In the High Court of South Africa
(Western Cape Division, Cape Town)

CASE NO:761/2018

In the matter between:

SUPERDRIVE INVESTMENTS LIMITED (RF) Applicant

And

CHANTAL ADAMS Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 21 JULY 2023

RALARALA, AJ

INTRODUCTION

[1] Two applications serve before me: one from the applicant seeking the amendment of its particulars of claim brought in terms of rule 28(4) of the Uniform Rules of Court; and the other from the respondent which is an application for a cost order in terms of rule 41(1) (c) of the Uniform Rules of court. Both applications are opposed and opposing papers were accordingly filed. For ease of reference the parties will be referred to as applicant and respondent in both applications.

[2] The applicant seeks leave to amend the prayers its particulars of claim by replacing it with the following:

"WHEREFORE the Plaintiff claims, in its aforesaid representative capacity against the Defendant for:

1. Correction to the Agreement in respect of the Chassis Number from ONS[…] to WBA[…];

2. Cancellation of the Agreement;

3. Payment of the amount of R419 608.43;

4. Interest on the amount of R419 608.43 at the rate of 1.500% per annum above the prime overdraft rate from time to time, currently 10.250% from 5 DECEMBER 2017 to date of final payment;

5. Costs on attorney client scale;

6. Further and or alternative relief.

IN THE ALTERNATIVE CLAIM:

1. Correction to the Agreement in respect of Chassis Number from ONS[…] to WBA[…];

2. Confirmation of Cancellation of the Agreement;

3. Return of the goods being:

VEHICLE DESCRIPTION 2014 BMW 3201 M SPORT LINE A/T (F30)

ENGINE NUMBER B93[…]
CHASSIS NUMBER WBA[…]

4. That judgment for the amount of damages that the Plaintiff may have suffered, together with interest thereon, be postponed sine die, pending the return of the vehicle to the Plaintiff, the subsequent valuation and sale of the vehicle, and the calculation of the amount to which the plaintiff is entitled.

5. Interest on the aforementioned amount per annum above the prime overdraft rate of 1.500% as from 19 SEPTEMBER 2018 to date of final payment, with such interest to be capitalized monthly in advance.

6. Costs of suit on an Attorney client scale;

7. Further and /or alternative relief."

[3] The respondent applies to this court in terms of rule 41(4)(c) that:

1. In accordance with the provisions of rule 41(1) (c) of the Uniform Rules of Court, the plaintiff be directed to pay the defendant's costs in respect of the plaintiff's application for rectification and its application in terms of rule 41(4) of the Uniform Rules of Court, which the plaintiff withdrew on 30 June 2022 without consenting to pay the costs thereof.

2. That the plaintiff be ordered to pay the costs of this application.

3. Such further and /or alternative relief be granted to defendant.

FACTUAL BACKGROUND

[4] The applicant instituted an action against the respondent for payment of R418 608.43, together with interest and costs, pursuant to the cancellation of an instalment sale agreement concluded between the parties for the purchase of a 2014 BMW 320i. The sale agreement was subject to the application of the NCA. On 27 February 2018, the respondent defended the action, and the plaintiff launched an application for summary judgment.

[5] A settlement agreement was concluded by the parties on 29 March 2018, and made an order of court on 16 April 2018. The respondent failed to comply with the terms of the settlement order, and on 26 October 2018, the applicant applied for judgment in terms rule 41(4). On 16 November 2018 judgment was granted in favour of the applicant. The respondent brought an application for rescission of the judgment in terms of rule 42(1)(a) of the Uniform Rules of court, on the basis that the judgment was erroneously granted. The respondent disputed the settlement amount which the applicant obtained judgment for, claiming that the judgment amount of R326 688.59 could not have been correct as the settlement provided for a final payment of R210 959 as at 5 September 2018. The applicant conceded to rescission of judgment, and an order rescinding the judgment was granted on 12 March 2019. The rule 41(4) application was postponed to the semi urgent roll.

[6] The application for rectification of the settlement agreement was launched on 25 June 2019 and subsequently enrolled on the semi urgent roll on 14 August 2019 with the rule 41(4) application. On 14 August 2019 Hlophe JP, referred the matter for oral evidence to be heard on 10 February 2020, and the parties' subsequent conduct of the matter was recorded. The parties failed to comply with the court order and on 21 May 2020 the matter was removed from the roll with a view to settle the matter.

[7] A notice of withdrawal of the application for judgment in terms of rule 41(4) and the application for rectification of the settlement agreement notice were delivered on 30 June 2022. An application for an order as to costs in terms rule 41(1)(c) was served on the applicant pursuant to the withdrawal of the application for judgment in terms of rule

41(4). On 27 July 2022, a notice to amend the applicant's particulars of claim in terms of rule 28(1) was delivered. The applicant alleges that the respondent served a notice of objection in terms of rule 28(3) of the Uniform Rules of Court on 11 August 2022.

