IN THE HIGH COURT OF SOUTH AFRICA

(GRAHAMSTOWN HIGH COURT)

APPEAL NO. CA 05/2012

CASE NO 984/2011

Reportable	**Yes**

Ex parte:

PETRUS JACOBUS LE GRANGE **First Appellant**

YOLANDA LE GRANGE **Second Appellant**

In re:

PETRUS JACOBUS LE GRANGE **Plaintiff**

and

YOLANDA LE GRANGE **Defendant**

FULL BENCH APPEAL JUDGMENT

D VAN ZYL ADJP:

[1] It has always been the trend in divorce proceedings, more so than in other civil actions, for parties to elect to resolve their disputes in a non-adjudicatory manner. Through the use of dispute resolution mechanisms

designed to foster the amicable settlement of disputes, such as conciliation or mediation, parties arrive at a negotiated settlement of the issues raised in an action for the dissolution of their marriage relationship. The usual outcome of such a negotiated settlement is the conclusion of an agreement, for the terms of the settlement to be recorded in a written document, and for it to be made an order of the court. The record of this agreement or contract is commonly referred to as a settlement agreement, a deed of settlement or a consent paper. The agreement usually deals with matters such as the division of the assets of the parties, the payment of maintenance, custody of, and contact with the children, and the payment of the costs of the proceedings.

[2] In divorce proceedings a negotiated settlement can only take place in the context of existing legal proceedings. The reason for this is the fact that only the court can dissolve the marriage and has to approve any agreement in relation to the custody and maintenance of the children born of the marriage. This has two consequences: The first is that as a rule negotiated settlements in divorce proceedings also deal with other issues arising from the consequences of the dissolution of the marriage, such as the proprietary rights of the parties and the payment of maintenance by the one party to the

other. Secondly, like any other negotiated settlement, the parties will inevitably also give consideration to the question of the enforcement of the terms thereof in the event of any future non-compliance therewith by any of the parties thereto. As the agreement has been reached in the context of an existing action, the parties as a result more often than not seek enforcement through the machinery of the court by agreeing that the settlement agreement be made an order of the court.

[3] This appeal is in broad terms concerned with the question of when the court will be entitled to make a settlement agreement between parties in divorce proceedings an order of court, and when to comply with a request by the parties to do so. The facts of the case can be summarised as follows:- The two appellants were husband and wife. Their marriage was in community of property. In April 2011 the first appellant commenced divorce proceedings against the second appellant. The relief sought in paragraph 2 of his particulars of claim was for an order declaring the two appellants to be the co-holders of parental responsibilities in respect of their two minor children as envisaged in section 18(2)(a) of the Children's Act[1]. The relief claimed with regard to the respective rights and obligations of the parties in the exercise of their parental duties were set out in some detail. The first

[1] Act 38 of 2005.

appellant's claim in paragraph 3 further included an order that the second appellant forfeit the benefits arising from their marriage in community of property.

[4] The appellants chose to resolve the issues arising from the action and entered into a settlement agreement. It was agreed that the divorce would proceed on an unopposed basis with the incorporation of the terms of the settlement agreement into the order of the court. The agreement further provided that the second appellant would retain certain movables and that the first appellant would retain the remainder. The agreement then proceeded to deal with the immovable property and provided that the second appellant would receive a sum of cash money, together with certain purchased items, all amounting to R50,000,00. In return the second appellant would transfer her half share in the immovable property to the first appellant, and both parties undertook to do what was necessary to achieve this, such as the signing of the required documentation.

[5] With regard to the children, the agreement recorded an arrangement which differed in several respects from the relief initially claimed by the first appellant in paragraph 2 of his particulars of claim. It provides for the

parties to be co-holders of parental responsibilities and rights and determines matters such as the place of residence of the children and their maintenance. The family advocate, who was ordered by the court in terms of section 4 of the Mediation in Certain Divorce Matters Act[2] to investigate and report on the interests and welfare of the children, considered this part of the agreement against the **"best interests of the child standard"** in section 7 of the Children's Act. She concluded that she was satisfied that the agreed arrangements would serve the best interests of the two children. This report formed part of the documentation placed before the court *a quo* at the hearing of the matter.

