THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG LOCAL SEAT

CASE NO. A25 / 2021
HC CASE NO. 2996 / 2017

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

27 September 2023 .....
DATE SIGNATURE

In the matter between:

DEON MARIOUS BOTHA N.O. **FIRST APPELLANT**

MARYKE LANDMAN N.O. **SECOND APPELLANT**

and

WILLEM HENDRIK VAN ZYL **FIRST RESPONDENT**

EMBRENCHIA MARTHINA VAN ZYL **SECOND RESPONDENT**

J U D G M E N T

RATSHIBVUMO ADJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 08H00 on 27 September 2023.

[1] **Introduction.**

This is an appeal against a judgment handed down by Mphahlele J (as she then was) of this Division (court *a quo*) on 30 July 2021. In terms of that judgment, a writ of execution issued by the Appellants (respondents in the application before the court *a quo*), against the First Respondent (first applicant before the court *a quo*), dated 03 July 2019, in the amount of R250 815.39, was set aside. The Appellants were also ordered to pay the costs of the application.

[2] The interpretation of the settlement agreement entered into between the Appellants and the First Respondent, which was made an order of court on 25 March 2019, was the gist in the application before the court *a quo*. The question was whether the settlement agreement, which was meant to settle several court litigation matters between the Appellants on one hand and the First Respondent and his family members on the other hand, included the costs awarded by the court in favour of the Appellants on 29 June 2018 under Case No. 2996/17 in the Gauteng Division of the High Court, Pretoria, functioning as the Mpumalanga Circuit Court, Middelburg. The Respondents argued that the costs awarded in that case were included in the settlement agreement, whereas the Appellants submitted that they were not. This question was interpreted in favour of the Respondents by the court *a quo*. The Appellants appeal with leave of the court *a quo*.

[3] **Background.**

It is apposite to unpack the genesis of this impasse in order to be on the accurate page of interpretation of the settlement agreement. The Appellants were appointed as joint liquidators of SA Voere en Graan CC on 08 September 2017, following a liquidation order granted at the instance of Rand Agri (Pty) Ltd. Soon after their appointment, the Appellants, acting in terms of section 341(2) of the Companies Act, No. 61 of 1973 (the Companies Act), brought a court application against the First Respondent to have the payments he received from SA Voere en Graan CC after the liquidation had commenced, declared void, and for him to be ordered to pay them back with interest and costs. That application was brought under Case No. 2996/17.

[4] That application was scheduled for hearing on 09 May 2018. However, before that date, the First Respondent conceded the merits of the application and agreed that judgment should be entered against him for the full amount claimed being R1 759 998.92, together with interests and costs. A draft order was prepared in line with that concession which was made an order of court on 09 May 2018. The costs were reserved as the court contemplated ordering the First Respondent to pay costs on punitive scale. He was given an opportunity to present an affidavit explaining why punitive costs order should not be allowed. While awaiting judgment on costs, and on 11 May 2018, the First Respondent paid the capital amount claimed together with interests. On 29 June 2018, judgment on costs was handed down and the First Respondent was ordered to pay the costs of two counsel, one being senior counsel.

[5] Case No. 2996/17 was not the only litigation instituted by the Appellants, against the First Respondent, although it was the one to reach the payment stage first. An action was also instituted under Case No. 2994/17. In this case, the

Appellants, acting under sections 26, 29, 30 and 21 of the Insolvency Act, No. 24 of 1936, wanted to have certain dispositions made to the First Respondent by SA Voere en Graan CC, before the commencement of winding-up, set aside.

[6] Amongst the applications later launched by the Appellants was an application against the First Respondent under case number 1631/18. This application, like the one under Case No. 2996/17, was premised on section 341(2) of the Companies Act, but involved further dispositions other than those dealt with in the earlier case. The Appellants further instituted several applications and actions against First Respondent's family members such as the Second Respondent and their son, Mr. CJ Van Zyl, who was the sole member of SA Voere en Graan CC. The Appellants also instituted legal proceedings against the Respondents' family trust.

[7] **The Settlement Agreement.**

The trial in Case No. 2994/17 was scheduled to commence on 25 March 2019. Before the trial could start, the Appellants entered into a settlement agreement with the Respondents, Mr. CJ Van Zyl and their family trust, with a view to settle a number of claims in pending litigations. This settlement agreement was made an order of court on 25 March 2019. Clauses 1 and 6 of this agreement are relevant to this appeal. They provide,

> "1. In full and final settlement of each of the respective actions and applications instituted by the plaintiffs, and all of which are yet to be concluded and which remain pending, with the following case numbers:
>
> 1.1 2995/17(DM Botha NO and Another / CJ Van Zyl);
>
> 1.2 1631/18 (DM Botha NO and Another / WH Van Zyl);
>
> 1.3 574/18 (DM Botha NO and Another / The Van Zyl Famillie Trust);
>
> 1.4 3210/18 (DM Botha NO and Another / The Van Zyl Famillie Trust
>
> 1.5 1547/18 (DM Botha NO and Another / CJ Van Zyl);
>
> 1.6 1836/18 (DM Botha NO and Another / EM Van Zyl and
>
> 1.7 1837/18 (DM Botha NO and Another / CJ Van Zyl).

