IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO: EL1544/2024

In the matter between:

NALEDI SOVASI **Applicant**

And

NTSIKELELO LUYANDA SOVASI **Respondent**

JUDGMENT

ZONO AJ:

Introduction

[1] The applicant approached this court, *mainly*, for mandatory interdict in terms of which she seeks to compel compliance with Clause 10.3 of the Deed of settlement entered into between her and the respondent, ostensibly on the 06th of April 2021. In essence the applicant seeks an

order in terms of which the respondent is compelled to take all necessary steps to facilitate the sale of the immovable property situated at 63 Manley Road, Saxlby, East London, Erf No1616, measuring 1045m^2, which property is to be sold by auction. The applicant further seeks the respondent to be compelled to sign all necessary documentation for the aforementioned purposes, that is, to effect the sale and transfer of the said property.

[2] In the event of respondent's failure to take the necessary steps to effect sale and transfer of the immovable property aforesaid, the applicant further seeks the sheriff of this court to be authorized to sign all the necessary documentation and take all such steps as they may be necessary to effect the sale and transfer of the said immovable property.

[3] As a consequence of the above relief the applicant seeks an order compelling the respondent to cooperate with auctioneers to provide free access for inspection and viewing of the property. Should access be not provided, auctioneers be granted leave to use the services of a locksmith to gain access to the property. All outstanding bond installments payable by the respondent to First National Bank be ordered to be paid from the respondent's portion of the net proceeds of the sale of the immovable property. All outstanding amounts due to the Municipality (BCMM) by the respondent be ordered to be paid from respondent's portion of proceeds of the sale of the immovable property. Punitive costs order is sought against the respondent.

[4] Although the main relief seeks compliance with Clause 10.3 of the Deed of Agreement, the central Clause sought to be enforced is Clause 10.3.5 which reads as follows:

> "*10.3.5It is further agreed that the immovable property situated at Erf ELM 01616 commonly known as 63 Manley Road, Saxilby, East London will be transferred into the defendant's name within 90 (ninety) days of the granting of the decree of divorce, failing which, the immovable property situated at 63 Manley Road, Saxilby, East London, shall be placed on the open market to be sold as soon as possible, at the best available price. The net proceeds from the sale of the aforesaid property after the usual deductions such as rates, outstanding bonds, cancellation costs and Estate Agents commission shall be divided equally between the parties. The parties agree that they undertook to sign all documentation relating to the sale and transfer of the property when called upon to do so, failing which the sheriff of this court shall be empowered to do so on their behalf".*

[5] The central issue is whether there is a legal basis to compel the respondent to comply with the aforesaid provision. All the orders sought in the notice of motion revolve around this Clause. They may be granted only if there is a legal basis to do so. Before dealing with this issue, it is important to anteriorly deal with the brief background as that has a bearing on the determination of this matter.

Brief Factual Background

[6] Sequel to divorce proceedings having been instituted in the Regional Court, a divorce order was granted in the following terms:

> "*That the bonds of marriage subsisting between plaintiff and defendant be and are hereby dissolved. That the deed of settlement between the parties handed in and marked Exhibit "B", attached hereto, is made an order of court".*

[7] The parties exchanged a lot of correspondence, especially about the aforesaid immovable property. After it became clear that parties could not find each other, the applicant instituted the present proceedings.

[8] To support the relief sought in the notice of motion the applicant preponderantly refer to the specific terms of the Deed of Agreement, especially Clause 10.3.2, 10.3.3, 10.3.4 and 10.3.5. thereof. The applicant makes the following specific allegations about Clause 10.3.5 in her founding affidavit:

> "*34. The respondent refuses to comply with the terms of the settlement agreement, more particularly paragraph 10.3.5 thereof. On 01 August the respondent was given one last chance to reconsider his position….*
>
> *38. Aside from the fact that the respondent has failed to comply in any reasonable manner with its obligations relating to the sale of the immovable property the respondent continues to reside in the immovable property and to enjoy the use and benefit of same to my detriment and the detriment of the minor children.*
>
> *41. It is further clear from the correspondence that I have tried everything in my power to facilitate the sale of the immovable property, which is what was agreed upon in our deed of settlement at the time when the divorce action was finalized. The respondent has been willful in his actions and has actively prevented the sale of the property and has further caused the Municipal account on the property to fall in arrears, which would be ultimately prejudicial to me upon the sale of the property*" (sic).

[9] While the pleadings-including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits-must be interpreted to establish what the basis of the applicant's claim is, it is not for the court to say that the facts

asserted by the applicant would also sustain another claim[1]. When interpreting the notice of motion and the assertions referred to above, it is plain that the descriptive character of applicant's case before this court is that of a mandatory interdict[2]. I state at this early state that applicant's founding papers are not a model of clarity, and I will deal with that later in this judgment.

