REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2009/17752

REPORTABLE: NO
OF INTERETS TO OTHER JUDGES: NO
REVISED
DATE **1/12/2015**

In the matter between:

FAGAN, KEVIN JOHN	**FIRST APPLICANT**
FAGAN, ERNA	**SECOND APPLICANT**
CHOICE PAINTS AND HARDWARE CC	**THIRD APPLICANT**

And

BUSINESS PARTNERS LIMITED	**RESPONDENT**

JUDGMENT

WINDELLJ:

INTRODUCTION

[1] The subject matter of this application is an order granted by this court (per Mojapelo DJP) on 17 February 2012. The order is in the following terms:

"WHEREAS the Plaintiff has issued summons against the Defendants, the one payingthe other to be absolved, inter alia, for:-

1. Payment of the sum of R552 194.71, together with interest thereon at the rate of 14% per annum from 26 March 2009 to date of payment;

2. Payment of the sum of R259 297.00, together with the interest thereon at the rate of 14% per annum from 26 March 2009 to date of payment;

3. Declaring that Erf [....] Mindalore Township, belonging to the First Defendant, specially executable;

4. Declaring that the moveable property wheresoever situate belonging to the First Defendant, to be declared generally executable in terms of the notarial bond number B[....] and Plaintiff be allowed to deal with such assets in terms of the provisions of the bond;

5. Cost of suit on the scale as between attorney and own client and payment of collection commission;

6. Further and/or alternative relief.

AND WHEREAS this matter has been set down for trial on 17 February 2012;

AND WHEREAS the parties have reached a settlement, which settlement agreementthey require to be made an Order of Court;

NOW THEN THE FOLLOWING IS HEREBY AGREED:

1. The Defendants agree to pay the Plaintiff an amount of R750 000.00 (seven hundred and fifty thousand Rand) plus interest at 14% per annum from 17 February 2012 to date of payment as follows:-

1.1 R10 000.00 (ten thousand Rand) for 3 (three) months commencing on 30 March 2012 up to and including 31 May 2012 and payable at the end of each and every month;

1.2 R12 500.00 (twelve thousand five hundred Rand) per month from 30 June 2012 up to and including 31 August 2012 payable at the end of each and every month;

1.3 The balance of the capital and interest, together with the Plaintiff's costs taxed up to 1O February 2012 to be paid by the Defendant on or before 28 September 2012;

2. In the event the Defendants defaulting in any of the aforementioned payments the full amount as claimed by the Plaintiff in its summons, together with interest mentioned therein as claimed in the summons shall become due, owing and payable and the Plaintiff shall be entitled to proceed against the Defendants without any notice to the Defendant.

3. In this event the First Defendant hereby accepts that the Plaintiff will be entitled to

execute against the immovable property belonging to the First Defendant, namely Erf [....] Mindalore Township and that such property in the event of default be declared executable by the Plaintiff;

4. *The parties require the settlement agreement to be made an Order of Court, subject to the approval of the above Honourable Court.*

5. The parties record further that the settlement agreement is in full and final settlement of this matter and should the Defendants effect payment within the aforementioned period, the Plaintiff undertakes to cancel the bond it has over Erf [....] Mindalore Township, belonging to the First Defendant, at the cost of the First Defendant.

6. The Defendants hereby agree that no variation, waiver or estoppe/ will be of any force or effect unless it is reduced to writing and signed by the Plaintiff and the Defendants or their duly appointed attorneys."

[2] There are two applications serving before this court. Firstly, the applicants seek the rescission of the judgment by Mojapelo DJP wherein the settlement agreement was made an order of court. The rescission application is brought under the provisions of Rule 42(1)(a), *alternatively* the common law *alternatively* the

provisions of Rule 31. Secondly, the respondent has brought an application in terms of Rule 46 wherein it seeks an order that immoveable property be declared specially executable.

THE PARTIES

[3] The first applicant is Kevin John Fagan, a businessman and hotelier who is married in community of property to Erna Fagan, the second applicant. The third applicant is Choice Paints and Hardware CC, a close corporation duly registered in accordance with the Close Corporations Act, with its principal place of business at [....] Voortrekker Road, Mindalore North, Roodepoort, Krugersdorp *(hereinafter referred to as the property.)* Mr Fagan is the sole member of Choice Paints and Hardware CC. Choice Paints and Hardware CC was cited as the first defendant in the action procedure whilst Mr and Mrs Fagan were cited as the second and third defendants respectively.

