

DELIVERED ON: 22 MARCH 2024

[1] This is the court's judgment in the opposed application in terms of which the applicant seeks the following relief:

“1. Judgement against the First Respondent for:

1.1. Payment of R5 000 000.00 (five million rand);

1.2. Interest on R5 000 000.00 calculated at the statutory interest rate per annum from 23 March 2022, alternatively a tempore mora, until date of payment;

1.3. Cost of the application (sic)

2. Further and/or alternative relief.”

[2] The relief sought by the applicant premised from a Final Settlement Agreement (“*the settlement agreement*”) concluded on 6 July 2021 between the applicant, represented by Mr DL Motaung in his capacity as executor in the estate of the late FM Dingani, and the first respondent, represented by Mrs Z Tindleni, in her capacity as Municipal Manager of the first respondent.

[3] Before I deal with the settlement agreement, the litigious history leading up to the settlement agreement is summarised *infra*.

[4] On 20 March 2020, before the liquidation of Oxy Trading 279 (Pty) Ltd (“*Oxy Trading*”), Oxy Trading instituted provisional sentence summons proceedings against the first respondent for payment of the amount of R21 018 279.20, interest on the said amount and costs of suit.

[5] Provisional sentence was granted in favour of Oxy Trading on 17 November 2020 for the relief sought *supra*, and as a result of the provisional sentence, OXY Trading caused a writ of execution to be issued to attach the first respondent's bank account. This prompted an urgent application by the first

respondent to interdict Oxy Trading to proceed with the execution of the writ and furthermore to set aside the attachment of its bank account.

[6] Before the urgent application was adjudicated, the applicant and the first respondent concluded the settlement agreement. For purposes of this application, the following material terms and conditions were agreed to:

“5

It is further recorded that the parties appointed experts i.e. accounts, mediators and security consultants to assist in the conclusion of this settlement agreement.

6.

The parties therefore agree in full and final settlement of the dispute on the following:

- 6.1 the Defendant shall pay to the Plaintiff R15 000 000.00 (Fifteen Million Rand) as final payment on or before 16 July 2021;
- 6.2 the Plaintiff shall cease the prosecution of its claim in the High Court within 14 days of the payment referred to in paragraph 6.1 being made;
- 6.3 the Plaintiff shall instruct the Sheriff to release all property of the Defendant attached by writ of execution under the abovementioned case number upon payment being made by the Defendant;
- 6.4 the Plaintiff shall be responsible for the payment of the experts referred to paragraph 5 and the costs of the Defendant as referred to in paragraph 1(c) of the provisional sentence order.

7.

The parties agree to that the payment referred to in paragraph 6.1 shall be paid into the trust account of the Defendant's attorney to hold as

security for the fulfilment of Plaintiffs (sic) obligations under this agreement and to facilitate payment as referred to in paragraph 6.4.

8.

On completion of its obligation under this agreement, the Plaintiff shall dispatch to the Defendant's attorney of record a letter confirming compliance with this agreement and shall provide them with the details of the trust account of the Executor into which the balance payment shall be made.

9.

The Defendant shall within 7(seven) days after receipt of confirmation from the Plaintiff provide a full balance statement and make payment into the account provided to by the Plaintiff."

[7] The payment of the costs order contained in paragraph 1(c) of the provisional sentence as referred to in clause 6.4 *supra* reads:

"Costs occasioned by the postponement of the matter on 22 October 2020 is awarded to the defendant;"

[8] It is undisputed that Oxy Trading complied with its obligations in terms of the settlement agreement.

[9] It is the applicants' case that:

[9.1] On 6 August 2021 and 10 August 2021 three separate payments in the total amount of R10 000 000.00 were made by the first respondent, through the second respondent, to Oryx Trading's attorney, namely Motaung Attorneys.

