REPORTABLE

IN THE KWAZULU-NATALHIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO:AR 213/2013

In the matter between:

FANO LUCKY BOY KHWELA First Appellant
ZODWA DOREEN KHWELA Second Appellant

and

WELLINGTON DHLAMINI Respondent

JUDGMENT

GORVEN J

[1] This matter hasnegotiated a long and winding road.It has been sent down blind alleys and has at times attempted to retrace its steps. I am tempted to say that it has been a comedy of errors except that, because people's lives and money are involved, there is no room for humour. I shall refer in this judgment to the respondent as the applicant and the appellants as the respondents respectively. This is how the parties were referred to in the two applications which gave rise to the two judgments which form the subject matter of the appeal.

[2] The journey began with a written agreement (the property agreement) for the purchase and sale of an immovable property (the property) that was signed by the parties on 29 August 2008. On the face of the property agreement, the respondents purchased the property from the applicant. It is common cause that the respondents obtained occupation of the property pursuant to the property agreement. Since then, the matter hastravelled along various roads in the Durban Magistrates' Court (the court) in various applications.

[3] The first of these involved an *ex parte* application, brought for authorisation by the court to serve a notice in terms of s 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). The order was granted and the notice in question was duly served on the respondents.This order is not appealed against.

[4] Thenext junction reached involved anapplication for the eviction of the respondents (the original application). The applicant claimed that the respondents had failed to perform their obligations under the property agreementand that he had cancelled it as a result. Thisapplication was opposed and was set down for hearing on 26 September 2011. On that day, both sets of parties were represented by legal practitioners. It was recorded by the magistrate, in terms of Rule 27(6) of the Magistrates' Court Rules, that the matter had become 'settled as per Draft Order' (the settlement agreement).[1]The applicant, in a further step along the journey,subsequently sought a ruling on whether the settlement agreement was merely recorded in terms of Rule 27(6)or was made an order of court. The court pronounced on this issue on 9 March 2012 to the effect that what had been effected was

[1] Rule 27(6) provides as follows: 'Application may be made to the court by any party at any time after delivery of notice of intention to defend and before judgment to record the terms of any settlement of an action without entry of judgment agreed to by the parties: Provided that if the terms of settlement so provide, the court may make such settlement an order of court.'

the recordal of the settlement agreementand that it had not been made an order of court. That recordal in terms of Rule 27(6) is not appealed against and has not been set aside on any other basis.

[5] It will be helpful to set out in full the contents of the settlement agreement. Although it refers to the plaintiff and the defendants, the references should clearly be to the applicant and the respondents respectively. It was headed 'Draft Order in Terms of Rule 27(6)' and read as follows:

'THE MATTER BEING SETTLED, IT IS HEREBY ORDERED AS FOLLOWS:

1. The first and second defendant and all those claiming occupation through them shall vacate the premises situated at A242 Old Main Road, Amanzimtoti on or before the 31st December 2011.

2. In the event that the first and second defendant fail to vacate the premises on the date set out in paragraph 1 hereof the sheriff of the court is hereby authorised to evict the first and second defendant and all those claiming occupation through them on the 1st January 2012 or any date thereafter.

3. It is recorded that in the event that the 1stand 2nd Defendant are able to raise sufficient cash, bank guarantee or bond before the 31stDecember 2011 the Plaintiff shall enter into an agreement of sale with them in order to sell the property situated at A242 Old Main Road, Amanzimtoti to the 1st and 2nd Defendant.

4. The Plaintiff will be entitled to retain the funds paid by the first and second Defendant as damages and compensation for the use of the premises at a rate of R2500.00 per month, escalating annually at a rate of 10%, from the 1st August 2008. The balance of any funds paid to the Plaintiff by the 1st and 2nd Defendant pursuant to the agreement shall be refunded to them.

5. The first and second Defendant shall pay R3000.00 to the Plaintiff each month as consideration for the use of the premises for the months of October, November and December 2011. Such payment will be made to the Plaintiff on the 15 day of each of the listed months.

6. In the event that the first and second defendant default on any of the terms of this agreement, the sheriff of the court is hereby authorised to evict them and any person

claiming occupation through them from the premises immediately, without further notice.