[6] The action then proceeded on an unopposed basis. At the hearing of the matter and after receiving the evidence of the first appellant, the court granted a decree of divorce together with orders in terms of paragraphs 2 and 3 of the particulars of claim. In its reasons in the application for leave to appeal the court *a quo* explained its refusal to incorporate the terms of the settlement agreement into its order by stating that it followed the principle in the judgment in *Thutha v Thutha*[3] (*Thutha*), wherein the court in essence set its face against the practice of the different courts in this division of making or incorporating settlement agreements into the judgment or order of the

[2] Act 24 of 1987.
[3] 2008(3) SA 494 (TkH).

court. The court *a quo* granted the appellants leave to appeal on the limited issue of the correctness of the *Thutha* judgment, and **"whether or not the guidelines in that decision on when to make a settlement agreement an order of court is a proper exercise of the discretion and should be followed in this Division."** [4]

[7] The Supreme Court of Appeal subsequently on application to it extended that ground of appeal in accordance with paragraphs 1.1 and 1.2 of the appellants' notice of motion to also include:

> **"1.1 That the Court had erred in granting orders in terms of the First Applicant's Particulars of Claims, not requested by the parties despite the issues having been agreed on difference (sic) terms between the parties in a Deed of Settlement.**
>
> **1.2 That the Court had erred in not granting an order as requested by the Applicants as set out in their Deed of Settlement at least in respect of the immovable property."**

[8] At the hearing of the appeal the appellants were represented by Ms *Crouse*, while Mr *Paterson* SC and Ms *Watt* acted as *amicus curiae* at the request of

[4] The judgment in the application for leave to appeal is reported as *PL v YL* 2012(6) SA 29 (ECP). The order appears at 40H (para [52]).

the court. They are thanked for their assistance. By way of introduction it must be said that although some of the aspects which I intend to deal with in this judgment may apply with equal force to agreements to settle issues in other actions, it must be made clear at the outset that this judgment deals with, and is limited to settlement agreements in the context of divorce proceedings where the parties have agreed that the terms of their agreement be made an order of the court. The order in other words presupposes the existence of an agreement by the parties as the basis for it. It is in this sense that the terms **"judgment by consent,"** or simply **"consent judgment"**, are used in this judgment.[5]

[9] When a settlement agreement is concluded in the context of a civil action its aim is to relieve the court from its duty to decide the issues in the action. Where it has the effect of disposing of the issues between the parties as raised by the action itself, it would in most instances constitute a compromise *(transactio)*.[6] A compromise is subject to the common law

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[5] An instructive and well researched article on the subject of consent judgments is by Hutchison **"Contracts embodied in orders of court: The legal nature and effect of a judgment by consent."** Essays in Honour of M M Corbett at page 229 to 263.

[6] **". . .the agreement of compromise, also known as *transactio*, is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by diminishing his claim or by increasing his liability – see for example *Cachalia v Harberer & Co* 105 TS 457 at 462, *Dennis Peters Investments (Pty) Ltd v Ollerenshaw and Others* 1977(1) SA 197 (W) at 202, *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others* 1978(1) SA 914 (A) at 921, *Trust Bank van Afrika Bpk v Ungerer* 1981(2) SA 223 (T) at 225 and *Tauber v Von Abo* 1984(4) SA 482 (E) at 485 -6"** per Leach J in *Karson v Minister of Public Works* 1996(1) SA 887 (E) at 893F.

principles of contract.[7] The implication thereof is that the agreement may be enforced by any party thereto or resiled from by any party on the same grounds as those applicable to contracts in general.[8] Where the parties agree to resolve their dispute in this manner one of two things may happen:- They may agree to withdraw the action, in which event any dispute regarding compliance with the settlement agreement must be dealt with as constituting a breach of contract. The enforcement of any remedy available to the aggrieved party, such as specific performance, can only be achieved by the commencement of a new action. Because the original action had been terminated, the court cannot, and does not play any active role in the supervision of the enforcement of the settlement agreement.