[9.2] On 23 March 2022, the second respondent, acting on behalf of the first respondent, provided Oxy Trading with a statement of account in respect of the outstanding balance of R5 000 000.00. In this statement

of account, the second respondent purported to indicate, on behalf of the first respondent, that the outstanding balance of R5 000 000.00 has in fact been set off by monies which became due to Maritz Attorneys, JM Professional Services CC and Bokwa Attorneys.

- [9.3] The amounts deducted from the outstanding balance referred to *supra* were not due and payable by Oxy Trading and could not have been accounted for against the balance of R5 000 000.00 in terms of the settlement agreement. I do not intend to deal with these deductions, because, as conceded by the first respondent *infra*, no amounts were payable by Oxy Trading and should not have been deducted from the outstanding debt in terms of the settlement agreement.
- [9.4] The first respondent is in breach of the payment terms of the settlement agreement, in that it failed to pay the balance of the of R5 000 000.00 due and owing to Oxy Trading.
- [10] The first respondent's opposition of the relief sought by the applicant is based on the following:
- [10.1] A letter was received from its attorney, the second respondent, on 15 July 2021 wherein the second respondent provided the first respondent with the bank account details into which the payment of the amount due and payable to the applicant in terms of the settlement agreement had to be made. The bank account number provided by the second respondent was FNB Account number [...], purported to be the bank account of Motaung Attorneys.
- [10.2] The first respondent paid the total amount of R15 000 000.00 into the bank account number referred to *supra* on 16 July 2021, and did not make any deductions from the said amount.
- [10.3] The first respondent, by virtue of the fact that the second respondent indicated that the bank account referred to *supra* was that of Motaung

Attorneys, made payment of the settlement amount to Motaung Attorneys, being the trust account of Mr Motaung, the executor as referred to in the settlement agreement, and consequently it discharged its obligations in terms of the settlement agreement.

[10.4] The first respondent was represented at all relevant times by Mr Maritz, an attorney at Bokwa Attorneys with offices in Welkom. The first respondent has no knowledge of the statement of account provided to Oxy Trading on 23 March 2022, and furthermore denies any contingency agreement between itself, Bokwa Attorneys or Maritz Attorneys. The first respondent specifically denies any knowledge of Maritz Attorneys and JM Professional Services CC.

[11] In its replying affidavit in answer to the first respondent's allegation that it paid only one amount into the bank account provided by Mr Maritz referred to *supra*, the applicants rely on:

[11.1] The specific obligation on the first respondent in terms of the settlement agreement, namely that payment of the settlement amount referred to *supra* was to be made by the first respondent into the trust account of its attorney of record to hold as security pending the fulfilment of Oxy Trading's obligations in terms of the settlement agreement. Only after Oxy Trading complied with its obligations in terms of the settlement agreement, was the balance of the settlement amount to be paid into the bank account provided by Oxy Trading, namely the trust account of the executor. The first respondent did not comply fully with this obligation.

[11.2] The bank account number provided to the first respondent by the second respondent referred to *supra* was neither the trust account of Mr Motaung nor was such account details provided to the first and second respondents by Oxy Trading, the executor or the applicants.

[11.3] The trust account number of Motaung Attorneys was in fact [...] and not as specified by the second respondent.

[11.4] From the bank account statements of account number [...] (the purported trust account of Motaung Attorneys) provided by the second respondent during an insolvency enquiry conducted by the applicants, it was established that the amount of R15 000 000.00 was paid into the said account on 16 July 2021, and the subsequent payments made to Mr Motaung referred to *supra* on 6 and 10 August 2021 were made from this account.

[11.5] It was further established that account number [...] is the bank account of Major Issues Trading 501 CC ("*Major Issues*"), and during the period 11 October 2019 to 14 October 2022, the second respondent was the sole member of Major Issues.

[12] In argument, Mrs Ngubeni, on behalf of the first respondent, made the following submissions:

[12.1] Not only was the first respondent not aware of the incorrect bank account details provided by the second respondent to the first respondent referred to *supra*, the first respondent also made the applicants aware that payment was made by the first respondent, but regardless of this, the applicants elected to pursue this application against the first respondent, knowing that the second respondent was paid the amount claimed by the applicants.

