IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 36906/2019

DELETE WHICHEVER IS NOT APPLICABLE

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

14.02.2022 Tlhotlhalemaje
DATE SIGNATURE

In the matter between:

FOURIE HERMANUS **Applicant**

and

OLIVIER LYNETTE MAGDELENIA **Respondent**

Heard: **10 February 2022 (*Via* Microsoft Teams)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives *via* email and by being uploaded to *CaseLines*. The date for hand-down of the judgment is deemed to be on 12 February 2022.**

JUDGMENT

TLHOTLHALEMAJE, AJ

[1] The Applicant seeks specific performance in accordance with the terms of a reciprocal agreement entered into between himself and the Respondent. He contends that he has performed in full in terms of that contract, whilst the Respondent's obligations in that regard remained due.

[2] The background to this application to the extent that it is common cause and relevant to the order to be made below is summarised as follows;

2.1 The Applicant and the Respondent over time had both an employment and romantic relationship. The Applicant was employed by the Respondent in his business as a financial manager. At the same time they were in a personal relationship and had jointly held certain assets and co-habited in one of the jointly held properties.

2.2 The romantic and employment relationships went acrimonious towards the end of 2018, resulting in the Applicant resigning from her employment. Resulting from the acrimonious end of the relations between the parties, it is further not in dispute that criminal proceedings and domestic violence court proceedings initiated by the Respondent are currently pending.

2.3 As a result of the breakdown of the relationships, the parties had on 01 November 2018 and acting in their own capacities, entered into a written agreement (Memorandum of Understanding) with a view of resolving all disputes arising from their terminated relationships. The agreement creates reciprocal obligations between the parties.

2.4 The basis of the main claim brought by the Applicant is that he is entitled to specific performance in respect of the Respondent's obligations under the provisions of clause 2 of the agreement read together with its clause 4[1]. He

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[1] Clause 2 reads as follows;

'2. ***TRANSFER OF PROPERTY***

2.1 The parties have agreed that Unit 314 which is registered in both the party's names, will become Hermanus's sole property, upon satisfaction of the conditions set out in Clause 4. Hermanus undertakes to transfer the property onto his name ***within 6 (six) months*** *of signature of this agreement. Hermanus will take responsibility for all expenses related to Unit 314, including levies, utility charges and any fees related, to the transfer of the property.*

2.2 The parties have agreed that Unit 214, which is registered in Lynnette's name, is to be transferred unto Hermanus' name, upon the satisfaction of the conditions set out

seeks an order that the Respondent should forthwith, sign all documents that may be necessary to effect the registration of Unit 214 which situate at Amanzimtoti, eThekwini, Kwa-Zulu Natal, into his name.

2.5 The Respondent on the other hand contends that to the extent that the agreement created reciprocal obligations, she was entitled, in terms of clause 2.4 of the agreement, to refuse to effect the registration of transfer of ownership of unit 214 into the name of the Applicant in terms of clause 2.2 of the agreement, until such time as the Applicant had complied with his various obligations set out in clause 4 of the agreement.

2.6 Following letters of demand and when there was non-compliance, the Applicant instituted these proceedings on October 2019. The Respondent failed to defend the claim and the Applicant then sought and obtained a default order on 27 November 2019 before Van der Walt AJ.

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in Clause 4. Hermanus undertakes to transfer the property onto his name within 6 (six) months of the signature of this agreement. Hermanus will take responsibility for all expenses related to unit 214, including levies, utility charges and any fees related to the transfer of the property.

2.3 It is agreed that the current monthly bond payment in respect of Unit 214 is deducted from Lynette's personal account. The parties have agreed to continue with this arrangement, pending the transfer of Unit 214 into Hermanus' name.

2.4 Should Hermanus fail to comply with any obligations as set out herein, his right to the transfer will be cancelled and the parties reserve their right to approach a court with competent jurisdiction for relief.

2.5 Upon meeting all the conditions set out in Clause 4 and should Lynette fail to take any steps required to transfer the properties into Hermanus's name within 7 (Seven) days of being made aware of the need to take any actions required, both parties agree that the Sheriff of the High Court is authorised and mandated to sign any such documents on their behalf and in their stead.'

Clause 4 of the agreement provides;

4. HERMANUS' OBLIGATIONS.

'4.1 Hermanus will be responsible for all costs related to the transfer of Unit 214 and Unit 314. The choice of conveyances is at the discretion of Hermanus.