[10] The parties may however choose to agree to ask the court to give judgment on the issues raised by the action in accordance with the terms of their settlement agreement. One of the advantages of this arrangement is that the court retains jurisdiction over the matter in the sense that it has the inherent power or authority to ensure compliance with its own orders.[9] This enables the parties, in the event of a failure by any one of them to honour the terms of the order, to return directly to the court that made the order, and to seek

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[7] See Caney **The Law of Novation** at page 47 and *Blou Bul BoorKontrakteurs v Mclachlan* 1991(4) SA 283(T).
[8] Voet **Commentarius ad Pandectas** 2.15.23; *Westmacott v Johannesburg Motor Mart* 1921 NPD 202.
[9] See Taitz **The inherent jurisdiction of the Supreme Court** at page 19 *et seq*. Also *Ex Parte Millsite Investment Co (Pty)Ltd* 1965(2) SA 582 (T) at 585H.

the enforcement thereof without the necessity of commencing a new action. It is this second method which is preferred in divorce proceedings, no doubt as stated by counsel in argument, for the simple reason that it is the more attractive option. Why that is so will be dealt with later in this judgment.

[11] As we are concerned with a divorce action, it is necessary to point out that a distinction must be made between settlement agreements in such proceedings and those concluded in other types of litigation. This distinction is a necessary consequence of the fact that the dissolution of a marriage relationship and its consequences are primarily regulated by statute and concerns issues of status and the welfare of children in respect whereof the court fulfils an important function as upper guardian. The ability of the parties in a divorce action to reach a settlement or possibly a compromise with regard to the issues or disputes arising in such proceedings must as a result be determined with reference to the provisions of the Divorce Act.[10] These issues may fall into two categories. In the first category are those matters in respect of which the legislature has committed to the court, and not to the parties, the responsibility and consequently the authority of making a decision. Section 3(a) read with section 4(1) of the Divorce Act expressly provides that the court may grant a decree of divorce when its

[10] Act 70 of 1979.

proved that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there are no reasonable prospects of the restoration of a normal marriage relationship.[11] The plaintiff must as a result place evidence before the court to establish this fact.

[12] A further issue which the court is by law required to determine and regulate is the interests of the minor or dependent children of the marriage. Our law, as it is now reflected in the Constitution,[12] the Children's Act[13] and the Divorce Act prescribes that the child's best interests must determine the outcome when a court has to make an order regarding a child. In terms of section 6 of the Divorce Act the court may not grant a decree of divorce until it is **"satisfied"** that the arrangements that have been made with regard to the welfare of the children of the parties are satisfactory or the best that can be achieved in the circumstances. The factors to be considered in this regard are reflected in section 7(1) of the Children's Act.[14] Once the court is so satisfied it may make any order it deems fit with regard to the guardianship, custody, access and maintenance of the children. To achieve this the court in divorce proceedings is also empowered by section 34, read with section 29

[11] The second ground of divorce is the mental illness or continuous unconsciousness of a party to the marriage as contemplated in section 5 of the Divorce Act.
[12] Section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996. **"A child's best interests are of paramount importance in every matter concerning the child."**
[13] Section 9 of the Children's Act provides that **"In all matters concerning the care, protection and well being of a child the standard that the child's best interest is of paramount importance, must be applied."**
[14] See *McCall v McCall* in 1994(3) SA 201(C).

of the Children's Act, to make a parenting plan as envisaged in section 33 of that Act an order of the court.

[13] What this means is that in divorce proceedings the parties themselves cannot, by reaching agreement in respect of the aforementioned two issues, compromise and dispose thereof without the intervention of the court. It is as a result implicit in any settlement agreement wherein the parties have reached agreement on any of the matters falling in the first category, that it is subject to the approval of the court. Should the court sanction the terms of the settlement and incorporate it into its order, it represents a decision of the court made on the evidence placed before it.[15] The parties can accordingly not have any expectation that their agreement to make the terms of the settlement agreement on these issues an order of the court, will automatically be acceded to. In the second category of matters which the parties may choose to include in their settlement agreement falls their proprietary rights, and the payment of maintenance by the one spouse to the other after the divorce. In respect of these two matters the Divorce Act pertinently empowers the court to give effect to an agreement between the parties. Its