THE APPLICATION FOR AMENDMENT OF THE PARTICULARS OF CLAIM
THE APPLICANT'S SUBMISSIONS

[8] The applicant avers that the settlement agreement expired on 5 September 2018, and that the respondent has not settled the arrears and remains in possession of the motor vehicle. The intended amendment seeks to introduce a prayer for the return of the vehicle. The applicant asserts that the application is not mala fide and it will allow the parties to ventilate the dispute and assist in determining the real issues between them. Ms. Samkange, on behalf of the applicant argued that the amendment will not prejudice the respondent as it does not introduce a new cause of action and the principal issue between the parties remains the same. The applicant also claims that the proposed amendment is borne out of the same facts.

[9] Meanwhile, the respondent asserts that the applicant is unduly escalating the costs in the matter by the withdrawal of these applications, and attempting to unilaterally renege on an agreement which was entered into between the parties. The respondent contends that the agreement in clause 5 provides that the agreement would constitute the entire and sole agreement between the parties in respect of the subject matter, that neither of the parties would be bound by any undertakings, representations, warranties, promises and the like not recorded therein, and that no variation, amendment or cancellation, of the settlement agreement or its terms shall be of any force and effect unless reduced to writing by both parties to the agreement.

[10] Mr. Gagiano, for the respondent, contends that the applicant and the respondent are both bound by the terms of the agreement which was made an order of court and thereby the action of these proceedings were concluded and finalized. According to the

respondent the requests addressed to the applicant to provide the correct amount that the respondent is required to pay in terms of the settlement agreement were ignored.

[11] The respondent alleges that the applicant in launching this application is attempting to resuscitate a claim which has been settled and finalized by way of judgment. The respondent continued by asserting that the applicant is not entitled to the requested amendment and denies that the application is not mala fide.

[12] The respondent denies that the amendment would allow for adequate ventilation of the parties' disputes due to the applicant's failure to take the court into confidence and explain the reasons for abandoning the application for rectification in terms of rule 41(4). The respondent contends that the settlement order is still in force and effect and has not been set aside, nor varied, and accordingly the proceedings under this case number have concluded.

[13] In reply the applicant refutes that clause 5 of the settlement agreement precludes the applicant from pursuing the rights under the original instalment agreement. For completeness clause 5 reads:

> "Neither of the parties shall be bound by any undertakings, representations, warranties, promises and the like not recorded herein. This agreement constitutes the entire and sole agreement between the parties in respect and regarding the subject matter. No variation, amendment or cancellation, including consensual cancellation, of this agreement and or its terms (including this clause) shall be of any force and effect unless reduced to writing and signed by both parties to the agreement."

[14] The applicant argues that the parties insofar as the applicant's rights remain expressly reserved as provided for in clause 4.2 and 4.3 which read:

"4.2 Nothing in this agreement is to be construed and /or regarded as novating and / or compromising the Applicant's /Plaintiff's rights. This agreement is concluded without prejudice to, and with full reservation of Applicant from pursuing its rights under this settlement and in terms of the Instalment Sale Agreement.

4.3 The parties agree that the Applicant/Plaintiff in its absolute and sole discretion, act in terms of and pursue its rights as and when Applicant's/Plaintiff's so desires and/or requires are and remain at all n times expressly reserved."

[15] The applicant denies that this application is a resuscitation of its claim that had been settled by the parties. The applicant's contention in amplification is that the applicant only seeks compensation for the motor vehicle in the respondent's possession. Alternatively, the applicant seeks the return of the motor vehicle as the defendant has failed to pay its full purchase price in terms of the instalment sale agreement.

THE APPLICATION TERMS OF RULE 41(1)(c)

[16] The application relates to the withdrawal of the applicant's application for judgment brought in terms of rule 41(4) and the application for rectification of a settlement agreement entered into by the parties, which was made an order of court. The relief sought by the respondent in the form of an order directing the applicant to pay the costs of the withdrawn rectification application. In their replying affidavit, addressing this issue, the applicant submits that both parties be ordered to pay their own costs given that prior to the applicant's withdrawal, the respondent had failed as well to comply with the 14 August 2019 order by the Judge President.

THE ISSUES TO BE DETERMINED

[17] The court has to determine the following issues:

1.whether the amendment of the particulars of claim is justifiable given the settlement order.

2. whether the applicant should bear the costs of the application for rectification of the settlement order that was subsequently withdrawn by the applicant.

