

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

CASE NO.: EL1532/2016

In the matter between:

ECD3632/2016

TAURUS GROUP OF COMPANIES (PTY) LTD **Applicant**

And

SIKHUMBUZO VANTO **First Respondent**

VANTO ORTHOPAEDIC SERVICES **Second Respondent**

JUDGMENT

BESHE J:

[1] The applicant has approached this court for an order in the following terms:

“1. Declaring that the Appeal noted by the First and Second Respondents (as Appellants) against the judgment in the Applicant’s favour in the East London Regional Court case number: EC/EL/RC 1145/13 C has lapsed and is of no force or effect;

2. Directing that the First and Second Respondents pay the costs of this Application on an Attorney and Client scale;

3. Granting the Applicant such further and/or alternative relief as the above Honourable Court may deem appropriate.”

[2] In addition to opposing the application, the respondents filed a counter-application in terms of *Rule 6 (9) of the Uniform Rules* of this court seeking the following orders:

“1. An order declaring that Respondent in the main application have fully complied with the order and judgment of the Regional Court granted on the 16th April 2015 under Case No.:- EC/EL/RC 1145/13C;

2. An order declaring that the Settlement Agreement entered into between Applicant and the Respondents is valid, binding and enforceable;

3. An order declaring that Respondents have fully complied with the settlement agreement and are thus absolved from any further liability in respect of the Regional Court Judgment under Case No. : EC/EL/RC 1145/13C;

4. An order directing the Applicant in the main action liable to pay costs of this counter-application on a punitive scale, as between Attorney and Client; alternatively, on a party and party scale

5. Such further and/or alternative relief as this Honourable Court may deem meet.”

[3] The applicant is a company with limited liability duly registered in accordance with the company laws of this country. The deponent to the founding affidavit, **Mr Duncan Bruce Campbell (Campbell)** is the sole director of the applicant.

[4] Likewise, first respondent is the sole member of second respondent which is a Close Corporation.

[5] It appears to be common cause that judgment was granted in the Regional Court, East London on the 16 April 2015 in favour of the

applicant against the respondents jointly and severally for the payment of a sum of R104 428.38 together with costs and interest.

[6] According to the applicant, the respondents filed three notices of appeal against the judgment mentioned above. The last being filed on the 4 October 2015. That however the respondents have to date failed to apply for a date on which the appeal will be heard, failed to file a record and failed to file security for costs of the appeal. Hence the application for an order declaring that the appeal against the Regional Magistrates' judgment as aforementioned, has lapsed.

[7] It appears to be common cause that respondents have subsequently made payments of R108 000.00 and R50 000.00 respectively. The latter amount was paid in November 2015. A further payment of R102 896.19 was made by the respondents on the 22 February 2016. According to the applicant, an amount of R72 000.00 is still outstanding or owing by the respondents. Applicant submits that should the relief sought be granted, it will gain control of the process of execution in seeking to enforce the judgment that was granted in its favour.

[8] In a bid to oppose the application and support the counter-application, first respondent contends that he reached an out of court settlement with **Mr Campbell** on the 23 September 2015. The agreement was to the effect that he would pay R108 000.00 which he did on the 29 September 2015. Further that the settlement agreement was drafted by **Mr Campbell**. Same is attached as an annexure to first respondent's answering affidavit as SV2.

[9] The relevant parts of the agreement record the following:

“Vanto Orthopaedic Services cc hereinafter referred to as **Vanto** tendered an amount of **R 108 000-00** (**one hundred and eight thousand rands**) as settlement of a portion of the capital amount due in respect of **Regional Court Case Number EC/EL/RC 1145/13C** which amount is accepted by the Plaintiff (Taurus Group of Companies Pty Ltd) hereinafter referred to as KTC and for (indistinct) KTC will hereinafter absolve and **release Vanto** from the capital amount(s) due and or payable and or claimed as from the date of payment which will be no later than **30 September 2015** on or before which date the amount of **R 108 000-00** (**one hundred and eight thousand rands**) will reflect in the account of KTC being :

ABSA account number [...] using reference ‘**TT87**’

VANTO further undertakes to **withdraw its appeal** to the judgement handed in the Regional Court in respect of case number EC/EL/RC1145/13C and **KTC** grants and will **consent to the withdrawing of the judgment against Vanto.**”

[10] First respondent states that on the basis of the agreement, he proceeded to instruct his attorneys of record not to pursue the appeal. He goes on to say that he paid a further amount of R50 000.00 because he learnt that applicant had issued a writ to have his property executed and did so out of desperation. He also confirms making a further payment of R102 000.00 to the applicant.