[15] In *Rowe v Rowe* 1997(4) SA 160 (SCA) at 167B - C Hefer J explained it in the following manner in dealing with the recission, on the ground of fraud, of a decree of divorce that incorporated an agreement of settlement: **"In my view this constituted a fraud perpetrated on the Court itself. After all the Court does not act as a mere recorder when the parties to divorce proceedings in which minor children are involved, settle their differences; it is duty bound to satisfy itself that their arrangements will serve the best interests of the children; and this it can only do on truthful information supplied by the parties."**

authority is found in section 7(1) of that Act. It reads as follows: **"A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other."** In contrast to issues in the first category, an agreement to settle the proprietary consequences of the divorce and the payment of maintenance to one of the spouses relieves the court of the duty to decide these two issues. Subject to what is stated hereinafter with regard to the payment of maintenance to a former spouse,[16] these are matters that are therefore capable of being compromised. In practice any settlement with regard to the assets of the parties that has the effect of modifying the proprietary consequences of the divorce or disposing of issues arising therefrom, would inevitably also constitute a compromise. Failing agreement, these issues, where they have been raised on the pleadings, are to be determined by the court on the evidence placed before it. To this category may also be added any agreement relating to the costs of the action.

[14] Counsel for the two appellants and the *amici curiae* correctly acknowledged that the court is not compelled to incorporate into its order an agreement of settlement dealing with any of the issues falling in the second category, and

[16] See paragraph [30] of this judgment.

that there is nothing in the provisions of the Divorce Act that in any way detracts therefrom. The power of the court in this regard is clearly of a discretionary nature. The reason for this lies not only in the use of the word **"may"** in section 7(1) of the Divorce Act, but also in the adversarial nature of our legal system. Once the parties to a civil action have reached agreement in relation to the issues raised by the action, and elected not to seek the relief claimed therein, the mandate of the court to determine those issues and to grant the relief claimed by the respective parties, is terminated.[17] Any order which is then granted by the court is simply made with a view of assisting the parties in resolving their disputes and facilitating the enforcement of the terms of their agreement. It must accordingly be accepted as a point of departure that the court is not compelled or obliged to incorporate an agreement as envisaged in section 7(1) into its order. For reasons which are to become apparent in the discussion that follows, the enquiry is rather focused on a determination of the considerations relevant to the exercise of the court's discretion in this regard, and the question whether the approach adopted by the court in *Thutha* constitutes a proper exercise of that discretion.

[17] See para [24] of this judgment.

[15] An overview of the reported decisions on the subject shows that there are two basic requirements that are to be met when the court considers a request to grant a judgment in accordance with the terms of a settlement agreement. The first is that the court must be satisfied that the parties to the agreement have freely and voluntarily concluded the agreement and that they are *ad idem* with regard to the terms thereof.[18] As will be pointed out later in this judgment[19], the granting of an order in terms of section 7(1) of the Divorce Act holds certain consequences for the rights of the parties. To the first requirement must accordingly be added that the court must satisfy itself that the parties are in agreement that the terms of their settlement be made part of the order of the court. The second requirement is that the order sought must be a competent and proper one to make in the circumstances. The first requirement speaks for itself. It is the second requirement and in particular its content that is relevant to this appeal and the issue raised in the *Thutha* judgment. What it requires in the first place is that it must be competent for the court to make the settlement agreement an order. That is, it must relate directly or indirectly, to an issue or *lis* between the parties that is properly before the court, and in respect whereof, but for the settlement agreement, it would possess the necessary jurisdiction to entertain.[20] Accordingly, to

[18] Caney *op cit* at page 57.

[19] See paras [29] to [32].

[20] *Schierhout v Minister of Justice* 1925 AD 417 at 423; *Ex Parte Venter and Spain NNO*; *Fordom Factoring Ltd & Others intervening*; *Venter and Spain v Povey and Others* 1982(2) SA 94 (D) at 101; *Hodd v Hodd*; *D' Aubrey v D' Aubrey* 1942 NPD 198 at 204 to 205 and *Van Schalkwyk v Van Schalkwyk* 1947(4) SA 86 (O) at 98.

quote the example in the case of *Hodd v Hodd; D'Aubrey v D'Aubrey (Hodd v Hodd)*:[21]

". . .if two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to Court to have that agreement made an order, merely on the ground that they preferred the agreement to be in the form of a judgment or order because in that form it provided more expeditious or effective remedies against possible breaches, it seems clear that the Court would not grant the application".[22]

In the second place, the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order. This means:- (a) that the terms must not be illegal, contrary to public policy or good morals or in violation of a protected right in the Constitution,[23] and (b), that it should hold some practical and legitimate advantage.[24]

[16] Turning then to deal with the judgment in *Thutha*, the court raised concerns regarding the practice in the Eastern Cape courts of incorporating