[12.2] Regardless the above knowledge, the applicants persist in not seeking relief against the second respondent.

[12.3] The executor (Mr Motaung), accepted the payment referred to *supra* from an entity belonging to the second respondent in three instalments, none of which were in terms of the settlement agreement. The acceptance of these payments were outside the terms of the

settlement agreement. Mrs Ngubeni submitted further in this regard that the payments made in instalments on 6 and 10 August 2021 were clearly contrary to the settlement agreement, and the executor never questioned this non-compliance of the payment terms set out in the settlement agreement. These submissions morphed into a final contention that both parties to the settlement agreement were in breach thereof.

[12.4] Mrs Ngubeni conceded that the second respondent represented the first respondent through Bokwa Attorneys at the time the banking details of Major Issues were provided to the first respondent, purportedly to be the trust account details of the executor.

[12.5] Mrs Ngubeni submitted further that Bokwa Attorneys should have been joined as a party to the proceedings and that the applicants should have gone after Bokwa Attorneys, alternatively the second respondent, for payment of the outstanding balance of R5 000 000.00. It was suggested by Mrs Ngubeni that the mere fact that the outstanding balance is public funds, this Court should find it unreasonable for the first respondent to be held liable for payment of the said balance, because if the first respondent is found to be liable, it will result in the first respondent paying double the amount it already paid in terms of the settlement agreement.

[13] I agree with the submission on behalf of the first respondent only in as far as it relates to the contention that the first respondent only obtained knowledge of the incorrect bank account details provided by the second respondent when the applicants' replying affidavit was filed. However, for reasons set out *infra*, I do not agree with the remaining issues raised on behalf of the first respondent, especially the submission relating to applicants' persistence with this application, regardless of the alleged knowledge that the second respondent provided the incorrect bank account details to the first respondent.

- [14] Mr Zietsman SC correctly summarised the main issue to be determined, namely whether the first respondent made payment of the full settlement amount in terms of the settlement agreement to the executor as provided in clause 8 of the settlement agreement or to Oxy Trading.
- [15] In terms of clause 7 of the settlement agreement, the first respondent was obliged to make payment of the amount of R15 000 000.00 into the trust account of its attorney, namely the second respondent who was an attorney at Bokwa Attorneys at the time, to be held as security pending the fulfilment of Oxy Trading's obligations in terms of the settlement agreement.
- [16] The settlement amount was only payable by the first respondent's attorney into the trust account of the executor (Mr Motaung) after Oxy Trading complied with its obligations in terms of the settlement agreement. Clause 9 of the settlement agreement expressly provides that the payment must be made "into the account provided to the (sic) by the Plaintiff", being Oxy Trading.
- [17] I was referred to *Stabilpave (Pty) Ltd v South African Revenue Service*¹ where the Supreme Court of Appeal, with reference to the dictum in *Mannesmann Demag (Pty) Ltd v Romatex Ltd and Another*,² reaffirmed the position that when a creditor stipulates or requests a particular mode of payment, the debt will only be discharged if the debtor complies with it.
- [18] In terms of the settlement agreement, Oxy Trading expressly nominated the trust account of Mr Motaung in which payment of the settlement amount had to be made. It is clear from the objective evidence that neither Oxy Trading nor Mr Motaung nominated the bank account of Major Issues as the account in which the payment had to be made.
- [19] It is not the first respondent's case that Oxy Trading or Mr Motaung provided it or the second respondent with the bank account details as recorded in the second respondent's letter of 15 July 2021, nor is it the first respondent's case

¹ 2014 (1) SA 350 (SCA) at paras 9 – 10.

² 1988 (4) SA 383 (D) at 389F – 390D.

that the bank account details provided to the first respondent by the second respondent were in fact the trust account details of the executor (Mr Motaung) as contemplated in clause 8 of the settlement agreement.