7. The above agreement shall be recorded in terms of Rule 27(6) of the rules of the above Honourable Court and shall be in full and final settlement of both the action and application in terms of the Prevention of Eviction and Unlawful Occupation of Land Act under the above case number.'[2]

[6] The next step taken along the journey was an application brought in March 2012 for the settlement agreement to be made an order of court pursuant to the provisions of Rule 27(9) (the Rule 27(9) application). In support of this relief the applicant claimed a breach of the settlement agreement by way of the failure of the respondents to 'raise sufficient cash, bank guarantee or bond before the 31st December 2011'as provided for in paragraph 3 thereof.The respondents opposed the application. Significantly, they did not deny that the original application had been settled, or that the settlement agreement had been concluded in the terms reflected therein. Nor did they deny that they had consented to the settlement agreement being recorded in terms of Rule 27(6). They did not deny that they had failed to perform some of the terms of the settlement agreement. They limited their defence to an assertion that the settlement agreement was not signed by both parties.

[7] The significance of this assertionis stated by the respondents as follows. Because 'the Applicant did not lodge a statement of the terms of settlement signed by all the parties to the action as envisaged in Rule 27(8)',[3]'the present application cannot succeed'.[4]This point requires a brief overview of Rule 27 and a brief analysis of Rules 27(7), (8) and (9).The clear underlying rationale for Rule 27 is that where litigious matters are

[2] The grammar has not been corrected.
[3] Para 8 of the second respondent's answering affidavit, p 56 of the record.
[4] Para 9 of the second respondent's answering affidavit, p 57 of the record.

settled, a mechanism is provided for judgements to be granted in terms of the settlement without having to begin *ab initio* with an action based on the settlement agreement. If the rule was not in place, a matter which had been settled by way of a compromise, and where a party did not reserve the right to proceed on the original causes of action, would require the party concerned to commence a new action to sue on the settlement agreement. I will deal below with the requisites for a compromise. This is because the settlement agreement would constitute a fresh cause of action. The Rule provides a means to obtain an expeditious judgement where the terms of a settlement agreement have not been complied with. In the circumstances dealt with under the Rule, judgement can be granted on a settlement agreement which has compromised the original cause of action pursuant to the provisions of Rule 27(9) without a fresh action being instituted.

[8] I now turn to a brief analysis of Rule 27 (7), (8) and (9). Their material terms read as follows:

'(7) An application referred to in subrule (6) shall be on notice, except when the application is made in court during the hearing of any proceeding in the action at which the other party is represented or when a written waiver (which may be included in the statement of the terms of settlement) by such other party of notice of the application is produced to the court.

(8) At the hearing of an application referred to in subrule (6) the applicant shall lodge with the court a statement of the terms of settlement signed by all parties to the action and, if no objection thereto be made by any other party, the court shall note that the action has been settled on the terms set out in the statement and thereupon all further proceedings in the action shall, save as provided in subrules (9) and (10), be stayed.

(9)(a) When the terms of a settlement agreement which was recorded in terms of subrule (6) provide for the future fulfilment by any party of stated conditions and such conditions have not been complied with by the party concerned, the other party may at any time on notice to all interested parties apply for the entry of judgement in terms of the settlement.…'

Within the context of Rule 27 and the Rule 27(9) application, the following is the effect of these sub-rules. First, Rule 27(7) was complied with in the present case because the original application had been set down for hearing on the day the recordal was made. Rule 27(8) requires the lodging of a statement signed by all the parties at the hearing of an application in terms of Rule 27(6). The respondents say that no such statement was lodged. Within the context of the Rule 27(9) application, this was not contradicted by the applicant in reply. On the face of it, therefore, the recordal in terms of Rule 27(6) should not have been made for want of compliance with the provisions of Rule 27(8). However, Rule 27(9) does not itself require the settlement agreement to have been signed by the parties. It simply requires a prior recordal to have been made under Rule 27(6). That recordal was made on 26 September 2011.