4.2 Hermanus has agreed that in lieu of Lynette's claim against Unit 314, Hermanus undertakes and agrees to pay Lynette an amount of R 400 000.00 (Four Hundred Thousand Rand), in the following manner.

4.2.1 R 200 000.00(Two Hundred Thousand Rand) within 24 (Twenty Four) hour of signature of this agreement.

4.2.3 (sic) R 200 000.00 (Two Hundred Thousand Rand) to be paid to Lynnette by Hermanus within 6 (12 months) months of the date of signature hereof.'

2.7 The above order was subsequently rescinded on 29 October 2020 following an application that came before Ngomane AJ. From the averments made in the founding affidavit in support of the rescission application and also flowing from the subsequent filing of an answering affidavit by the Respondent to the main claim, the Applicant contends that the various defences to his claim have raised material disputes of fact incapable of resolution on the papers. He had formed the view that the matter ought to be referred for oral evidence.

2.8 Significant with the Respondent's contentions in her founding affidavit in support of her rescission application was equally that the Applicant had in seeking and obtaining the default order, simplified the nature of the dispute, and that his claim ought to have been brought by way of action rather than an application[2].

2.9 In regards to the parties' obligations under clause 4 of the agreement, the Respondent had conceded having received the payment in accordance with clause 4.2.3 above of R200 000.00. There is however a dispute as to whether the Applicant's obligations were complied with in respect of the payment under clause 4.2.1, it being common cause that an addendum was made to those provisions by handwriting manuscript, to indicate that payment will be *'made from the accounts as agreed'*.

2.10 The Respondent's contention however in both the founding affidavit in respect of the rescission application and the answering affidavit in the main claim, was that the Applicant did not permit or enable her to withdraw the full amount of R200 000.00, as he had already used the available funds in the account his own and business purposes.

2.11 The Applicant had denied these allegations, contending that the Respondent was authorised to draw the amount from the business accounts, and there was no merit in her contentions that the payments had

[2] At para 10.8 of the Founding Affidavit, *Caselines* 003 - 17

not been effected because she had no access to the account, as she was the only person with access to those accounts.

2.12 Other than factual disputes arising from the Applicant's obligations under the clause under discussion, the Respondent has also disputed that the Applicant had met his other obligations under clause 4 of the agreement related to the transfer of shares, transfer of cell phone contracts. She also challenged the validity of the entire agreement relied upon by the Applicant.

2.13 She contends *inter alia* that resulting from the parties' brief reconciliation after their acrimonious separation, there was mutual termination of the agreement. In a nutshell, she claims that the agreement was cancelled or repudiated, which repudiation she had accepted on around 17 November 2018, some 16 days after it was concluded.

[3] In the end, even though the matter before the Court was in regard to whether the Applicant was entitled to specific performance, at these proceedings, central to the determination before the Court was whether the dispute should be referred for oral evidence.

[4] Arising from the provisions of Rule 6(5)(g) of the Uniform Rules, it is accepted that where an application cannot properly be decided on affidavit, the Court may dismiss the application, refer the matter for the hearing of oral or make such order as it deems fit with a view to ensuring a just and expeditious decision[3].

[5] It is trite that a litigant who elects to proceed on notice of motion, and where a material dispute of fact is foreseeable or who should have realised when launching the application that a serious dispute of fact was bound to develop,

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[3] Rule 6(5)(g) of the Uniform Rules of Court provides as follows:
'Where an application cannot properly be decided on affidavit the Court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular but without the effecting the generality of the aforegoing it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise'.

does so at his/her peril. This is so in that the Court may in the exercise of its discretion, decide to dismiss the application in its entirety.

[6] The reasoning behind this approach is self-evident in that to allow litigants to change tactics midstream the litigation path they have chosen would not only be prejudicial to the other litigants to the dispute, but also clearly defeat the purpose of attaining expeditious and just decisions[4]. Equally trite is that an application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers[5].

[7] Applying the above principles to the facts of this case, it will be significant to point out that since the rescission application was launched and granted, and prior to the Respondent having filed her answering affidavit to the main claim, and also before the Applicant could file an answering affidavit, the parties' attorneys of record had through an exchange of correspondence from 2 November 2020, essentially agreed that the matter ought to be referred for oral evidence.