> The parties, including all the persons cited as Defendants and/or Respondents in the aforesaid matters, agree to the terms as set out hereafter, which terms shall bind all the signatories to this agreement.
>
> …
>
> 6. The Plaintiffs and Defendant, and each of the Defendants and/or Respondents under the matters in the case numbers referred to before, will have no further claims of any nature whatsoever against each other."

[8] **Before the Court *a quo*.**

The reason the Respondents approached the court *a quo* was to challenge a writ of execution secured by the Appellants against them in Case No. 2996/17. Although this case was finalised in respect of the main claim, the costs which were ordered by the court on a later date, remained due and payable. The Appellants had in October 2018, served a notice of intention to tax the bill of costs in respects of those costs, on the First Respondent, who in November 2018, served a notice of intention to oppose. Following several meetings between the Appellants' tax consultants and those of the First Respondent, the amounts of the bill of costs were settled between them on 12 December 2018, at R236 909.29 and R13 906.10. The settled bill of costs was therefore stamped by the taxing master on 14 May 2019.

[9] After failing to pay the costs following a letter of demand, the Appellants secured a warrant of execution on 01 August 2019. The Sheriff was instructed to execute this warrant, which he attempted to do on 07 October 2019, by serving it on the First Respondent. The return of service from the Sheriff was a *nulla bona* return. This prompted the Appellants to bring an application for the sequestration of the Respondents' joint estate, which they did on 24 March 2020. On 29 June 2020, while the application for the sequestration of the joint estate was pending, the Respondents brought the application before the court *a quo*

seeking a relief to have a writ of execution dated 03 July 2019, issued by the Appellants in the amount of R250 815.39, set aside.

[10] The bases for the application were fully laid out in the First Respondent's founding affidavit when he said, "the applications and actions referred to in clauses 1.1 to 1.7 were all pending applications and actions… The cost order that was previously granted in favour of the respondent indeed constituted a claim which the respondents had against me. It was settled in express terms as provided for in clause 6. I only consented to the settlement agreement on the basis that the respondents would have no further claims of any nature whatsoever against me. If it was not for this clause, I would never have agreed to the settlement agreement. Based on the provisions of clause 6 of the settlement agreement the respondents were not entitled to proceed with any execution steps based on the costs order granted in its favour."[1]

[11] In accepting this reasoning, the court *a quo* held that it was true as the Respondents submitted, that clause 1 identified the parties to the settlement agreement by specifically stating the case numbers and the names of the parties in respect of each and every case. The court *a quo* agreed that the settlement agreement was only in respect of the actions and applications which were yet to be concluded and which remained pending as at 25 March 2019. It also held that "clause 6 qualifies clause 1 and clearly goes beyond the matters stated therein. Those parties specifically mentioned in clause 1 will have no further claims of any nature whatsoever against each other." It further held that although the case number in current matter is not stated in clause 1, it was not in dispute that the parties *in casu* [Case No. 2996/17] were clearly stated therein.[2]

[1] See paragraphs 8.7 to 8.10 of the Founding Affidavit on p. 7-8 of the paginated bundle.
[2] See paragraphs 23-24 of the judgment by the court a quo on p. 210 of the paginated bundle.

[12] In reaching this conclusion, the court *a quo* thereby rejected the submission by the Appellants to the effect that "since the application under Case No. 2996/17 had been finally disposed long before the settlement agreement was reached, it was neither pending nor yet to be concluded." It further rejected as unsubstantiated the submission by the Appellants to the effect that "the pending legal proceedings to which the settlement agreement between the parties pertained were expressly identified in the settlement agreement, with reference to the case numbers under which each such matter resorted… and Case No. 2996/17 was not included." In essence, the court *a quo* held that clause 1 was meant to identify the parties, and not the cases; and since the parties to Case No. 2996/17 are also identified in it, this case is also included in the matters regarded as settled through the settlement agreement.

[13] **Evaluation.**

Just as the court *a quo* did, I refer with approval to the words of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] when he held,

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between

[3] 2012 (4) SA 593 (SCA) at para 18.

> interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." [My emphasis].

[14] The first concern I have with the interpretation of the settlement agreement attributed to clause 1 by the court *a quo* is that it attaches no weight to the words used therein, in particular, under clause 1. Before stipulating all the cases to which agreement would apply, the parties expressed the following,

> "In full and final settlement of each of the respective actions and applications instituted by the plaintiffs, and all of which are yet to be concluded and which remain pending, with the following case numbers…" [My emphasis].

My understanding of the usage of the word "with" is that while there could be many applications and actions pending between the parties, the settlement agreement would apply only to the matters with the case numbers stipulated thereafter.