[10] Mandatory interdict is an order requiring a person to do some positive act to remedy a wrongful state of affairs for which he is responsible, or to do something which he ought to do if the complainant is to have his rights[3]. It has been said that a mandatory interdict can serve to compel the performance of a specific statutory duty, and to remedy the effects of unlawful action already taken[4]. The formal terminology of the notice of motion coupled with the relevant assertions in the founding affidavit conduce to an interpretation that establishes mandatory interdict as the legal basis of applicant's complaint.

[11] The applicant approached this court for a mandatory final interdict. There are three requisites for the grant of a final interdict, all of which must be present[5]: A clear right on the part of the applicant; an injury actually committed or reasonably apprehended; and the absence of any other satisfactory remedy available to the applicant.

[1] ***Gcaba v Minister of Safety and Security and others*** 2010 (1) SA 238 (EC) Para 75.
[2] ***Makhanya v University of Zululand*** 2010 (1) SA 62 (SCA) Para 72.
[3] ***Lipschitz v Wattrus NO*** 1980 (1) SA 662 (T) at 673 C-D; ***Kaputuaza v Executive Committee of the Administration for the Heros*** 1984 (4) SA 295 (SWA) at 317 F-H.
[4] Baxter: Administrative Law 690; ***Jordan v Penmill Investments CC*** 1991 (2) SA 430 (E) at 436 E.
[5] ***Setlogelo v Setlogelo*** 1914 AD 221.

[12] It is without a doubt that the applicant is entitled to the proceeds of the sale of the immovable property in question. The proceeds to which the applicant is entitled can only be extended to her once the property is sold and paid for. In terms of Clause 10.3.4 of the Deed of Agreement the applicant is entitled to one-half of the market value of the immovable property less one-half of the amount outstanding in respect of the mortgage bond currently registered over the immovable property.

[13] A harm or injury is caused if the sale and transfer of the immovable property is not taking place or is delayed. The respondent was entitled to the transfer of the immovable property within 90 days of the granting of the decree of divorce. The transfer was contextually dependent upon the payment referred to in Clause 10.3.4 of the Deed of Agreement which reads as follows:

> "*10.3.4 On registration of transfer, the defendant shall effect payment to the plaintiff of ½ (one half) of the amount outstanding in respect of the mortgage bond currently registered over the immovable property. It is recorded that the market value of the property is the sum of R1 379 000.00 (One Million Three Hundred and Seventy-Nine Thousand Rands)".*

Failure to cause the transfer to be effected within the stipulated 90 (ninety) days prescribed in the Deed of Agreement is injurious or harmful to the applicant. Such failure adversely affects applicant's right to payment as indicated above.

[14] The absence of any other satisfactory remedy available to the applicant is the next topic on the subject. Clause 10.3.5 of the Deed of settlement provides for two possibilities in the event of the respondent not fulfilling or performing his obligations.

14.1 Firstly, failure to transfer the immovable property within stipulated time shall result in the immovable property being placed on the open market to be sold as soon as possible, at the best available price. Any party may avail him or herself to this remedy. Placing the immovable property on the open market is a satisfactory remedy available to the applicant. It does not appear clearly in the papers why the applicant failed to explore this remedy. All the disputed attempts that were allegedly explored did not relate to the placing of the immovable property on the open market[6]. Even if they were to relate to the placing of the immovable property on the open market, the nature of the dispute raised in the papers would necessitate the rejection of the applicant's version.

14.2 Secondly, the Clause provides that the sheriff of the Regional Court shall be empowered to sign all the documentation relating to the sale and the transfer of the property if the parties fail to do so when called upon to do so. It does not appear "*ex facie"* the papers that the documentation referred to in this Clause was ever prepared and that the respondent was ever called upon to sign same. Assuming that such was done, the sheriff of the Regional Court should have been approached for signature on behalf of the respondent if the respondent is refusing to sign. There is absolutely no basis for approaching this court for an order directing the respondent to sign all the documentation relating to

[6] ***Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd*** 1984 (3) SA 623 (A) at 634 E-G.

the sale and the transfer of the property, when the sheriff of the Regional Court has not been approached. There is no basis to authorise the sheriff to sign document if the sheriff has not been approached and refused. The sheriff is authorised by the parties in their agreement.

[15] The existence of an adequate alternative remedy is such that it must be such as to afford the injured party a remedy that gives similar protection to an interdict against the injury that was occurring or apprehended[7]. An internal remedy provided in an agreement is a legal remedy that must be exhausted before coming to court for a similar protection for which the agreement provides[8]. On the application of doctrine of contractual privity the applicant is bound by the terms of her agreement[9]. Parties are bound by the contract they make with each other[10].

