IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A178/21

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

_____ _____

DATE SIGNATURE

In appeal between:

MAKHAFOLA & VERSTER INCORPORATED **Appellant**

(Registration No. 2006/008701/21

and

HURTER & COETZEE LEGAL COSTS CONSULTANTS CC **Respondent**

JUDGMENT

MBONGWE J: [S. POTTERRIL CONCURRING]

INTRODUCTION

[1] This appeal from the Magistrate's Court, Tshwane Central, Pretoria, concerns two civil claims under case numbers 18119/2015 and 5825/2015 in respect of debts the Appellant owed to the Respondent. The parties had entered into a settlement agreement encompassing the total amounts in both claims and subsequently had the settlement agreement recorded by the court in terms of Rule 27(6) of the Magistrate's Court Rules. In due course and consequent to a failure by the Appellant to honour its payment obligations in terms of the settlement agreement, the respondent brought an application to court seeking relief in terms of Rule 27(9). The relief sought by the Respondent was granted by the Additional Magistrate and is the subject of this appeal.

FACTUAL MATRIX

[2] During February 2012 the Respondent herein instituted action proceedings against the Appellant under case number 12945/2012 seeking, inter alia, an order for payment of outstanding invoices for professional services rendered to and at the behest of the Appellant.

[3] Between 20 June 2012 and 27 June 2012 the parties entered into a partially written and partially oral settlement agreement, consequent to a pending application by the Respondent for summary judgment in respect of the claim under case number 12945/2012. In terms of the settlement agreement, initially an offer by the Appellant dated 20 June 2020, the Appellant undertook to pay R2 500 per month for 6 months which would be increased thereafter to interim payments of R5 000 per month reviewable over time. The offer was accepted by the Respondent's attorneys in a letter dated 27 June 2012. The capital amount owing at that stage stood at R50 800.66, including interest for the period May 2011 to 27 June 2012. The Appellant made three payments of R2000-00 each on 09 July 2012 and 0 8 August

2012 and a further R3000-00 on 10 November 2012. There was an outstanding balance of R43 800.66.

[4] On 6 February 2015 the Respondent instituted another action under case number 5825/2015 against the Appellant claiming payment of the amount of R59 071.83, including interest from 10 Feb 2012 to date of payment. The claim was in respect of professional services rendered in the period Feb 2012 to March 2013.

[5] During March 2015 the Respondent again instituted action against the Appellant under case number 18191/2015 seeking payment of R36 456.00 for a similar cause of action, being services rendered to the Appellant from September 2010 to January 2012

THE SETTLEMENT AGREEMENT (CASE No 5825/2015 and 18191/2015) ANNEXURE X6

[6] On 02 February 2017 the parties entered into a settlement agreement in respect of the Respondent's claims under case numbers 5825/2015 and 18191/2015. In terms of the agreement, the principal debt was calculated at R95 527.83. It was further agreed that the Appellant would pay a compromise amount of R55 000.00 in full and final settlement of the debt as follows;

6.1. Clause 1.2.1 R30 000.00 on or before 26 February 2017; and

6.2. Clause 1.2.2 R25 000.00 on or before 26 March 2017.

[7] At the request of the Appellant, the dates of payments in terms of clauses 1.2.1 and 1.2.2 were extended to 31 March 2018 and 30 April 2018 for payments of R10 000,00 and R45 00,00, respectively.

DEFAULT

[8] The settlement agreement between the parties contained the undermentioned conditions applicable in the event of default of payment by the Appellant;

8.1. Clause 1.4.1 of the agreement provides that <u>should</u> the Defendant;

1.4.1.1 Fail to pay any amount in terms hereof on the due date, and/or;

1.4.1.2 breach any of the obligations contained herein, and/or;

1.4.1.3 be placed under administration, provisional or final sequestration, and /or;

1.4.1.4 allow a judgment to be given against them, and/or;

1. 4.1.5 agree to a compromise with its Creditors;

8.2. Clause 1.4.2 <u>Then and in that case</u>:

1.4.2.1 The full outstanding Principal Debt becomes due and payable, without prejudice to any other right the Plaintiff might have;

1.4.2.3 The Plaintiff will immediately and without any notice proceed with the current litigation process against the Defendant alternatively reserves the right to institute de novo proceedings.

[9] Of significance is that the settlement agreement contained a clause to the effect that the agreement was in full and final settlement of the issues between them.

[10] The Appellant defaulted once again and the provisions of clause 1.4.2.1 of the agreement became operational, that is, the full amount of 95 527,83 owing became due.

<u>RULE 27(6) APPLICATION</u>

[11] The Respondent brought an application for summary judgment against the Applicant which resulted in the parties agreeing that the settlement agreement be recorded by the court in terms of Rule 27(6) of the Magistrate's Court Rules, the Respondent withdrawing the summary judgment application and the Appellant tendering the costs. The Respondent brought the relevant application and the settlement agreement was recorded by the court on 23 March 2018.