[8] The Applicant's attorneys of record's correspondence had sought the consent of the Respondent's attorneys of record, further indicating that where there was an agreement, an application for such a referral would be brought without the necessity of an opposition. They further indicated that there was therefore at that point, no need to file and serve the Respondent's answering affidavit to the main claim. The Respondent's attorneys of record's response on 9 November 2020 was essentially to agree that the matter be referred for oral evidence, further proposing that the matter stood to be dealt with as an action procedure, with the Applicant's founding affidavit acting as his Particulars of Claim.

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[4] See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at page 1162, where it was held;

> 'It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply (what is now Rule 6) to what is essentially the subject of an ordinary trial action'.

[5] See *Law Society of the Northern Provinces v Mogami and Others* (588/08) [2009] ZASCA 107; 2010 (1) SA 186 (SCA) ; [2010] 1 All SA 315 (SCA) at para 23; *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) 979F – I; *De Reszke v Maras and others* 2006 (1) SA 401 (C) at 413G-H

[9] The common approach of the parties appear to have differed on 12 November 2020 when the Applicant's attorneys proposed an agreed order that included a condition that he should be allowed to deliver a Declaration. The Respondent's attorneys' response on 25 November 2020 was to agree to the proposed order other than that the Applicant should deliver a Declaration, insisting that his affidavit should stand as a Declaration. When the parties could not agree on an order, the Applicant's attorneys then put the Respondent's attorneys on terms to file her answering affidavit to the main claim, which was then followed by a replying affidavit.

[10] It is further significant to point out that even though a separate application for the referral of the matter for oral evidence was not launched, in the replying affidavit, the Applicant had indeed indicated that this issue would be raised, and was indeed raised *in limine* when the matter was heard. To that end, the Court is prepared to accept that the manner with which it was raised does not fall foul of the principles set out in the authorities set out above[6].

[11] From the pleadings and as also apparent from the parties' common understanding, there are various disputes of fact that clearly cannot be resolved on the papers. The parties both clearly dispute that the essential reciprocal obligations of the agreement have not been met. The proceedings in this matter had not gone to a point where the Court can express a view that the main application is bad in law and/or on the facts. Furthermore, there is no basis for any conclusion to be reached that the disputes of facts which were raised by Respondent can be said to have been reasonably foreseeable, as these only became apparent when the Respondent filed her founding affidavit in respect of the rescission application, in which she had in any event alluded to those disputed facts.

[12] To the extent that the Respondent had as at the time that she filed the rescission application intimated that these disputed facts were indeed real and incapable of resolution on the papers, I therefore find it extraordinary that

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[6] *fn 4*

despite that appreciation, she would suddenly vehemently oppose such an order.

[13] Obviously the bone of contention between the parties despite an agreement was whether the Applicant should be allowed to deliver a Declaration. To the extent that the Respondent had in any event agreed that the Applicant's Notice of Motion shall stand as simple summons, I did not understand the basis of the objection to the delivery of a Declaration, nor what the possible prejudice to her was. This is even more so where the proposed order had made provision for the normal rules related to action proceedings to be still applicable.

[14] In the end, even though the parties had always intended to refer the matter for oral evidence, the Court will nonetheless in the light of the belated objection by the Respondent, still exercise its discretion and grant such an order. In the light of the myriad of disputes of facts arising from the pleadings, it is not for this Court to narrow down the issues that the trial court will have to be seized with.

[15] This then brings me to the question of costs. The Applicant accused the Respondent of having been obstructionist especially after it was apparent that the matter ought to be referred for oral evidence. In the same breath however, and without detracting from my earlier conclusions that the points were properly raised for consideration by the Court, the Applicant did not do himself any favours by insisting that the Respondent should file her answering affidavit when the parties could not agree on an order. He could simply have approached the Court prior to the closing of pleadings. In the circumstances, the costs ought to be reserved for determination by the trial court.

[16] Accordingly, the following order is made;

Order:

1. The application is referred to trial.

2. The notice of motion shall stand as a simple summons.

3. The notice of intention to oppose shall stand as a notice to defend. The applicant shall deliver a declaration within twenty days of this order.

4. Thereafter the rules related to actions shall apply.

5. The costs to date shall be reserved for determination by the trial Court

Edwin Tlhotlhalemaje
Acting Judge of the High Court
Gauteng Local Division

Appearances:

For the Applicant:	Adv. R Goslett, instructed by AC Nothnagel Attorneys
For the Respondent:	Adv. D Ainslie (Ms), instructed by Yolandi Van Der Watt Attorneys