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[21] Supra.
[22] At 204.
[23] See generally Christie **The Law of Contract in South Africa** 5th ed at page 343 to 349; *Schierhout v Minister of Justice* supra and *Schutte v Schutte* 1986(1) SA 872 (A) (an attempt to oust the jurisdiction of the courts); *Swadif (Pty) Ltd v Dyke NO* 1978(1) SA 928 (A) at 945A - B (the order cannot seek to bind or place obligations on third persons who are not parties to the settlement agreement); *Benefeld v West* 2011(2) SA 379 (GSJ); *Shields v Shields* 1946 CPD 242; *Kotze v Kotze* 2003(3) SA 628 (T).
[24] *Hodd v Hodd*; *D' Aubrey v D' Aubrey* supra at 207; *Van Schalkwyk v Van Schalkwyk* supra at 96, 98; *Mansell v Mansell* 1953(3) SA 716 (N) at 721H and *Claassens v Claassens* 1981(1) SA 360 (N) at 364C – D.

settlement agreements in divorce proceedings into court orders. The applicant therein sought the enforcement by way of contempt of court proceedings of an order wherein a settlement agreement was incorporated. The decree of divorce included an order that **"The Deed of Settlement being Exhibit B annexed hereto be and is hereby made an Order of Court."** The respondent was accused of having failed to comply with the terms of what was contained in the deed of settlement. The court was asked to hold the respondent in contempt, and to sentence him to a term of imprisonment which was to be suspended pending his compliance with the terms of the agreement. The application was dismissed for the reason that the terms of the order relied upon were not capable of enforcement. The court (per Alkema J) held that a court order must **"be effective, enforceable and immediately capable of execution by the sheriff, his deputy, or members of the South African Police Service."**[25] To comply with this requirement it was found that the order must be one *ad factum praestandum* so as to be capable of enforcement by way of civil contempt proceedings. To be capable of execution an order must be for the payment of money *simpliciter* (*ad pecuniam solvendam*). This, according to the court in *Thutha*, means that those terms of a settlement agreement that are not capable of ready enforcement in any of these two ways without redress to further litigation,

[25] At 499E (para [15]).

must as a rule not be embodied in a court order.[26] By way of example, this would include orders of which the wording are not clear and unambiguous, and where the implementation of the terms are left to the discretion of the one of the parties or a third person such as the sheriff.[27]

[17] The practice of making an agreement between the parties to litigation in civil matters an order of the court has a long history and has its origins in our common law.[28] A similar practice exists in the English law on which our own rules of civil procedure is primarily based.[29] In *Van Schalkwyk v Van Schalkwyk*[30] the court (Van den Heever J) sketched the historical background to this practice and came to the conclusion that **"The tradition of such orders is very strong in our legal system."**[31] In *Schierhout v Minister of Justice*[32] the Appeal Court (Kotze JA) had no difficulty in confirming the existence of this practice as part of our law and said that **". . . if there exists no objection in the nature or terms of such compromise or other agreement between the parties, embodied in a consent paper, the practice of the courts is to confirm it, and make the agreement arrived at a rule or order of court"**[33]

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[26] At 507 G (para [53]).
[27] At 507 C – D (para [53]).
[28] Hutchison *op cit* at page 235.
[29] Erasmus **"The interaction of substantive and procedural law: The South African Experience in Historical and Comparative Perspective"** Stell Law Review 1990 3 at page 348 *et seq* and Zimmermann & Visser **Southern Cross, Civil Law and Common Law in South Africa** at page 141 *et seq*.
[30] Supra. Also *S v Loubser* 1969(2) SA 652 (C) at 662A.
[31] At 95.
[32] Supra.
[33] At 423.

[18] In divorce matters it is similarly a long standing practice which preceded section 7(1) of the Divorce Act,[34] and although regulated in one way or another by the practice rules of most of the divisions, it is with the exception of the KwaZulu-Natal division, a firmly established practice to incorporate settlement agreements into an order of the court. The rule of practice in KwaZulu-Natal provides that **"Unlike some other divisions, it is an established and long-standing practice that the entire agreement of settlement cannot be made an order of court."**[35] The application of this practice rule is explained as follows by Didcott J in *Claassens v Claassens*:[36]

> **"Here** [the Natal provincial division] **as a rule, the Court simply orders the parties on request to do what they have promised, to the extent that such lends itself to a command, falls within its jurisdiction, and is otherwise unobjectionable. It spells this out, by and large choosing its own words. Seldom does it even mention the agreement. But the parts used as material for its order are converted into one in that way, no less surely and much more precisely. For the rest, the litigants must look to their contractual rights, which hold no immediate interest for it."**[37]

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[34] *Eksteen v Eksteen* 1920 OPD 195; *Frazer v Frazer* 1922 EDL 85; *Smith v Smith* 1925 WLD 183; *Hoogendoorn v Hoogendoorn* 1937 CPD 123; *Berkowitz v Berkowitz* 1956(3) SA 522 (SR).

