IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 4559/2004

DATE: 15 SEPTEMBER 2008

In the matter between:

GABRIEL PETRUS ROSSOUW Applicant

and

EMILIE DALENE ROSSOUW AND ONE OTHER Respondent

JUDGMENT

NGEWU, J:

[1] The applicant launched an application in which he sought rectification of a clause in a consent paper agreed upon between him and the first respondent on August 2006 which was subsequently made a court order on 23 August 2006.

Applicant further applied for an order setting aside, or suspending the warrant of execution issued pursuant to the said clause, pending the outcome of the application for rectification.

[2] In terms of paragraph 4 of the consent paper the applicant agreed to make payment to the first respondent in the sum of R8 200 000 as follows;

4.1.1 By payment of the sum of R300 000 (Three Hundred Thousand) by 30 September 2006, directly to the plaintiff's attorney of record, Baumann, Gilfillan Incorporated;

4.1.2 By payment to the plaintiff of the sum of R1million, by no later than 30 September 2006, directly into such bank account as nominated by the plaintiff;

4.1.3 By payment of R1million upon the registration of Transfer of ownership of the Franskraal property (referred to in paragraph 4.5.1 of the deed) in the event that the property is sold or by no later than 31 January 2007, whichever occurred first;

4.1.4 By payment of the sum of R5 900 000 upon the date upon which the Gabriel Rossouw Trust effects transfer of ownership of the farm Morgenzon to the purchaser or by 1 August 2007, whichever occurs first;"

[3] It is common cause that the applicant met his obligations in terms of clause 4.1.1, 4.1.2, 4.1.3 only. Though, I must add, that the first respondent alleged that the amount in 4.1.3 was only paid on 13 March 2007 and not on 1 January 2007 as was provided for in the consent paper. She further sought interest on the R1million at the rate of 15.5% for the period 1 February 2007 to 13 March 2007 in an amount of R17 410,96.

[4] It was further not in dispute that the amount of R5 900 000, as provided for in clause 4.1.4 had not been paid. First respondent sought interest on the amount aforesaid for the period 2 August 2007 to 28 August 2007 in the sum of R67 467,95.

[5] In terms of clause 3 of the consent paper applicant agreed, and undertook to contribute to first respondent maintenance as follows;

"3.1.1 Until such time as first defendant, now applicant, has complied with this obligation in terms of 4.1.4 below, by payment to the plaintiff (now first

respondent), of the sum of R24 000 per month, without deduction or set off, into such account as plaintiff may determine, the first such payment to be made on 1 September 2006 and thereafter on or before the 1st day of each month.

3.1.2 Until such time as the first defendant has complied with his obligations in terms of 4.1.3 below or secured the mortgage bond finance in terms of paragraph 4.2.1 below, by payment to the plaintiff of the sum of R4 100, 20 per month without deduction or set off, into such account as plaintiff may determine, the first such payment to be made on 1 September 2006 and thereafter on or before the 1st day of each month.

3.1.3 In the event that first defendant has for any reason not complied with his obligations in terms of paragraph 4.1.3 and 4.1.4 of the consent paper by 1 September 2007, the maintenance payable by him in terms of paragraph 3.1.1 and 3.1.2 above shall increase in accordance with the percentage increase in the Consumer Price Index

as determined by the Director of Statistics for the middle income group during the preceding year calculated for the period 30 June 2007 and thereafter shall increase annually on 1 September of each succeeding year on the aforesaid basis for 12 months period ending 30 June of the year.

[6] On 31 August 2007 first respondent took out a warrant of execution against the applicant for the sum of R5 985 058,91, which amount she detailed in the affidavit as follows; R5 900 000 plus R17 410,96, being interest due on the amount of R1million, which was due and payable on 31 January 2007 plus R67 467,95 being interest due on the amount of R5 900 000 from 2 August to 28 August 2007.

[7] It was contended on behalf of the applicant that the warrant is not supported by its *causa* and is not in accordance with the judgment, in that no interest is payable on the amounts of R1000 000.00 and R5900 000.00 while they remain unpaid as the amounts in 3.1.1 and 3.1.2 and also clause 3.3 covered such eventuality. Hence, the payments of the above amounts cease on payment of the capital amounts to the first respondent. Interest payment was not what parties had

in mind at the time the consent paper was signed. By then the farm Morgenzon had already been on the market for a period in excess of one year, and applicant had no sufficient personal assets to cover the amounts due to the respondent. The real intention of the parties was that the R5.9million would not be payable until the farm Morgenzon was sold. It was argued that the consent paper does not reflect the true intention or the common intention of the parties as they both contemplated that the farm Morgenzon, which was worth R5 900 000 would be sold before applicant could be able to make payment to the first respondent.