[16] In the circumstances I see no reason why the applicant failed to exhaust the remedies provided in Clause 10.3.5 of the Deed of Agreement. I find that they provide a similar protection to the interdictory relief the applicant is seeking herein. The Deed of Agreement provides an alternative satisfactory remedy to the applicant. Accordingly, this application cannot succeed. It must fail on this basis alone.

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[7] ***Rhodes University v Student Representative Council of Rhodes University*** 2017 (1) LL SA 617 (ECG) Para 86.
[8] ***Totalgaz Southern Africa (Pty) Ltd v Rhyder Investments CC t/a DTB Sales and another*** Case No EL 809/2024 Para 22.
[9] RH Christie: The law of Contract in South Africa, 5th Edition, Page 260.
[10] ***Gugu and another v Zongwana and others*** 2014 ALL SA 203(ECM) Para 21.

[17] However, even if I am wrong in the characterisation of this case in the light of the reference made in the founding affidavit to he alleged noncompliance with the divorce order and a vague reference to contempt of court order. In a confused way, this application viccilated between mandatory interdict and contempt of court proceedings without one being alternative to the other. No relief relating to the contempt of court order is sought in the notice of motion. However, allegations are made in the founding affidavit about contempt of court. When matter was argued in court it was argued as a contempt of court application. It is important to state that applicant's founding papers are not a model of clarity. No single clear cause of action is pleaded.

[18] Even if it can be said the relief for contempt of court order is sought (which is not the position) and the case for such contempt is pleaded in support of the relief, the applicant would still be required to prove the following requisites:

> That an order was granted against the respondent; that the respondent was either served with the court order or informed of the grant of the order; and that the respondent has either disobeyed the order or neglected to comply with it.

[19] There is absolutely no clear or dim suggestion on the applicant's papers that the respondent was served with or informed about the court order. Applicant's case on contempt of court order would have fallen or failed on the first hurdle. It is trite law that an applicant must make out its case

in the founding affidavit[11]. No case for service of the court order is made out in the papers. The court order (Decree of Divorce) does not show that the respondent was in court when it was granted. There is no averment in the founding affidavit stating that the respondent was in court when the decree of divorce was granted. In the light of the above and the nature of the proceedings it was incumbent upon the respondent to ensure that the respondent was served with or informed about the court order; and an allegation is made in the founding affidavit that the respondent was duly served with or was fully informed of the court order.

[20] Diemont JA puts this point aptly as follows in Mistry[12] "*When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas 1924 WLD 67at 68 and as has been said in many other cases…. An applicant must stand or fall by his petition and the facts alleged therein and that, although sometime it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein".*

[21] To underscore the importance of pleadings, as a matter of proper pleading, it is not sufficient for a party, to attach, without more, an annexure to an affidavit and then expect the opposing party and the court to sift and trawl through the annexures with a view to speculating as to what case is made out. That practice, if allowed, would degenerate the significance of the pleadings and introduce an improper practice of

[11] ***Nkume v Transunion Credit Bureau (Pty) Ltd and Another*** 2014 (1) SA 134 (ECM) Para 7.
[12] ***Director of Hospital Services v Mistry*** 1979 (1) SA 626 (A) at 635-636A.

pleading through correspondence and documents that are not pleadings. That practice would be contrary to the express provisions of Rule 6(1) of the Uniform Rules of court which provide thus:

> *"(1) Every application must be brought in notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief*". (my underlining).

It is to the facts pleaded in the founding or supporting affidavit that the respondent must plead or is called upon to plead[13]. Rule 6(1) must be juxtaposed with Rule 18(4) of the Uniform Rules of court which require that *"every pleading shall contain a clear and concise statement of material facts upon which a pleader relies for his claim or defence…."*.

[22] It is impermissible for the parties to simply annex documents to the affidavits and not identify the portions thereof on which reliance is placed. It is further impermissible not to indicate the case which is sought to be made out on the strength of the document and portion relied upon. I am not alone on this point. Joffe J in *Swissborough*[14] had this to say:

> "*Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met".*

[13] Rule 6(5)(d)(iii) of the Uniform Rules.
[14] ***Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South*** Africa 1999 (2) SA 279 (T) at 324 F-G.