[9] The only defence raised by the respondents is to the effect that the recordal under Rule 27(6) was not competent for want of compliance with Rule 27(8). This provides no defence to the Rule 27(9) application. This is because, in fact, the settlement agreement had been recorded under Rule 27(6), whether rightly or wrongly. That jurisdictional fact was all that was required to entitle the court to consider an application under Rule 27(9). The court hearing the Rule 27(9) application was not entitled to consider whether the recordal of the settlement agreement under Rule 27(6) had been properly made. Unless and until that recordal is set aside, it remains binding. This is so regardless of the nature of a recordal in terms of Rule 27(6). If the recordal is regarded as an administrative measure, it is valid until set aside according to the principles set out in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*.[5] If it is regarded as a judgment, it is valid until set aside according to the principles

[5]2004 (6) SA 222 (SCA) para 31.

set out in *Jacobs & others v Baumann NO & others*.[6] For the purposes of this appeal it is not necessary to decide whether such a recordal amounts to an administrative act or a judgment although I incline to the latter. The crucial fact is that the respondents have not even to date appealed or brought under review or in any other way set aside the recordal of the settlement agreement in terms of Rule 27(6). That recordal then stands as a jurisdictional fact upon which the court was entitled to rely for the purposes of the Rule 27(9) application.

[10] It is therefore unnecessary to analyse in detail precisely what is required before the court is entitled to make a recordal in terms of Rule 27(6). It may be that the recordal would have been vulnerable to a challenge. I say may because it is not necessary to make a finding that such a challenge would have succeeded and I therefore do not do so. The issue of whether the parties did or did not sign the settlement agreement was therefore irrelevant to the Rule 27(9) application and did not constitute a defence to it.

[11] As mentioned, accordingly, Rule 27(9) requires only two jurisdictional facts before an application may be brought and an order can be granted. The first is the recordal of a settlement agreementin terms of Rule 27(6). The second is the failure of one of the parties to comply with the stated conditions in the settlement agreement. The first requirement is clearly satisfied bythe recordal of the settlement agreement consented toby the parties on 26 September 2011. I turn, therefore, to consider whether the applicant made out a case that the respondents had failed to comply with one of the stated conditions of the settlement agreement.

[6]2009 (5) SA 432 (SCA) para 20.

[12] There are difficulties both with thesettlement agreement and with the breach relied on by the applicant. Paragraph 3 of the settlement agreement amounts to a *pactum de contrahendo* or, in lay terms, an agreement to conclude an agreementat some future date. I say this because paragraph 3 indicates that if the respondents comply with certain terms on or before 31 December 2011, the applicant 'shall enter into an agreement of sale with them in order to sell the property'. A *pactum de contrahendo* is binding on the parties. In order for it to be binding, however, it 'is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main contract to which the parties have bound themselves…'.[7]Since the second or main contract to be concluded relates to the sale of immovable property, the *pactum* contained in paragraph 3 must be reduced to writing and signed by both parties.[8]It must also contain all the material terms of such agreement. Paragraph 3 of the settlement agreement clearly does not comply. It was not signed by the parties and did not contain at least one of the material terms of the agreement, namely the purchase price. An entirely new agreement is clearly envisaged by paragraph 3. There is no reference to the property agreement. It cannot be said, therefore, that the terms of the property agreement relating, inter alia, to price, are to be read as being incorporated by reference in the *pactum*. Paragraph 3 of the settlement agreement therefore amounts to an unenforceable*pactum de contrahendo*. The failure to comply with its terms does not give rise to an actionable breach. It cannot therefore found the relief claimed under Rule 27(9).

[13] This does not mean that the applicant did not establish that the respondents had failed to comply with one of the conditions of the

[7]Per Corbett JA in *Hirschowitz v Moolman& others* 1985 (3) SA 739 (A) at 766D-E.
[8]Section 2(1) of the Alienation of Land Act 68 of 1981;*Venter v Birchholtz* 1972 (1) SA 276 (A) at 284C-D. Although *Venter* dealt with the predecessor of this Act, the reasoning applies equally to the new Act.

settlement agreement.It is common cause that the respondents had failed to vacate the property on or before 31 December 2011. They were therefore clearly in breach of paragraph 1 of the settlement agreement. Since there was no other defence proffered to the application, the applicant was entitled to an order under Rule 27(9). The court granted an order (the first judgment) on 12 July 2012 in the following terms:

'There is to be entry of judgment against the first and second respondents, who are the first and second defendants in this matter, on the terms set out in the agreement of settlement recorded at court on the 26 September 2011.