[35] Practice Rule 15.

[36] Supra.

[37] At 363 E – F.

[19] In *Thutha* the court approved of this approach to settlement agreements in divorce matters and proceeded to find that the practice of the different courts in the Eastern Cape to make or incorporate deeds of settlement into a court order should not be followed. On an analysis of the rules of practice and the joint rules of the different courts in this division, it was found that they do not compel a court to do so. There also, in the court's view, does not exist any case law in this division that may constitute authority for such a proposition. It was further found that section 7(1) of the Divorce Act does not **". . . authorise a court to make a settlement agreement part of the court order: it merely sanctions an existing power of the court, in appropriate circumstances, to make an order in accordance with certain terms of the contract. The court therefore, on my reading of the section, retains the discretion to decide which terms of the settlement agreement is capable of becoming a court order, and which terms are best suited to leave as a contract between the parties upon which they can sue."**[38]

[20] With regard to those matters which the court are obliged to decide in terms of section 6 of the Divorce Act, such as the custody of the children born of the marriage and their maintenance, the *Thutha* judgment says must be dealt with expressly in the court order itself, and must **". . . not [be] left to the terms**

[38] At 505 (para [43]). That section 7(1) does serve, and is intended to confer upon the court the authority or power to grant an order as envisaged therein is apparent from the historical background of this subsection. This aspect is dealt with in paras [23] to [30] of this judgment.

of an agreement of settlement."[39] On the other hand, issues such as those relating to the division of the assets, the settlement of the proprietary rights of the parties and, what the court described as incidental matters arising from the dissolution of a marriage, should **". . . best be left to the terms of a settlement agreement upon which an aggrieved party may sue, rather than incorporating those issues into an order of court readily capable of execution."**[40] This must however not, according to the court, be regarded as a hard and fast rule, and a court may in appropriate circumstances embody certain terms of a settlement relating to custody, maintenance and the settlement of certain proprietary rights, in the court order. It is however always subject to the proviso that **". . . those terms must be capable of ready enforcement by execution without redress to further litigation."**[41]

[21] In summary, what the *Thutha* judgment in essence says is the following: The practice of the wholesale incorporation of the terms of a settlement agreement into an order of court by simply recording that the terms thereof are made an order of the court, must not be followed. Unless the settlement agreement translates into a decree to do something, or to refrain from doing something, it should not be made an order of court. Instead, those terms in

[39] At 508A (para [53.7]).
[40] At 508B (para [53.8]).
[41] At 508 I (para [55]).

the agreement which deal with matters in respect of which the court is required to make a finding in terms of section 6 of the Divorce Act, must be translated by the court into a format that makes it capable of ready enforcement, and must be recorded in the order. All other matters with which the settlement agreement deals with must be left as contractual terms and it is up to the parties to choose to treat non-compliance therewith as a breach of contract.

[22] On a reading of the judgment in *Thutha,* it is evident that the court placed reliance for its findings on the decision in *Mansell v Mansell*[42] *(Mansell)*, on which the practice in KwaZulu-Natal not to turn an entire settlement agreement in divorce proceedings into an order of court, is also based. The law governing divorce and its consequences has undergone significant changes since the judgment in *Mansell*. Reforms introduced by the legislature through the Divorce Act were aimed at managing the dissolution of the marriage relationship and its consequences by facilitating the granting of a divorce where there is no hope of the restoration of a normal relationship. It moved away from the fault-based grounds for divorce and introduced the concept of an irretrievable break-down of the marriage relationship.[43] These reforms, as I will attempt to show, were not limited to

[42] Supra.
[43] *Schwartz v Schwartz* 1984(4) SA 467 (A) at 472E – 475D.

the dissolution of the marriage itself, but were also directed at an amicable resolution of the issues which arise from the consequences of its dissolution. Whether these reforms have any relevance to the application of the principle enunciated in *Mansell* requires an investigation of the legal setting in which the *Mansell* judgment was made, and whether any subsequent developments in the law relating to divorce may in any way influence or affect the reasoning used in arriving at the conclusions reached therein.