[12] Meanwhile, the Taxing Master had determined that the Appellant pays to the Respondent's costs of the application in an amount of R9 974.81, excluding the sheriff's fees.

[13] On 13 September 2018 and to enforce payment of the costs, the court ordered the Appellant in terms of section 65 A (1) of the Magistrate's Court Act 32 of 1944 to pay the amount of R800.00 per month from 30 September 2018.

[14] On 18 February 2020 the Respondent brought two applications in the Magistrate's Court in respect of the two matters forming the basis of the court recorded settlement agreement and seeking relief in terms of Rule 27 (9), that is, orders the Appellant was lawfully indebted to the Respondent in the amounts of R59 O71-83 (case number 5825/2015) and R36 456.00 (case number 18191/2015). The applications were heard on 15 April 2021 and were opposed by the Appellant.

GROUNDS FOR OPPOSITION TO RULE 27(9) APPLICATIONS

[15] The Appellant brought a number of grounds of opposition to the Respondent's application in terms of rule 27(9), including raising points *in limine* which were all dismissed by the court a quo in a judgment dated 13 May 2021. The findings and orders of the court a quo are the subject of this appeal. Hereunder I consider the grounds of the Appellant's opposition and the findings of the court *a quo* with

specific focus on the specific grounds of appeal this court is called upon to consider and pronounce on.

PRINCIPLES OF APPEAL

[16] It is a trite principle of our law that a court hearing an appeal is not at liberty to interfere with the factual findings of the court a quo, unless the findings were plainly wrong and/or that the trial court had misdirected itself (see *R v Dhlumayo & Another* 1948(2) SA 677 (A)). However, there was neither an erroneous factual finding nor application of the law in the matter before the trial court. The appeal comes before us, in my view, as a result of the Appellant's misunderstanding of the confined space provided by the provisions of rule 27 (6) for the granting of a rule 27(9) application following a failure to honour the terms of a settlement agreement recorded in terms of rule 27(6) of the Magistrate's Court Rules.

GROUNDS OF APPEAL

[17] The Appellant's grounds of appeal that appear and are considered in the analysis following hereunder.

ANALYSIS

[18] It appears to me that the Appellant fails to appreciate the nature and the connectivity between the individual two actions combined in the recorded settlement agreement in terms of rule 27 (6) and the effect of the provisions of rule 27(8) thereto. The settlement agreement, firstly was recorded in terms of rule 27(6) without being made an order of court. It was, consequently not a *transactio*. Secondly, Clause 1.4.2.3 in each settlement agreement explicitly reserved the respondent's right to proceed with the suspended action proceedings or institute the action proceedings *de novo* in the event that the Appellant defaulted on payment by the future date stipulated in the recorded settlement agreement.

[19] By the operation of the provisions of rule 27(8), on the recordal of a settlement agreement in terms of rule 27(6) the continuation of action proceedings is suspended. This, in my view, is to afford the party who carries the obligation to perform in terms of the settlement agreement to do exactly that when the time for performance stipulated in the recorded settlement agreement comes. In my view, the Appellant misconstrued firstly the nature and stature of the recorded settlement agreement in thinking that it had become a transactio and, secondly, the Appellant was oblivious to the implication of the provisions of rule 27(8) which suspends the action proceedings. This is evidenced by the Appellant's contention in the court a quo that the two actions concerned were *lis pendent* and that the recorded settlement agreement ought to be dismissed.

[20] In the commentary on rule 27(6) of Jones & Buckle, Tenth Edition it is stated:

> *''The effect of the recording by the court of the terms of a settlement agreement is that further proceedings are stayed in terms of subrule 27(8), and that an application for the entry of judgment in terms of the settlement agreement may be brought under subrule (9) if one of the parties fails to comply with the terms thereof. The terms of settlement are recorded by the court without entry of judgment, except if the settlement provides that the court may make the settlement an order of court, in which event the court may do so.''*

[21] The situation as in the present matter is addressed in Jones and Buckle in the following terms:

> *'An agreement of compromise, a transactio excludes an action on the original cause of action, except if the settlement expressly or by clear implication provides that, on non-performance with the provisions thereof, a party can fall back on the original cause of action. It is submitted that the subrule cannot be construed as having altered the common law by conferring upon a*

magistrate's court the power to set aside a settlement and permitting the plaintiff to revert to his original cause of action. It if further submitted that, in any event, a settlement which has been made an order of court in terms of subrule 27(6) cannot be set aside under this subrule: setting aside of such a settlement would amount to rescission of a judgment of the court.''