[23] The Supreme Court of Appeal endorsed this principle in *Zuma*[15] as follows:

> *"[47] The trial judge, again, failed to comply with basic rules of procedure. Judgment by ambush is not permitted. It is not proper for a court in motion proceedings to base its judgment on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest ─ the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. A party cannot be expected to trawl through annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. The position is no different from the case where a witness in a trial is not called upon to deal with a fact and the court then draws an adverse conclusion against that witness".*

[24] I am therefore satisfied that the requirement of service or notice of the court order has not been pleaded in the founding affidavit. Whilst it is true that a Deed of Agreement was entered into between the parties and both parties are aware of the contents thereof, it does not necessarily follow that such knowledge, without more, engenders knowledge of the court order which was not in existence when the parties were entering into a Deed of Agreement.

[25] Even if I am wrong in this regard, applicant's application for contempt of court would still not succeed for another reason. There is nothing leading me to a conclusion that the respondent was wilful and *mala fide* in not complying with the court order of 06th May 2021.

[26] The respondent posits a case that the non-compliance with the court order, part of which is Clause 10.3.5 of the Deed of Agreement which

[15] ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 227 (SCA) Para 47.

was made an order of court, was not wilful and *malafides.* The respondent accepts that he did not acquire a bond within 90 (ninety) days of divorce order due to applicant's personal loan reflecting in respondent's credit profile. The respondent failed affordability assessment due to the adverse information relating to applicant's loan. However, respondents financial position improved and he then became able to comply with the court order, *albeit* after 90 (ninety) days of the divorce order. When his financial situation changed, the respondent made several offers to the applicant, which offers were not accepted by the applicant. These contentions are not in dispute as I will demonstrate hereinafter.

[27] In relevant paragraphs of the replying affidavit the applicant deals with respondent's allegations as follows:

> "*14. It is specifically problematic for the respondent that he claims not to have been in the position to obtain a bond due to a personal loan reflecting on his account. The respondent has never produced any proof of such. I had the exact same situation, and I obtained a bond. That excuse had been used since 2021. I have set out the factual position in my founding affidavit" (*sic).

Respondent's assertion that the applicant has been aware of the adverse information listed against the respondent's name is not in dispute. It is also not in dispute that applicant's loan is listed against respondent's name. The applicant confirms that she was exactly in the same position, but she was fortunate as she managed to obtain the loan notwithstanding that negative listing.

[28] About respondent's proactiveness to make some settlement proposals to her, the applicant replied thereto as follows:

> *"16. I am further not willing to accept a 50% offer on the actual value of the property. The respondent has been offering me much less than the actual value of the property, which he very well knows" (*sic).

[29] In *Fakie*[16] Cameron JA said that the offence is committed not by a mere disregard of a court's order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. The contempt proceedings are concerned with the unlawful and intentional refusal or failure to comply with the court order[17]. If a person's failure to comply is thus due to inability to do so or flows from a mistake as to what was required, a committal for contempt will not be granted[18]. Generally, where, as in this case, non-compliance calls for an explanation that points away from defiance, a party might plead impossibility of performance, or the existence of an impediment inhibiting performance[19].

[30] There is no factual basis to negate respondent's contention that his non-compliance with Clause 10.3.5 of the Deed of Agreement incorporated into a court order of 06th May 2021 was due to him not having been able to be afforded credit due to the adverse listing in respect of the applicant's loan. I am therefore unable to find that the respondent deliberately and intentionally violated court's dignity, repute or authority. Accordingly, the respondent has succeeded in casting doubt[20]on whether he deliberately and intentionally violated the court

[16] ***Fakie NO v CC II Systems (Pty) Ltd*** 2006 (4) SA 326 (SCA) at 333 and 334.
[17] Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa, Volume 2, Page 1100.
[18] Herbstein and Van Winsen: The Civil Practice of High Courts of South Africa, Volume 2 Page 1110.
[19] Readam v BSB International 2017 (5) SA 183 Para 10.
[20] Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa, Volume 2 Page 1104.

order dated 06th May 2021. This application cannot succeed. It stands to fail.

[31] The only outstanding issue is that of costs. The general rule is that costst must follow the result. I see no reason why there should be deviation from that general rule. The applicant is liable to pay costs of the application.

[32] In the result the following order shall issue:

32.1 **The application is dismissed with costs.**

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ZONO AJ

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

Counsel for the Applicant	: **ADV D MOSTERT**
Instructed by	: **Sharp, Crisp& Associates**
	14 Bonza Bay Road
	Beacon Bay
	East London
	Tel:043 422 0284
	Email: kayleen@sharplaw.co.za
	Ref:MS K B CRISP/AB/SOV2/001
Counsel for the Respondent	:**ADV. L. MATI**
Instructed by	:**Schoombee Van Der Nest Attorneys**
	39 Vincent Road
	Vincent
	East London
	Tel: 043 743 1267
	Email: holly@schoombee.co.za
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