[23] As stated, the source of the court's authority to make a settlement agreement an order of court in divorce proceedings, regulating the proprietary consequences of the divorce and the payment of maintenance to a former spouse, is now to be found in the provisions of section 7(1) of the Divorce Act.[44] The purpose and importance of this subsection is locked up in its history and the reason for its existence as part of the Divorce Act.[45] It replaced section 10(1)(b) of the Matrimonial Affairs Act[46] which was enacted with the aim of removing the uncertainty that had been caused by the full-bench decision in the then Natal Provincial Division in *Hodd v Hodd*, and an earlier decision in the Free State in *Schultz v Schultz*.[47] In

[44] See para [13] of this judgment.
[45] See *inter alia* Hahlo **The South African Law of Husband and Wife** 2nd ed fn 29 on page 15.
[46] Act 37 of 1953.
[47] 1928 OPD 155.

Hodd v Hodd the court held that an agreement between spouses in a divorce action which provided for the maintenance of a former spouse could not be made part of the decree of divorce. This finding was based on the view that at common law the reciprocal duty of support which exists between spouses during the existence of the marriage comes to an end upon the dissolution thereof.[48]

[24] As a result the court in *Hodd v Hodd* held that any agreement relating to the payment of such maintenance was not based on any antecedent right to receive maintenance after the divorce, and that as such it was not capable of representing any agreed settlement or compromise of any claims arising from the action. **". . . although it will undoubtedly give effect by way of orders to rights recognised by the law, and to agreed settlements and compromises based upon those rights. . . some cause of action, or recognised legal right to invoke the assistance of the Court, must exist before the Court will make any order, except, perhaps dismissing the proceedings."**[49] This finding is premised on the adversarial model on which dispute resolution is based in our law, namely that the court's mandate or jurisdiction is determined by the *lis* between the parties. The court's authority in other words does not extend beyond the issues which the action is capable of raising, and which the parties

[48] *Schutte v Schutte* supra at 880 and *Strauss v Strauss* 1974(3) SA 79 (A) at 93 H.
[49] *Hodd v Hodd* supra at 204 – 205.

themselves have raised in their pleadings.[50] It follows therefrom that if there exists no duty to maintain, and therefore no antecedent right to claim maintenance after the marriage had been dissolved, it is not an issue which the court may competently decide and rule on in its judgment and the order issued pursuant thereto.

[25] To do so would mean that the court, in the words of Selke J, adopted by Broome JP in *Mansell*, would act as **". . . a mere registry of documents or agreements. . ."**,[51] The result of this was that the courts refused to make settlement agreements which provided for maintenance after the dissolution of the marriage an order of the court, unless it can be found to constitute an agreement **"on a claim relating directly or indirectly, wholly or in part, to**

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[50] It is explained as follows by Jacob and Goldrein on **Pleadings: Principles and Practice** at 8 – 9, quoted with approval by Heher J in *Jowell v Bramwell-Jones and Others* 1998(1) SA 836 (W) at 898F – J: **'As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings. . . . For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature it if were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation. . . . Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The Court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "any other business" in the sense that points other than those specified in the pleadings may be raised without notice'**

[51] At 204.

proprietary rights by one or other of the spouses."[52] In *Mansell* the court was asked to make a settlement agreement an order of the court which made provision for the maintenance of the plaintiff after the divorce. Broome JP held that there were, what he described as two obstacles to this request. The first was a legal obstacle, namely the decision in the *Hodd v Hodd* which he was bound to follow, and in respect whereof in his view there was no reason to doubt the correctness of. Accordingly, the court could not competently make the agreement in relation to the maintenance of the plaintiff an order of the court. To do so would have meant that it would have acted as a registry of obligations as it was put by Selke J in the *Hodd's* case.