[22] Clause 1.4.2.3 in the settlement agreement between the parties in the present matter expressly states that the respondent reserves its rights to continue with its extant actions should the Appellant default the terms of the agreement. I have already found that the recorded settlement agreement between the parties was not made an order of court and, consequently did not constitute a transactio as contended for by the Appellant. The respondent was accordingly entitled to fall back on its original cause of action, not only by the provisions of clause 1.4.2.3 of the agreement, but also by virtue of the settlement agreement not having been made an order of court. A transactio would have precluded the respondent from relying on the original cause of action.

[23] A default of payment by the date stipulated in the recorded settlement agreement would lift the suspension on the action proceedings and trigger the operation of clause 1.4.2.3 of the settlement agreements. In its judgment dated 23 September 2013, the court in the matter of *Khwela and Another v Dhlamini* (AR 231/2013) ZAKZPHC, the court correctly stated that once the two requirements for the granting of an application in terms of rule 27(9) are met, namely, proof of a settlement agreement that was recorded in terms of rule 27(6) and has not been set aside and that the debtor has not honoured its payment obligations in terms of the settlement agreement, *'the application ought to be granted, whereupon the matter becomes res judicata''*. At that stage a settlement agreement recorded in terms of rule 27(6) constitutes a judgment and an order against the debtor, the Appellant *in casu*. Explaining a *transactio*, Solomon J in *Cachalia v Harberer & Co.* 1905 TS 457 at p. 462

stated: ‘’*Now, what is a transactio? I take the definition given by Grotius, who defines it as an agreement between the litigants for the settlement of a matter in dispute.’’*

[24] It is worth re-iterating that the recordal of a settlement agreement merely affords the debtor (Appellant) an opportunity to discharge its obligations in terms of the settlement on the future date stipulated in the settlement agreement and rule 27(8) suspends the existing action proceedings to afforded the Appellant the opportunity to discharge its obligations on that future date. Thus the settlement agreement does not render extinct the suspended action, as the Appellant contends. The suspended action remain very much alive and so are the terms and conditions agreed upon and contained in the relevant settlement agreement. It was the failure of the Appellant to honour the terms of the recorded settlement agreement that lifted the suspension in terms of rule 27(8) and thereby triggered the operation of the clause 1.4.2.3 of the agreements of settlement thus entitling the Respondent to proceed to exercise its rights reserved therein and seek relief in terms of rule 27(9).

[25] The two jurisdictional facts that the court *a quo* had to consider in the application in terms of rule 27(9), namely, the existence of a recorded settlement agreement that has not been set aside and a demonstration that the Appellant had failed to honour the terms of the settlement agreement were present and the court a quo was enjoined to grant the application in terms of rule 27(9). It is apposite to refer to the provisions of rule 27(9) which read thus:

> *“When the terms of a settlement agreement which was recorded in terms of sub-rule (6) provide for the future fulfilment by any partyof stated conditions and such conditions have not been complied with by the party concerned, the other party may at any time on notice to all interested parties apply for the entry of judgment in terms of the settlement.’’*

[26] In my view, the Appellant's contentions both in the court a quo and in this hearing demonstrated a misunderstanding or oblivion to the application of the provisions of rule 27, particularly the intricate nature of a recorded settlement agreement that has not been made an order of court. In short, at the time the settlement agreement was recorded in terms of rule27(6), the Appellant had not defaulted in terms of the settlement, but was given a future date(s) by which to discharge its obligations in terms of the recorded settlement agreement. Thus the contention that the settlement agreement at that stage constituted a *transactio* is misplaced and ought to be rejected.

CONCLUSION

[27] As the Appellant has premised its grounds of appeal on this rejected contention, it follows, therefore, that the appeal ought to be dismissed.

[28] I now turn to consider the Appellant's appeal against the punitive costs order mulcted on the Appellant consequent to the postponement of the hearing of the respondent's applications on the 9 March 2020. It is trite law that the determination of payment of costs is in the discretion of the court which has to be exercised judicially. A court of appeal is constrained against interference with the exercise of the discretionary powers of the court a quo [AUTHORITY] In any event the court a quo was well versed with and better placed to assess all the circumstances resulting in the absence of the Appellant's counsel from court on the date the matter was set down for hearing.

COSTS

[29] It is the general principle that costs follow the outcome of the proceedings.

ORDER

[30] Resulting from the findings in this judgment, the following order is made:

1. The appeal is dismissed.

2. The Appellant is ordered to pay the costs on the opposed party and party scale.

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M. P. N. MBONGWE J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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S. POTTERRIL J

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Appellant:	ADV T KWINDA
Instructed by:	MAKHAFOLA & VERSTER INCORPORATED
	PRETORIA
For Respondent:	ADV D.P VILLER
Instructed by:	VERMAAK BEESLAAR ATTORNEYS
	PRETORIA

JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON _____ AUGUST 2022.

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