[20] The applicants have clearly established that:

[20.1] The bank account details provided to the first respondent by the second respondent was not the trust account of the executor or the bank account which was nominated by either Oxy Trading or Mr Motaung.

[20.2] The said bank account is that of Major Issues, being a close corporation of which the second respondent was the sole member of at the time when payment was made by the first respondent on 16 July 2021 and when the three separate payments were made to the executor on 6 and 10 August 2021 referred to *supra*.

[20.3] Oxy Trading, through its representative, being Mr Motaung, only received payment in terms of the settlement agreement in the amount of R10 000 000.00.

[20.4] The second respondent was neither in terms of the settlement agreement nor in any other manner authorised to act during the execution of the settlement agreement on behalf of Oxy Trading or Mr Motaung.

[20.5] In *Barker v Probert*,³ the Appellate Division, dealing the with issue of a mandate to receive payment, held as follows:

“In considering whether York Estate was the agent of the defendant for receiving payment of the purchase price, it is important at the outset to bear in mind what the expression "agent of the defendant" means in the present context. It means no more than the person authorised by the defendant to accept payment of the purchase price by the plaintiff. It

³ 1985 (3) SA 429 (A) at 439D – G.

connotes a mandate by which the seller confers authority on the agent (his mandatary) to represent him in the acceptance of the payment of the purchase price, with the consequence, in law, that payment to the agent is equivalent to payment to the seller.

Viewed in this light, the contract between the parties itself shows prima facie that York Estate was the agent of the defendant for receiving the purchase price. The statement in the heading of the contract that York Estate was "acting as agents for" the defendant is inconclusive in this regard, since it may mean no more than that York Estate was the estate agent acting for the seller in procuring the sale, and an estate agent as such is not without more clothed with authority to receive the purchase price on the seller's behalf. But the provisions of clause 3, quoted earlier, go further and point to York Estate as being the defendant's agent for receiving the purchase price. In clause 3 it is expressly stipulated that all payments made in terms of it (including, on the facts here, the payment of the full purchase price) shall be made to the "agents", being York Estate. It is clearly implicit that York Estate is authorised by the defendant to receive the purchase price, for, were it not so, the purchaser would have been obliged to pay it to the defendant."⁴ (emphasis added)

[20.6] In applying *Barker supra* it was established by the applicants that neither Major Issues nor the second respondent was appointed by Oxy Trading or Mr Motaung as their agent to receive payment on their behalf in terms of the settlement agreement.

[21] With reference to *Baker supra*, the Supreme Court of Appeal held in *Minister of Agriculture and Land Affairs and Another v De Klerk and Others*⁵ as follows:

"[13] It is common cause that the full purchase price was duly lodged with the conveyancer in accordance with the terms of the deed of sale. The submission of counsel for the purchaser, however, loses sight of the question whether payment of the purchase

⁴ See also *Agu v Krige* 2019 JDR 0716 (WCC) at para 18 and *Minister of Agriculture and Land Affairs v De Klerk* 2014 (1) SA 212 (SCA) at paras 13 and 14.

⁵ 2014 (1) SA 212 (SCA) at para 13.

price to the conveyancer operated as discharge of the purchaser's obligation to pay the purchase price. In this regard I agree with the view expressed by Botha JA in *Baker v Probert*, that he has -

'difficulty in visualising a situation (save possibly for an exceptional case) in which there could be due performance of the obligation to pay the purchase price, by paying it to a third party, unless that third party was appointed and authorised by the seller to accept the payment, thus constituting him his agent for the purpose'." (emphasis added)

