969, the period of prescription for a judgment debt is 30 years. These proceedings were instituted well within the 30 year period.

<u>The plaintiff's case and specific performance</u>

[58] I have found that the plaintiff's tender of performance in November 2006 was accepted by the first defendant; that she paid the agreed purchase price into the trust account of Cliffe Dekker; that Cliffe Dekker issued an irrevocable guarantee of

[8] *PL v YL* 2013 (6) SA 28 (ECG) para 32.

payment; that the plaintiff signed the necessary transfer documents; and that the transfer documents were lodged in the Deeds Office (before the transfer was stopped on the instructions of the first defendant's attorney). I have also found that the various defences raised by the first defendant are without merit. That being so, the plaintiff has established her case: that the first defendant is obliged to register transfer of his half share of B[...] T[...] in the plaintiff's name and that this obligation, which stems from the deed of settlement, remains extant.

[59] It was argued by Ms Gordon-Turner that I should, nonetheless, not order specific performance.

[60] Although I have a discretion in this regard, the starting point is that an injured party to a contract who has performed his or her obligations has a right to demand performance of the other contracting party's obligations.[9] The position was set out thus by De Villiers AJA in *Haynes v Kingwilliamstown Municipality*:[10]

'It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod* interest. The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.'

[61] This statement of the law was qualified by Hefer JA in *Benson v SA Mutual Life Assurance Society*[11]as follows:

'The statement that the discretion is not circumscribed by rigid rules requires some elucidation. The use of the word "rigid" may be taken to imply that there are indeed rules regulating the exercise of the discretion but that they are not inflexible . . . I doubt, however, whether that is what was intended, particularly after it was accepted that a plaintiff has the right to elect whether to demand performance or to sue for damages, and that the Courts will as far as possible give effect to his election. That a right to specific performance exists was decided as long ago as 1882 . . . and subsequently reaffirmed in a host of cases . . . subject only to the qualification that the Court has a discretion to grant or to refuse an order for

[9] *Farmers' Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350.
[10] *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378G-H.
[11] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782F-783G.

performance. This right is the cornerstone of our law relating to specific performance. Once that is realised, it seems clear, both logically and as a matter of principle, that any curtailment of the Court's discretion inevitably entails an erosion of the plaintiff's right to performance and that there can be no rule, whether it be flexible or inflexible, as to the way in which the discretion is to be exercised, which does not affect the plaintiff's right in some way or another. The degree to which it is affected depends, of course, on the nature and extent of the rule; theoretically, I suppose, there may be a rule which regulates the exercise of the discretion without actually curtailing it but, apart from the rule that the discretion is to be exercised judicially upon a consideration of all relevant facts, it is difficult to conceive of one. Practically speaking it follows that, apart from the rule just referred to, no rules can be prescribed to regulate the exercise of the Court's discretion.

This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle . . . It is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to performance - and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy . . . Furthermore, the Court will not decree specific performance where performance has become impossible. Here a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former the creditor clearly has no legal remedy at all.'

[62] Ms Gordon-Turner argued that it would be unfair if specific performance was ordered because the property is now worth a lot more than it was in 2006, when the sale should have been concluded, that the increase in value had an effect of the cost of the transfer, which has to be paid by the first defendant, and he may also be liable for penalties as a result of the delay. She suggested that I should order that the property be sold and the purchase price be divided between the plaintiff and the first defendant.

[63] On the other hand, I have before me an agreement that is embodied in an order of court that requires, as part of a broader settlement of the proprietary

interests of the parties, that the first defendant's half share of B[...] T[...] be sold to the plaintiff for R375 000. Not giving effect to clause 6.3 when all of the other proprietary issues have already been finalised in terms of the agreement would be unfair to the plaintiff. It is unfortunate that after all this time, that part of the deed of settlement has not been finalised and that this litigation has been necessary.

[64] No evidence was placed before me as to the hardship that the first defendant would face if specific performance was ordered but I am prepared to accept that he would endure some hardship in the form of financial prejudice, although I do not know the quantum thereof. I do not see how I can order that the parties sell B[...] T[...] and share the purchase price. No such relief is claimed and it would conflict directly with the order that embodies the deed of settlement. My choice, it seems to me, is either to order specific performance – and thus give effect to the order – or cancel the agreement, leaving the plaintiff with no remedy. I cannot see how I can do the latter and I also cannot see how I cannot do the former.

[65] In *PL v YL*[12] Van Zyl ADJP made the point that once a settlement is incorporated into an order, as was the case here, the court 'retains authority over its own orders to ensure that the terms thereof are complied with', this vests in the parties 'the right to approach the court for appropriate relief in the event of a failure by one of them to honour the terms of a consent order' and so, 'by agreeing to their settlement being made an order of court, both parties effectively commit themselves to comply with the terms thereof and to be subjected to sanction by the court should they fail to do so'. In these circumstances, the plaintiff's right to specific performance must prevail.

Costs

[12] Note 8 para 32.

[66] The plaintiff claims the costs of two counsel. I am of the view that, given the nature and complexity of the case, it was a wise and reasonable precaution for the services of two counsel to have been engaged.[13]

The order

[67] I make the following order.

(a) It is declared that the first defendant is obliged to transfer his share in the sectional title immovable property known as 1[...] S[...], K[...], also known as B[...] T[...], K[...], (the property) into the name of the plaintiff against payment of the consideration of R375 000.

(b) The first defendant is directed to:

(i) transfer his share in the property into the name of the plaintiff, against payment of the consideration, as soon as possible;

(ii) nominate a conveyancer, in order to transfer his share of the property into the name of the plaintiff, within ten days of the date of this order;

(iii) sign all documents and take all steps necessary to transfer his share in the property into the name of the plaintiff (including making payment to the conveyancer nominated by him of all the costs necessary to effect transfer) within 30 days of the date of this order;

(c) In the event that the first defendant fails to take any of the steps referred to in prayer (b)(ii) and prayer (b)(iii) within the time periods provided for therein:

(i) the second defendant is authorised to take the necessary steps referred to in prayer (b)(ii) and prayer (b)(iii) as soon as possible, on the first defendant's behalf; and

(ii) the conveyancer nominated by the second defendant is authorised to:

(aa) deduct all the costs necessary to effect transfer of the first defendant's share in the property into the name of the plaintiff from the consideration; and

[13] See *Bouwer v Bouwer & another* EC 17 April 2008 (Case No.361/04) unreported paras 6-7 and the authorities cited therein.

(bb) transfer the first defendant's share in the property into the name of the plaintiff, against payment of the balance of the consideration after deduction of the costs of transfer referred to in prayer (c)(ii)(aa), as soon as possible.

(d) The first defendant is directed to pay the plaintiff's costs, including the costs of two counsel.

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C Plasket
Judge of the High Court

APPEARANCES

For the plaintiff: A Sholto-Douglas SC and J Ord, instructed by Whitesides.
For the first defendant: F J Gordon-Turner, instructed by Netteltons.