The issue of eviction and issues relating to PIE are adjourned *sine die* and can be addressed with the Court at a later stage.

The first and second respondents are to pay the cost of this application on the opposed scale, including costs of preparation.'

[14] The first judgment is the first of the twojudgments appealed against. The grounds of appeal deal with issues which all hinge on the original application or the validity of the recordal of the settlement agreement. The original application will be dealt with below. I have already dealt with the fact that the recordal has not been appealed against. I should also mention that it was not a ground of appeal that the first judgment contravened the provisions of s 4(7) of the PIE Act. In any event, since the settlement agreement consented to the respondents vacating the property, the first judgment did not enforce an eviction as defined in the PIE Act. This requires a deprivation of possession against the will of the occupier whereas the respondents had agreed to vacate.As will be seen below, the grounds of the appeal against the first judgment relating to the original application have no merit.

[15] Having said that, however, the order granted in the first unnumbered paragraph of the first judgment was not appropriate in the

circumstances. This purported to grant judgment in the terms contained in the settlement agreement. There are terms of the settlement agreement which are not susceptible of forming part of an order. Certain paragraphs should not have been included. I have already dealt with paragraph 3 which contained an unenforceable *pactum de contrahendo*. Paragraph 5 had run its course dealing as it did with payments up to the end of December 2011 which had, by then, passed. Paragraph 6 virtually repeated paragraph 2 and paragraph 7 dealt with the fact that the agreement settled the issues arising from the original application and the PIE Act. Thefirst unnumbered paragraph of the first judgment should have been limited to making paragraphs 1, 2 and 4 of the settlement agreement an order of court. It is therefore appropriate that the first judgment be amended on appeal to that effect.

[16] The grant of the first judgment was not the end of the matter. The applicant attempted to retrace his steps by setting down the original application for determination. The issues relating to compliance with the PIE Act and the *locus standi* of the applicant to launch the original application were traversed. The matter was presumably set downas a result of the second unnumbered paragraph of the first judgment. A different magistrate dealt with this argument and, on 1 October 2012, the court granted an order for the eviction of the respondents and all persons claiming occupation through them, suspending the order until 31 October 2012 and awarding costs to the applicant (the second judgment). The matter was adjourned until 31 October 2012 for proof of the availability of other land or accommodation. There is no indication in the appeal record as to what, if anything, took place on 31 October 2012. Presumably nothing happened because the record ends there and because the notice of appeal was lodged with the magistrate on 2 November 2012. That notice,

amended at a later stage, appeals against both the first and second judgments. I therefore turn to consider the appeal against thesecond judgment.

[17] Unfortunately, it appears that neither of the counsel who appeared before us got to grips with the matter. Their heads of argument revolved almost entirely around issues raised in the original application concerning the *locus standi* of the applicant and the identity of the parties to the agreement of sale. The position is as follows. The settlement agreement which was recorded on 26 September 2011amounts to a *transactio*. This is often referred to by the English law name of compromise. The test for whether an agreement is a*transactio* was dealt with in *Cachalia v Harberer& Co*[9] where Solomon J said the following:

'Now what is a *transactio?* I take the definition given by Grotius, who defines it as an agreement between litigants for the settlement of a matter in dispute.'[10]

He went on to assess whether an agreement amounted to a *transactio* in the following manner:[11]

'If, however, we examine the terms of the arrangement which was come to, it appears to me to contain all the essentials of a compromise of a lawsuit. Each party in this arrangement abated some of his previous demands. Each party receded to some extent from the position formerly taken up.'

In the present matter, both parties abated previous demands. The applicant abated his demand for immediate eviction. The respondents abated their demand to continue occupying the property beyond 31 December 2011. They also abated any rights accorded to them by the PIE Act by consenting to vacate on the conditions set out in the settlement agreement. The

[9]1905 TS 457 at 462.
[10] For the purpose of this judgment this definition suffices but Caney explains, with reference to the old authorities, that it is not necessary for a lawsuit to have commenced. An existing dispute is sufficient. LR Caney: *A Treatise on the Law relating to Novation, including Delegation, Compromise and Res Judicata*, Juta, Cape Town, 1992 at 54.
[11]At 462.

settlement agreement therefore meets the test for a *transactio*. Since the settlement agreement did not reserve the right of the parties to rely on their original rights, they cannot be relied upon.[12]Compromise has the same effect as *res judicata*.[13]The compromise is, in any event, made clear in clause 7 of the settlement agreement. The settlement agreement is stated to be in full and final settlement of the issues under the original application, including the issues under the PIE Act.