[4] Mr and Mrs Fagan operate a bed and breakfast trading under the name and style of African Sky Guest House on the property which is owned by Choice Paints and Hardware CC. Mr Fagan stated in his founding affidavit that the property is utilised for both residential and commercial purposes as he and his immediate family reside on the property.

[5] The respondent is Business Partners Ltd, a company duly incorporated and registered in terms of the Company Laws of the Republic of South Africa with its principal place of business situated at [....] Caxton Street, Industria, Johannesburg. The respondent was the plaintiff in the trial action.

THE TRIAL ACTION

[6] On 30 April 2009, Business Partners Ltd instituted action against Choice Paints and Hardware CC with Mr and Ms Fagan as sureties, for the payment of the sum of R 552 194.71, and an order declaring the immovable property belonging to Choice Paints and Hardware CC specially executable.

[7] The underlying *causa* was a written loan agreement concluded on 13 February 2007 in terms whereof Choice Paints and Hardware CC borrowed R700 000.00 from Business Partners Ltd. In terms of the agreement Choice Paints and Hardware CC undertook to repay the loan in monthly instalments of R16 470.00 payable over 60 months commencing on 1 March 2007. The loan was advanced in regard to a retail outlet conducted under the name of Choice Paints and Hardware CC. The agreement was subject to the delivery of securities. In terms of clause 8.1 of the agreement, Choice Paints and Hardware CC agreed to the registration of a new second covering mortgage bond by Choice Paints and Hardware CC over the property for R 500 000 as well as a general notarial bond by Choice Paints and Hardware CC over movable property situated at the property. The new second covering mortgage bond was registered over the property as well as a general notarial covering bond over all of Choice Paints and Hardware CC movable property, stock and effects.

[8] Choice Paints and Hardware CC defaulted in its obligations in that it failed to make payment of its instalments in respect of the loan and fell in arrears. The paint store ceased trading operations during August 2009.

[9] All three applicants defended the action and the matter was enrolled for hearing on 17 February 2012.

[10] The applicants were represented by their erstwhile attorney, Mr Roland T. Eloff throughout the relevant period of litigation between the parties.

[11] It is common cause, that no legal representative appeared at court on behalf of the applicants on the date of the trial due to the fact that the matter had become settled and the applicants had agreed to the settlement agreement being made an order of court.

[12] It is not disputed that the applicants were aware of the trial date as well as the fact that an order would be sought to make the settlement agreement an order of court. It is also uncontested that the applicants breached the settlement agreement which was made an order of court. The respondent subsequently caused for a

warrant of attachment to be issued and the property was judicially attached by the Sheriff of this court. The property has, however, to date hereof not been put up for sale.

THE RESCISSION APPLICATION

[13] In his founding affidavit, Mr Fagan based his application for rescission on clause 2 and 3 of the settlement agreement, and contends that the settlement agreement concluded by their erstwhile attorney was against public policy. Clause 2 and 3 of the settlement agreement provided for the following:

> *"2. In the event of the Defendant defaulting in any of the aforementioned payments the full amount as claimed by the Plaintiff in its summons, together with interest mentioned therein as claimed in the summons shall become due, owing and payable and the Plaintiff shall be entitled to proceed against the Defendant without any notice to the Defendant."*
>
> "3. *In this event the First Defendant hereby accepts that the Plaintiff will be entitled to execute against the immovable property belonging to the First Defendant, namely Erf [....] Minda/ore Township and that such property In the event of default be declared executable by the Plaintiff."*

[14] It is firstly submitted that the right of the plaintiff to proceed against the applicants for the amounts claimed in the summons without any notice to them is *contra bonos mores* and emasculates the *audi alteram partem* rule, as well as their right to be heard, which is constitutionally enshrined. Secondly, the right of the Plaintiff to execute upon the immovable property is in blatant contravention of the provisions of section 26 of the Constitution. Although the property may have a commercial use, its core utilisation is residential. Execution took place in terms of clause 3 without any judicial supervision. Even if the agreement is not declared to be *contra bonos mores,* the attachment of the property, following upon any rights the plaintiff may have obtained from this clause, entitles the Applicants to an order setting aside the attachment.