The applicant accordingly claimed rectification of paragraph 4.1.4 of the consent paper by deleting the words "by 1 August 2007 whichever occurs first" and by substituting then with the words "within a reasonable time". Applicant maintained that the Court should exercise its discretion to suspend the warrant as first respondent does not run any real risk of not getting her capital amount. She may run such a risk if the applicant's moveables are sold in execution and his only source of income, being the farming operations, are disrupted.

It was further submitted that even if the warrant was executed first respondent would receive a fraction of the capital amount owed to her, whilst severely crippling the applicant's earning ability, and ability to pay the monthly maintenance for the first respondent and their minor child. Applicant had taken steps to sell his farm properties to pay his debts but was hampered by external economic factors. As at the date of the argument he had already concluded a deed of sale for Morgenzon for R3.5million and also Langkloof and Franskraal, which would cover a major part of the first respondents remaining indebtedness. He even went an extra mile by disposing of the trust shares in order to meet his obligation towards the first respondent. He had also tried to secure mortgage bonds over his property, but unfortunately did not succeed due to the National Credit Act. Applicant further asked that the issue of rectification be referred for oral evidence.

[8] First respondent premises her claim on the ground that applicant successfully raised a bond over Franskraal in an amount of R1million and sold Morgenzon farm for R3.5million and did not make payments to her, which was not the case. In the alternative first respondent claimed that

more than six months, a date which applicant contended, was reasonable, had elapsed since the date of the application. According to her, even on applicant's own version, the payment was due. She further contended that she would never have agreed to an indefinite period of time for the sale of Morgenzon without making provision for the payment of interest on the sum of R5.9million.

The reason why the date of 1 August 2007 was inserted was specifically to cater for the eventuality that Morgenzon would not be sold by such date according to her. Both parties agreed and intended that payment had to be effected by not later than that date. First respondent further disputed that the proceeds of the sale of Morgenzon would be applied towards settlement of the applicant's indebtedness to her. She further submitted that applicant inflated the prices of the farms and delayed the sales. It was her contention that for applicant to succeed with rectification he had to prove a common intention of both parties that Morgenzon would be sold within a reasonable period and that the sale proceeds would be used to pay her. She further maintained that clause 3.3 was inserted to cater for the eventuality that the applicant might renege in respect of his obligations in terms

of the consent paper. Applicant failed to make payment on 1 August 2007, and, according to her, is *in mora ex lege.* Interest at the prescribed legal rate is applicable to the judgment.

[9] From the above it is clearly discernible that there are disputes of fact regarding the true intention of the parties in relation to clause, that is clauses 3.1.1, 3.1.2 and 3.3 of the consent paper, disputes which cannot be resolved on the papers. Accordingly this Court is unable to properly resolve the application on papers. The applicant has correctly applied that the question of rectification be referred for oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of court, as the court cannot make probability findings on affidavits. In this regard see Fourie Poultry Farms v Kwa-Natal Food Distributors 1991(4) SA 514 NPD.

Furthermore, at a glance, clause 4.1.4 of the deed of settlement does not seem to be meticulously worded. The first respondent's claim for interest in respect of the amounts owing is clouded with uncertainty if one has regard to clauses 3.1.1 and 3.1.2 of the consent paper.

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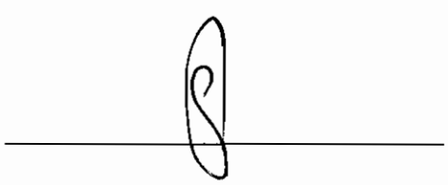
[10] In the interests of real and substantive justice between the parties, the Court will suspend the warrant of execution pending proper ventilation of the circumstances surrounding clauses 3.3 and 4.1.4 of the deed of settlement. Applicant has shown that he has made efforts in an attempt to realise the amount due to the first respondent and has continued paying the substantial amount required of him pending settlement of the respondent's claims.

[11] The court makes the following order:

11.1 The APPLICATION FOR RECTIFICATION IS REFERRED FOR ORAL EVIDENCE,

11.2 The WARRANT OF EXECUTION IS SUSPENDED pending the outcome of the application for rectification.

11.3 The costs incurred in the application up to this stage are reserved for decision by the Court deciding the application.



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NGEWU, AJ

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