[15] The other concern is that even upon reading clause 1 in conjunction with clause 6, it does not appear from the *prima facie* reading of the settlement agreement that clause 1 was inserted merely to identify the parties as opposed to identifying the cases through their case numbers. The Respondents' argument suggests that clause 1 was inserted to identify the parties and clause 6 qualifies it by providing that the parties so identified in clause 1 shall have no claim whatsoever against each other. If this was the position, there would be no need to list all the seven cases identifying repeatedly the very same parties.

[16] To demonstrate this point, I turn to the parties identified in clause 1. Under 1.1, and under case 2995/17, the parties identified there are DM Botha NO and

Another and CJ Van Zyl. These are the very same parties identified under 1.5 under Case No. 1557/18 and under 1.7 under Case No. 1837/18. Again, under 1.3 and under Case No. 574/18 the parties identified are DM Botha NO and Another and The Van Zyl Famillie Trust which are the very same parties identified under 1.4 under Case No.3210/18. To list seven cases in order to identify parties who could have been identified in just four of them defies logic, especially when omitting to include Case No. 2996/17 if that is what the parties had in mind when entering into this settlement agreement.

[17] Upon reading the settlement agreement and considering the Respondents' argument, one wonders as to why Case No. 2996/17 was not included under clause 1. Surely the Respondents had not forgotten about this case given the fact that it was the only case for which they had made any payment to the Appellants, and that was in the tune of over R1.7 million. The words used in the settlement agreement have to be understood with the following in the background. The Appellants had instituted several matters against the Van Zyls (including their Family Trust). Only one of these matters had gone beyond a judgment stage and a payment had been received with interests, except for the costs thereof.

[18] The reference in clauses 1 and 6 to "applications and actions that are yet to be concluded and which remain pending" was obviously with the understanding between the parties that the settlement agreement would have no impact on those matters that were already concluded and are no longer pending. For parties who have only one matter between them that has gone beyond the judgment and the claimed amount was paid, with only payment for costs outstanding, which costs had been settled although not yet stamped by the taxing master, I have no doubt that it is the only matter they had in mind as a "concluded" or "non-pending" matter. In reaching this conclusion, the question need not be whether parties were

right or wrong in regarding that matter as settled; but what is it that they had in mind, when signing the contract. Failure to do so, may cause us to fall into the trap cautioned by Wallis JA in the *Natal Joint Municipal Pension Fund* judgment.[4][My emphasis].

[19] I am in full agreement with the interpretation alluded to *Smith and Others v MEC for Health – Mpumalanga*[5] to the effect that until the costs are taxed by the taxing master, the case remains pending and not finalised. It was for this reason that in the matter of *Silosini v Democratic Alliance*,[6] this court rejected the applicant's contention that the case was *res judicata* when the respondent brought an irregular step application in terms of Rule 30, against the taxation notice of the applicant. As hinted earlier, courts must be alert to, and guard against, the temptation to substitute what they regard as reasonable (and perhaps, rightly so), sensible or businesslike for the words actually used. What matters is what the parties had in mind and *in casu*, the parties clearly did not want to include a case they considered as have been concluded, even if the courts may not interpret it to have been finalised as such.

[20] For the reasons above, I reach a conclusion that the settlement agreement settled a closed list of cases, totalling seven, and does not include any other case not listed therein. I also conclude that clause 1 was not meant to only identify the parties as this could have been easily achieved by mentioning their names, but to also identify and isolate the cases covered by the contract. The case in which a writ on costs was secured, was not included in the list of seven cases in clause 1. The application by the Respondents should have failed for those reasons.

[21] For the aforesaid reasons, the following order is made.

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[4] Supra under footnote 3 above.
[5] 2021 (6) SA 532 (ML).
[6] Reported on SAFLII as (2527 / 2022) [2023] ZAMPMHC 31 (19 September 2023).

21.1 The appeal is upheld with costs, such costs to include the employment of two Counsel by the Appellants, one being Senior Counsel (where so employed).

21.2 The order of the court *a quo* is set aside and substituted with the following:

The application is dismissed with costs.

[redacted]

TV RATSHIBVUMO
ACTING DEPUTY JUDGE PRESIDENT
MPUMALANGA DIVISION, MIDDELBURG

I agree.

[redacted]

MB LANGA
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MIDDELBURG

I agree

[redacted]

L BAM
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MIDDELBURG

FOR THE APPELLANT : ADV FH TERBLANCHE SC

		ADV H STRUWIG
INSTRUCTED BY	**:**	**STRYDOM & BREDENKAMP INC** **C/O GFT PISTORIUS ATTORNEYS** **MIDDELBURG**
FOR THE FIRST RESPONDENT:		**ADV APJ ELS**
INTRUSCTED BY	**:**	**RIAAN JACOBS ATTORNEYS** **MIDDELBURG**
DATE HEARD	**:**	**15 SEPTEMBER 2023**
JUDGMENT DELIVERED	**:**	**27 SEPTEMBER 2023**