[15] In his founding affidavit, Mr Fagan sets out his personal circumstances and revisits the trial action as well as other applications heard under the same case number. Several court documents related to the action procedure were attached to the founding affidavit as annexures. In the event that the application for rescission of judgment was successful and the settlement agreement was declared null and void, it was submitted that the matter should proceed to trial. The first applicant, Mr Fagan filed a replying affidavit on 24 February 2015 in which he acknowledged that the replying affidavit was not filed within the prescribed time periods as provided for in the Rules. The reason for failing to file the replying affidavit timeously was due to the fact that the first applicant was required to raise the necessary funds required by his current attorney-of-record. The late filing of the replying affidavit was condoned.

[16] Mr Fagan submitted that Ms van Heerden, who deposed to the answering affidavit on behalf of the respondent, did not have the necessary authority to do so. This argument was not persisted with and I am satisfied that the answering affidavit is before the Court.

[17] The respondent submitted that the applicants had failed to make out a case justifying the rescission of the judgment in terms of Rule 31(2)(b), Rule 42(1)(a) or the common law. The application for rescission was not *bona fide* and the application was dilatory in nature. The applicants also raised two other issues in their founding affidavit; novation and the royalties agreement. These two defences were not persisted with during the hearing of the application. I am in any event of the considerate view that there are no merits in these defences. A compromise, defined as a settlement of litigation or envisaged litigation, is a substantive contract that exists independently of the original cause, and is therefore not affected by the invalidity of the original obligation, provided that the terms of the compromise itself are not invalid. See *Benefeld v West 2011 (2) SA 379 (GSJ).*

CONSENT ORDER

[18] There is a recognised difference in substance between an order handed down by the court after hearing and deciding upon the merits of the dispute between

the parties, and an order made at the behest of the parties incorporating a compromise agreement or transaction reached between the parties, without the court making any determination on the issues. The difference appears to lie in the circumstances under which the order may be set aside by the court.

[19] A compromise, defined as a settlement of litigation or envisaged litigation, is a substantive contract that exists independently of the original cause. The applicants *in casu* challenge the validity and enforceability of the compromise. The defendant contends that the compromise is *contra bonos mores,* void and unenforceable. In *Georgias v Standard Chartered Finance Zimbabwe Ltd 2000 (1) SA 126,* Gubbay CJ held as follows:

> *"The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as* res judicata *on a judgment given by consent. It extinguishes* ipso jure *any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to defences to the original cause of action.... but a compromise induced by fraud, duress,* justus error, *misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court."*

[20] It is common cause that the order was granted in the absence of the applicants and their legal representative. There are three ways in which a judgment taken in the absence of one of the parties may be set aside. Firstly in terms of rule 42(1), secondly in terms of rule 31*(2)(b),* and thirdly in terms of the common law. The applicants brought this application under the provisions of rule 42 (1)(a). The purpose of rule 42(1) is to *"correct expeditiously an obviously wrong judgment or order".* It is trite that under Rule 42(1)(a) it is not necessary for the party seeking rescission to show good cause. In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment. See *Naidoo v*

Matlala NO 2012(1) SA 143 GNP. The court has a discretion whether to grant a rescission under rule 42(1)(a). See *Bakoven Ltd v GJ Howes (Pfy)Ltd 1992(2) SA 466 (E).*

[21] The court does not have inherent power to set aside its judgments and Rule 42 caters for a mistake. The court made a settlement agreement an order of court. The applicants failed to show that the judgment was erroneously granted and failed to establish grounds for a rescission under Rule 42 (1). In *De Vos v Calitz and De Villiers 1916 CPD 465* the court recognised that any order or judgment made by consent may, generally speaking, be set aside upon any ground which would invalidate an agreement between the parties. In *De Wet and Others v Western Bank Ltd 1977 (4) SA 770 (T)* Trengove AJA (as he then was) held that there would also be other circumstances, based on justice and fairness, which would justify rescission. A consent judgment is founded on contract, and like any other contract, defects such as fraud, error and lack of authority would warrant the avoidance of such agreement.