APPLICABLE LAW AND ANALYSIS

[18] Rule 28 governs the amendment of pleadings in the High Court. The rule provides as follows:

"Amendment of Pleadings and Documents

(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in sub rule (1) shall state that unless written objection to the propose amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with sub rule (3) is delivered within the period referred to in sub rule 9(2). The party wishing to amend may, within 10 days, lodge an application for leave to amend."

[19] The applicant seeks to amend the pleadings, specifically its particulars of claim subsequent to a settlement order. In amplification the applicant argued that the court would grant such relief unless the amendment is mala fide. In justifying the chronological sequence of events in the matter, the applicant argues that the settlement agreement and the credit agreement had since expired concomitantly on 5 September 2018. The respondent in her answering affidavit contends that the settlement order is still in force and effect as it has not been set aside or varied. Ms. Samkange, counsel for the applicant, in their heads of argument asserted that the amendments sought will clarify the application of common law action of rei vindication and the National Credit Act apply to material facts and cause of action.

[20] Discernment in this matter necessitates that the consideration of this issue be considered in the context of the application for the amendment of the particulars of claim being brought pursuant to a settlement agreement that has been made an order of court. As previously stated, the respondent opposes the present application on the basis that the settlement order is still extant. Mr Gagiano, for the respondent referred to a number of authorities dealing with the issue of settlement orders, to which I will refer. Considering the proposed amendment at this stage of the litigation of the matter, through the lens of these decided cases, the proposition is that such a court order has the effect of finality to the action between the parties. In *Moratis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others* (799/2016) ZASCA 54 (18 May 2017), the court held:

> *"…There is no difference in law between an order granted in the case of a default judgment; and an order pursuant to a settlement prior to the conclusion of opposed proceedings; or the order in a judgment pronounced at the end of the trial or opposed application."*

[20] A settlement agreement made an order of court, transforms the agreement terms to an enforceable court order. It is therefore an order like any other, ultimately converting

the standing of the rights and obligations between the litigants. *Eke v Parsons* 2015 (11) BCLR 1319 (CC) 29 -31.

[21] The crisp question that is raised is whether it would be permissible for the court to revisit the particulars of claim for the purposes of effecting an amendment considering the strides traversed by the parties in this matter. Rule 28 (10) permits a court in the exercise of its discretion to allow such an amendment, notwithstanding anything to the contrary in this rule at any stage before judgment. The respondent contends in their heads of argument that once a court has pronounced a final judgment, it becomes *functus officio* and its authority over the subject matter comes to an end. The rule makes it clear that the court is only permitted to exercise its discretion in so far as granting of amendments of pleadings and documents is concerned, prior to pronouncement of judgment or granting of an order in the matter. In this matter, the application is brought pursuant to the granting of the order. Since finality to litigation is the main purpose of a court order, it is inconceivable and unprecedented that a litigant will seek to amend the pleadings and be successful in that bid, where the order is still in existence. Granting such a relief in those circumstances, would be flouting an order of court. Notably, the applicant had subsequent to the court order, in a bid to enforce the order, applied for summary judgment which was granted and later rescinded at the behest of the respondent. In my view the remedy sought by the applicant is not permissible at this stage of litigation.

[22] Ms. Samkange, counsel for the applicant proffered an argument that the credit agreement underpinning this action and the settlement agreement have both expired through affliction of time. I was not directed to any authority by counsel for the applicant supporting and substantiating this contention. Except for the averment in their heads of argument, which states that more than 3 years has lapsed since the last payment was effected by the respondent and that her debt should have prescribed in terms of section 126 B of the National Credit Act 34 of 2005 ('NCA'), but summons delivered by the creditor to the debtor interrupts the running of prescription. The argument continued to the effect that, this is the case in circumstances where there has been non - compliance

with sections 129 and 130 of the NCA. Upon examination of Section 126B of the NCA, discernibly, its provisions prohibit the sale of debts under credit agreements which have been extinguished by prescription under the Prescription Act 68 of 1969 or where the consumer invokes the defence of prescription. In my view the provisions of section 126B of the NCA are not applicable *in casu*. In the instant case the debt has not been the subject of a sale to debt collectors and the debt as the applicant has submitted has not prescribed. This argument in my view is inconclusive.

[23] Similarly, the argument of non - compliance with ss 129 and 130 on the part of the respondent is untenable as the summons have been served which is a process preceded by compliance with ss 129 and 130. By virtue of a settlement order the matter have come to a finality. It must be emphasized that the settlement agreement has since transformed together with its terms into an order of this court, effectively laying the issues to the action to rest. It can therefore not be said that the order has expired. The applicant's argument is clearly unsustainable.