[11] First respondent concedes that there is no pending appeal and is adamant that he has fully complied with judgment of East London Regional Court, including interest and costs. He submits that the settlement agreement is clear and unambiguous. The agreement was for full and final settlement of the debt owing to the applicant.

[12] The applicant (main application) denies that the agreement was for the R108 000.00 to be in full and final settlement of the debt due to applicant. The agreement was prepared by him on the basis that first respondent indicated he had R108 000.00 that he was in a position to pay. The proposal along the lines of which the agreement was drafted was that he would pay the amount as part settlement of the amount due in respect of the Regional Court matter concerned. That he would be released from payment of the outstanding capital amount, but not from its liability to pay the outstanding costs and interest. He sent the proposed Settlement Agreement to the first respondent but first respondent did not send it back to him for his signature. Hence it is only signed by or on behalf of the respondents.

[13] Apart from submitting that the main application is “being vehemently opposed ...” first respondent concedes that he instructed his attorney not to proceed with the appeal and that there is no pending appeal. He acknowledges noting an appeal against the concerned judgment on the 23 April 2015.

[14] *Section 50 (1) of the Uniform Rules* of this court provides that:

“An appeal to the court against the decision of the Magistrate in a civil matter shall be prosecuted within 60 days after the noting of the appeal, and unless so prosecuted it shall be deemed to have lapsed.”

Subrule 4 in turn provides that:

“(a) The appellant shall within 40 days of noting of the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the registrar in writing his full residential and postal address of his attorney if he is represented.

(b)

(c) Upon receipt of such application from appellant or respondent, the appeal shall be deemed to have been duly prosecuted.”

[15] First respondent does not contend that there was compliance with the *Rule* mentioned above.

[16] I can find no reason why the order sought in the main application should not be granted.

[17] In so far as the counter-application is concerned, the settlement agreement annexed by the first respondent (first applicant in the counter-application) besides not being signed on behalf of applicant does not support his case. Instead it accords with applicant’s version, namely that the agreement was not for or provide for the full and final settlement of the debt owed to applicant. In other words the R108 000.00 was not intended to be in full and final settlement of the debt. The Settlement Agreement records that the R108 000.00 tendered by second respondent (the Close Corporation) as settlement of a portion of the capital amount due in respect of Regional Court number EX/EL/RC1145/13C. Later it records that applicant will release second respondent from the capital amount(s) due and or payable.

[18] That the agreement was not the full and final settlement of the debt is further bolstered by further substantial payments of R102 000.00 and R50 000.00 that were made by the first respondent which he alleges were made in desperation as a result of being hounded by the Sheriff with writs against his property. But if he honestly believed that he had settled the

debt that was owed to the applicant, he must have known that the Sheriff had no right to attach his property.

[19] In my view the respondents have not made out a case for the relief sought in their counter-application. Even if I were to regard or declare the Settlement Agreement as valid, binding and enforceable, no case has been made that the respondents should be absolved from any liability in respect of the Regional Court judgment. The Settlement Agreement clearly states that it is in respect of a portion of the capital amount. This in my view does not include interest and costs.

[20] Accordingly the following order will issue:

- (a) There will be an order in terms of prayer 1 of the notice of motion in respect of the main application.**
- (b) The counter-application is dismissed with costs.**
- (c) Respondents are ordered to pay the costs of the application.**

**NG BESHE
JUDGE OF THE HIGH COURT**

APPEARANCES

For the Applicant	:	Adv: KL Watt
Instructed by	:	NETTELTONS ATTORNEYS 118A High Street GRAHAMSTOWN Tel.: 046 – 622 7149 Ref.: Mr Nettelton
For the Respondents	:	Adv: M Mayekiso
Instructed by	:	WHITESIDES ATTORNEYS 53 African Street GRAHAMSTOWN Tel.: 046 – 622 7117 Ref.: R Asmal/mk/C10678
Dates Heard	:	16 November 2017
Date Reserved	:	16 November 2017
Date Delivered	:	30 January 2018