[22] The applicants submitted that the court order incorporating the settlement agreement was to be set aside on the grounds that the offending clauses purported to oust the jurisdiction of the court and violated the applicants' rights afforded to them in terms of section 26 of the Constitution. Clauses 2 and 3 of the consent order are therefore invalid and unenforceable on account of the fact that they are contrary to public policy. They purport to permit attachment and execution of the applicants' immovable property without intervention to due legal process.

[23] The applicants entered into a loan agreement with the respondent and agreed to put up the immovable property as security for the repayment of the loan. In the summons the respondent sought an order for the executability of the property. The applicants defended the action and employed a legal representative. The matter was set down for trial on 17 February 2012. On 14 February 2012 the applicant's attorney addressed a letter to the respondent's attorney wherein the following was recorded:

12.1 "I refer to your email letter dated 13 February 2012 and the settlement

agreement attached thereto.

12.2 Transmitted herewith is *the settlement agreement signed by the* defendants*.*

12.3 The matter is *therefore settled.*

12.4 The original settlement agreement will be delivered to our correspondent Attorneys on or before 16 February 2012 and may be uplifted there."

[24] In a further letter dated 17 February 2012 addressed to the respondent's attorney- of-record by the applicant's attorney-of record at the relevant time, the intention of the applicants (as first, second and third defendants) is stated at follows:

13.1 "As requested I herewith confirm that the settlement was signed in my presence on 14 February 2012 by the second and third defendants who each bound themselves by signing above their respective names and also bound the first defendant by signing the agreement as duly authorised representatives of the first defendant.

13.2 I confirm that the agreement may be *made an Order of Court."*

[25] In none of the affidavits deposed to by Mr Fagan was it alleged that Mr Eloff acted on behalf of the applicants without a mandate to do so. Summons was issued in 2009 and the matter was only set down for trial in 2012. At no stage did Mr Fagan aver that he was unaware of his constitutional right to housing in terms of section 26 of the Constitution or that he was unaware of his right to judicial oversight. Mr Fagan did not advance any reasons why his legal representatives, and as a matter of fact, why he himself as well as the second applicant did not attend court on 17 February 2012.

[26] Stipulations in a contract which are unconscionable, illegal or immoral will have the result that a court will refuse to give effect thereto. A contract or term of a contract may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to social or economic expedience, or is plainly improper and unconscionable, or unduly harsh or oppressive. The criteria upon which a contract may be declared contrary to

public policy is thus not sharply defined and changes with *"the general sense of justice of the community, the boni mores, manifested in public opinion".* It is necessary to draw a distinction between superficial public opinion and seriously considered public opinion on the general sense of justice and good morals of the community. See *Brisley v Drotsky 2002 4 SA 1 (SCA)* and *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004(5) SA 248 (SCA).

[27] A clause permitting the executibility of immovable property is not *contra bonos mores.* Most if not all mortgage loan agreements wherein executability is sought from the court, contain such a clause. Rule 46 of the Uniform Rules of Court does not prohibit parties from including an executibility clause in their agreements, but only provides for a procedure to be followed before the property can be attached and declared specifically executable. Mr Fagan and Ms Fagan signed the settlement agreement, duly witnessed by their attorney, after counsel for the parties had been successful in negotiating a settlement of the dispute which had brought them to Court. They also agreed that the court can declare the property executable. Having regard to the facts of this case interference by this Court with the settlement agreement would have the unacceptable result of creating widespread uncertainty with regard to contractual issues. In my view the provisions of the settlement agreement are not such as would render them contrary to public policy. Similarly, where a settlement agreement provides for legal action without any further notice, in light of the specific circumstances of this case, it can hardly be regarded as *contra bones mores.*

[28] In *Gollach and Gomperts(1967) (Pty) Ltd v Universal Mills* & *Produce Co (Pty) Ltd and others* 1978 1 SA 914 (A) at 923C-E it was reiterated with reference to Voet and Grotius that the purpose of a *transactio* is not only to put an end to existing litigation but also to prevent or avoid litigation. Reference was made to *Estate Erasmus v Church,* 1927 T.P.D. 20 at p. 24, in which a *transactio* was described *as "an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing.".* At page 923 D-E of the judgment, Miller JA stated the following:

"Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in the very concept of compromise. This is a circumstance which the Court must bear in mind, when it considers a complaint by a dissatisfied party that, had he not laboured under an erroneous belief or been ignorant of certain facts, he would not have entered into the settlement agreement"

[29] In *Gundwana v Steko Development and Others 2011 (3) SA 608 (CC)* the Court deal with the constitutionality of the practice of Registrars of the High Court granting default judgment and in particular ordering the special executability of immovable property where such constituted the homes of indigent debtors, after judgment on a money debt. It was held that this practice was unconstitutional for lack of judicial oversight bearing in mind the constitutionally entrenched right to housing. In par [53] and [54] the Court reiterated that:

[53] Some further cautionary remarks are called for. It is rather ironic that the effect of this judgment is to restore to the courts a function that they exercised for close on a century before the introduction of rule 31(5) in 1994. The change to the original position has been necessitated by constitutional considerations not in existence earlier, but these considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that, in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative course should be judicially considered before granting execution orders."

[54] In Jaftha, Mokgoro J, before listing some relevant factors that needed to be considered in judicial oversight of the execution process, warned that 'it

would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight' Mindful of that warning, I would merely add the following. It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.

[30] The settlement agreement containing the offending provision for the executability of the immoveable property which was made an order of court was not adjudicated or considered by a registrar but by a Judge in open court. This scenario is commonplace throughout various courts in the country and occurs on a daily basis. Such a mechanism caters for the expedient resolution of litigation involving disputes, especially in commercial matters. In *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank* the Court stated that the right embodied in section 34 of the Constitution is a right to a fair public hearing, not a right to a trial. At par [38] the Court held that *"many procedures that are the daily stuff of court business are decided on affidavit, and never go to trial."* The judgment incorporating the settlement agreement in the present application is clearly distinguishable from the judgment contemplated in *Gudwana* which provided for judicial oversight where executability of people's homes was sought. The applicants were represented by an attorney when the settlement agreement was entered into. The attorney representing the applicants confirmed in writing that the settlement agreement can be made an order of court. The facts of the matter in consideration are clearly distinguishable from the facts in Gudwana and Jafhta.

[31] I have no doubt that the parties had intended to bring all litigation to a conclusion by entering into the settlement agreement. To achieve this goal the parties agreed on the amount to be paid by the applicants, the payment terms and the intended consequences if the applicants failed to adhere to the payment terms. The applicants never contended that had they not laboured under an erroneous belief or been ignorant of certain facts, they would not have entered into the

settlement agreement. A consent to judgment duly executed cannot be arbitrarily revoked or withdrawn. The applicants failed to make out a case justifying the rescission of the judgment in terms of Rule 31(2)(b) or in terms of the common law. In light of the specific circumstances of this case I am of the view that the applicants were not *bona fide* in the bringing of this application and that they have no *bona fide* defence. I can find no reason to exercise my discretion in their favor to rescind the order.

RULE 46 APPLICATION

[32] The merits of this application were not sufficiently dealt with by the parties during the rescission application in order for this court to decide the issue. The property described in the settlement agreement and those forming the subject matter of the Rule 46 application are not the same. The settlement agreement referred to Erf [....] Mindalore whereas the separate application refers to Erf [....] Monument and Unit 26 in the Sectional Title scheme known as SS Edenhof. The applicants in the rescission application have not filed any opposing affidavit. It was however clear during the hearing of the rescission application that counsel for the applicants was not ready to deal with this application. It is also clear from his heads of argument that he is under the mistaken belief that the rule 46 application was brought for the property forming the subject of the settlement agreement. The Rule 46 application is postponed *sine die* with costs in favour of Business Partners Ltd.

[33] In the result the following order is made

1. The application for rescission of the order of court incorporating the settlementagreement is dismissed with costs.

LWINDELL
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

ATTORNEY FOR APPLICANTS:	Larry Marks Attorneys
COUNSEL FOR PLAINTIFF:	Advocate S. Cohen
ATTORNEY FOR RESPONDENT:	Shirish Kalian Attorneys
COUNSEL FOR DEFENDANT:	Advocate S. Aucamp
DATE MATTER HEARD:	18 August 2015
JUDGMENT DATE:	1 December 2015.