[24] I share the views expressed by Mr. Gagiano's argument that, until such time that the order is set aside there can be no consideration of amendment of pleadings. An order of court ought to stand until set aside by a court of competent jurisdiction. Until that eventuality transpires, the court order should be obeyed. *Bezuidenhout v Patensie Sitrus Beherend BPK* 2001(2) SA 224 (E). Ours is a democratic state established on the value of the rule of law. I also find the rationale expressed by *Herbstein J in Kotze v Kotze* 1953 (2) SA 184(C) reiterated by Froneman J in *Bezuidenhout* instructive to the matter at hand:

> *"The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands."*

[25] It is thus my considered view that it is not permissible for the court having brought the matter to finality to consider the question of amendment of the pleadings.

PAYMENT OF THE DEFENDANT'S COSTS

[26] The respondent filed a notice under rule 41(1) (c) of the Uniform Rules of Court, pursuant to the plaintiff's withdrawal of its judgment application in terms of rule 41(4) and subsequent application for rectification of the settlement agreement. The respondent contends that the withdrawal of both applications were made without consent by the respondent and without the applicant tendering of costs. In expanding its argument, the respondent asserts that the general principle is that the withdrawing party is liable as an unsuccessful litigant, to pay the costs of the proceedings. Mr. Gagiano relied on *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) 300D-E:

> *"Where a litigant withdraws an action or in effect withdraws it, very sound reasons must exist why a defendant or respondent should not be entitled to his costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all his claim or application is futile and the defendant, or respondent, is entitled to all costs associated with the withdrawing plaintiff's or applicant's institution of proceedings."*

[27] In opposing the application the applicant argues that it weighed up the advantages and benefits of pursuing both the rule 41(4) and the application for rectification of the settlement agreement. It is further argued that the settlement agreement upon which these applications are grounded has matured. Another consideration propounded by the applicant was the failure by the parties to comply with the 14 August 2019 court order which referred the matter to oral evidence. The applicant avers that both parties are blameworthy in that they failed to move the application forward when the applicant filed its notice of withdrawal.

[28] Rule 41(4) of the Uniform Rules of Court reads:

"Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties."

Rule41(1) reads:

"(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs: and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a) shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."

[29] The awarding of costs where an action or an application has been withdrawn remains in the court's discretion. Invariably the process includes consideration of all the facts between the parties in view of fairness to the parties. *Ward v Sulzer* 1973(3) SA 701 (A) 706G. Similarly, in *Widlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism Eastern Cape Provincial Government and Others* 2005(3) All SA 389 (E) , the court expressed :

"…in my view that even in cases where litigation has been withdrawn the general rule is of application, namely, that a successful litigant is entitled to costs unless the court is persuaded in the exercise of its discretion upon consideration of all facts that it would be unfair to mulct the unsuccessful party in costs."

[30] As previously indicated, the applicant did not substantiate the assertion that the settlement agreement had expired on 5 September 2018. Rule 41(4) relates to settlement agreements and not settlement orders, in my view both the applications for judgment in terms of rule 41(4) and the rectification of the settlement agreement were ill-timed, given that the settlement agreement was already made an order of court. In addition, and of significance is that the settlement agreement between the parties was novated by operation of law when it became an order of court on 16 April 2018. *Eke 68.* Thus, the applicant's argument is not sustainable.

[31] Regarding failure to launch and initiate the oral evidence proceedings, it is necessary to mention that the 14 August 2019 order was issued pursuant to the applicant's rule 41(4) and rectification of the settlement agreement applications. Due to the inability to initiate the oral evidence proceedings, the matter was removed from the roll on 21 May 2021 in view of settlement. The applicant subsequently withdrew both applications without the consent of the respondent or leave of the court to do so. In both these applications the applicant was *dominus litis*. In my view, the lackadaisical approach taken to the launching of the oral evidence process and the ultimate failure to comply with the 14 August 2019 order, should be attributed exclusively to the applicant. The applicant's argument in my view, in this regard is untenable.

[32] Invariably, the court has a duty to dispense justice to the litigants. In this instance justice demands the applicant be held responsible for the costs.

ORDER

[33] In the result, I make the following order:

[33.1] The application for amendment of the particulars of claim is dismissed.

[33.2] The applicant is ordered to pay the costs of the application including costs of counsel.

[33.3] The applicant is ordered to pay the costs of the application in terms of rule 41(4) , the application for rectification as well as costs of the rule 41(1)(c) including costs of counsel.

RALARALA N E
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT:	**ADV G SAMKANGE**
COUNSEL FOR THE RESPONDENT:	**ADV GAGIANO**