[18] The cause of action in the original application had therefore been compromised and could not be relied on. This includes the eviction relief and the issues under the PIE Act. In addition, the issue of eviction had become*res judicata*by virtue of the first judgmentand could not be revisited.[14]In the result, the original application should never have been set down for argument. The second judgment, having been granted pursuant to the original application, was not competent.This in turn means that the second unnumbered paragraph of the first judgment was incorrectly granted. There were no remaining live issues of eviction or issues relating to the PIE Act that could be adjourned to be dealt with at a later stage. They had been subject to the *transactio* concluded between the parties. The eviction had, in addition, been finally pronounced upon in the first judgment.

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[12]*Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669H-670A; *Jonathan v Haggie Rand Wire Ltd & another* 1978 (2) SA 34 (N) at 38G-39A.
[13]*Niemann*loc cit.
[14] In *Mitford's Executor v Ebden's Executors & others* 1917 AD 682 at 686, Maasdorp JA referred to three requirements for a plea of *res judicata* in the following terms, 'To determine that question it will be necessary to enquire whether that judgment was given in an action (1) with respect to the same subject matter, (2) based on the same ground, and (3) between the same parties'. In *Commissioner of Customs v Airton Timber Co Ltd* 1926CPD 351 at 359,Watermeyer J adopted the explanation from Spencer-Bower (*Res Judicata* sec. 162)to the following effect; 'Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms…'

[19] The appeal against the second judgment must accordingly be upheld and the second judgment set aside. As regards costs, the respondents are entitled to the costs of setting down the original application which gave rise to the second judgment. The applicant submitted that he had been misled by the second paragraph of the first judgment which purported to adjourn certain relief from the original application. He also submitted that the respondents raised spurious defences to this application. Even so, the fact remains that setting down the application was not competent and caused the respondents to incur unnecessary costs. The applicant, as the party who set down the application, must bear the responsibility for those costs.

[20] The appeal against the first judgment, granted on 12 July 2012 must be upheld in part. The order must be amended to provide that only paragraphs 1, 2 and 4 of the settlement agreement are made orders of court. It must also be amended by deleting the second unnumbered paragraph. The costs order granted in the third unnumbered paragraph must stand. As indicated, the appeal against the second judgment must be upheld and the order substituted with an order dismissing the application with the applicant to pay the costs attendant on its having been set down for hearing which resulted in the second judgment.

[21] The applicant is entitled to costs of the appeal since the substance of the relief dealt with in the appeals is whether the court was entitled to order the eviction of the respondents. Thisis provided for in paragraphs 1 and 2 of the settlement agreement which appropriately form part of theamended order of 12 July 2012. The applicant has therefore enjoyed substantial success on appeal.

[22] The following order accordingly issues:

1. The appeal against the order granted on 12 July 2012 is upheld in part and the order is amended to read as follows:
‘(a) Paragraphs 1, 2 and 4 of the settlement agreement recorded in terms of Rule 27(6) on 26 September 2011 are made orders of court.
(b) The first and second respondents are to pay the costs of this application on the opposed scale, including costs of preparation.’

2. The appeal against the order granted on 1 October 2012 is upheld and that order is set aside and substituted with an order that the application is dismissed with the applicantto pay the costs attendant on its having been set down for hearing which resulted in the second judgment.

3. The respondents are directed to pay the costs of the appeals.

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GORVEN J

I agree:

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POYO-DLWATI AJ

DATE OF HEARING: 16September 2013

DATE OF JUDGMENT: 23September 2013

FOR THE APPELLANTS:	MI Mkhizeinstructed by KUNENE ATTORNEYS.
FOR THE RESPONDENT:	ME Stewart instructed by MEUMANN WHITE, locally represented by ER BROWNE INCORPORATED.