- [22] It is not in dispute that the second respondent was the first respondent's attorney at the time the settlement agreement was concluded and when the various payments were made referred to *supra*. The extent that the second respondent misled the first respondent into making payment of the amount of R15 000 000.00 in an incorrect bank account and not to the executor in terms of the provisions of the settlement agreement or to Oxy Trading, such misrepresentation does not bind Oxy Trading or constitutes a misrepresentation on behalf of Mr Motaung or Oxy Trading.
- [23] In determining the application and the evidence presented in the affidavits, a final order will only be granted on notice of motion if the facts, as stated by a respondent, together with the facts alleged by an applicant, that are admitted by the respondent, justify such order.⁶
- [24] As a general rule, decisions of fact cannot properly be founded on a consideration of probabilities, unless the court is satisfied that there is no real genuine dispute on the facts in question, or that one party's allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers, or that *viva voce* evidence would not

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Stellenbosch Farmers' Winery Ltd v Stellenbosch Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235 and *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-I.

disturb the balance of probabilities appearing from the affidavits.⁷ In *Fakie NO v CCI Systems (Pty) Ltd*⁸ the Supreme Court held:

“[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.” (emphasis added)

[25] I am in agreement with the submissions made by Mr Zietsman SC, namely that the first respondent cannot rely on the payment which was made into the bank account of Major Issues as compliance of or as a discharge of its obligations towards Oxy Trading in terms of the settlement agreement.

[26] The first respondent's defence lacks merit and the dispute raised by the first respondent is clearly untenable. The first respondent has not complied with its obligations in terms of the settlement agreement. There should be no debate regarding the inherent credibility of the applicants' factual averments, supported by the objective evidence, particularly that the bank account into which payment was made by the first respondent was not nominated by Oxy Trading or Mr Motaung.

[27] Accordingly, based on the common cause facts and the objective evidence, the application should succeed with costs.

Costs of postponement on 1 December 2023

[28] The application was set down by the applicants to be adjudicated on 1 December 2023. The application was postponed on 1 December 2023 by

⁷ *Cape Town City v South Africa National Roads Agency Ltd* 2015 (6) SA 535 (WCC) at 608F-I; *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 197A-B; *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd supra* at 634H-635C; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 and *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290F.

⁸ 2006 (4) SA 326 (SCA) at para [56]. See *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011 (1) SA 8 (SCA) at paras 19 – 20 and *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154.

agreement to 15 February 2024, and the costs occasioned as a result of the postponement stood over for later adjudication.

- [29] The application for the postponement by the first respondent premised on the non-availability of the first respondent's counsel. The applicants' opposition of the application for postponement was in essence based on the first respondent's overall unpreparedness to proceed with the application. This unpreparedness was further pointed out as being the first respondent's failure to timeously file its answering affidavit (13 days late) and its heads of argument.
- [30] The applicants' counsel, as in the case of the first respondent, was also not available to deal with the application. However, the applicants instructed another counsel timeously to deal with the application on 1 December 2023. The first respondent's explanation as to the steps it took to obtain the services of another counsel is vague and insufficient to conclude that the first respondent did everything within its means to obtain the services of another counsel.
- [31] Furthermore to the above, the first respondent was notified as early as 20 November 2023 about the applicants' stance, namely not to consent to the request for postponement. With this knowledge, the first respondent issued and served the application for postponement only on 29 November 2023 (2 days before the application was set down for adjudication).
- [32] The more detailed principles governing the grant and refusal of postponements have been summarised by the Constitutional Court in *National Police Service Union and Others v Minister of Safety and Security and Others*⁹ as follows:

“The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted

⁹ 2000 (4) SA 1110 (CC) at 1112C-F.

unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.”¹⁰

[33] In *Myburg Transport v Botha t/a SA Truck Bodies supra* it was held:

“Where an the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney I and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be.”¹¹

[34] The first respondent sought an indulgence from court, and as correctly submitted by Mr Zietsman SC, the first respondent should pay the costs associated with the postponement of the application on 1 December 2023. However, I am not inclined to order the first respondent to pay costs associated with the postponement on an attorney client scale.

[35] Accordingly I make the following order:

¹⁰ See also *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] 3 All SA 236 (A) at para 28 and *Myburg*

Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NmS) at 314F – 315J.
¹¹ At 315H – J.