[26] The second obstacle related to the absence of the existence of any practical advantage for making the agreement an order of the court. The reason for this is that the agreement was couched in terms which were of such a nature that in the court's view they were rendered incapable of summary enforcement. It was held that unless the agreement is of such a nature that the parties thereto can proceed directly to execution, the court should

[52] Per Horwitz AJ in *Van Schalkwyk v Van Schalkwyk* supra at 100. See also *Ex Parte Stein and Another* 1960(1) SA 782 (T) at 783 A – B. According to *Hutchison op cit* at page 234 to 235 this decision **". . .sparked off a series of cases in the other provincial divisions from which it became apparent that the practice in regard to making such maintenance agreements orders of court on divorce varied from division to division. In the Transvaal and the Cape, it seems, the courts were quite happy to make such orders in terms of a consent paper executed by the parties, whereas in the Orange Free State and in the Eastern Districts the courts would do so only if the agreement regarding maintenance formed part of a general proprietary settlement between the parties."**

refrain from making it an order. To hold otherwise would result in the making of an order which confers **"no practical or legitimate advantage."**[53] Accordingly, if **". . . the plaintiff asks the Court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears to me to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation."**[54] For this reason, the judgment continues, **"It is no part of the duty of this Court, on the invitation of litigants to invest their agreement with some sort of vague *aura* or glamour which has no practical efficacy."**[55]

[27] This finding was made *obiter dictum*. The reason is that, as in the case of *Hodd v Hodd*, it proceeded upon the narrow ground that it was not the function of the court to decide matters which are not in dispute between the parties in litigation, and that their agreement cannot give the court jurisdiction which it does not otherwise possess. The legal obstacle which existed at the time of the judgments in *Hodd v Hodd* and *Mansell* has since been eliminated through intervention by the legislature.[56] The dissolution of the marriage and its consequence are now essentially regulated by statute. This includes the payment of maintenance to a former spouse. The first of such interventions took place by way of Section 10(1) of the

[53] *Mansell* (supra) at 721H.
[54] *Mansell* (supra) at 721E.
[55] *Mansell* (supra) at 721H.
[56] See *Schutte v Schutte* supra at 880G – J.

Matrimonial Affairs Act. This section gave the court the power, when granting a divorce, (a) to make an order compelling the guilty spouse to maintain the innocent spouse for any period until the latter's death or remarriage, and (b) to make any agreement between the spouses for the maintenance of any one of them, an order of court.[57] Unfortunately, as the power of the court to make an agreement between the litigants an order of the court was now regulated by statute, section 10(1) was given a limited meaning in subsequent court decisions. In *Maartens v Maartens,*[58] it was held that the power to transform agreements between the parties into a court order is restricted to agreements for the payment of maintenance as envisaged in that section. The effect of this was that the court could no longer embody an agreement dealing with the proprietary rights of the parties in its order.[59] This narrow approach to the powers of the court was questioned, it being argued that the court retained its residual power **". . . it always had under the common law the power to embody in its order whatever agreement the parties have come to with regard to property rights, maintenance after divorce, and similar matters . . ."**[60]

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[57] Section. 10(1) reads as follows: **"10(1) The Court granting a divorce may, notwithstanding the dissolution of the marriage – (a) make such order against the guilty spouse for the maintenance of the innocent spouse for any period until the death or until the remarriage of the innocent spouse, whichever event may first occur, as the Court may deem just; or (b) make any agreement between the spouses for the maintenance of one of them, an order of Court, and any Court of competent jurisdiction may, on good cause shown (which may be a cause other than the financial means of either of the respective spouses) rescind, suspend or vary any such order."**

[58] 1964(2) SA 104 (N).

[59] Also *Claassens v Claassens* supra at 363 to 364.

[60] Hahlo **"Waiver of claims to maintenance"** (1964) SALJ 293.

[28] Section 7(1) of the Divorce Act has now eliminated all of the obstacles created by the decision in *Hodd v Hodd* and by section 10(1) of the Matrimonial Affairs Act and its interpretation to the authority of the court to make an agreement between the parties in relation to the issues which fall within the second category an order of the court. This section is clearly wider than its predecessor and provides explicitly that the court may make an order in accordance with the written agreement between the parties with regard to both the maintenance of the former spouse and the division of the assets of the parties. The payment of maintenance by one spouse to the other post divorce is now, similar to any of the other consequences of the dissolution of the marriage, an issue which the court may legitimately deal with when granting a decree of divorce. There as a result no longer exists any reason not to also incorporate the terms of any agreement relating to the payment of such maintenance into the order of the court. Section 7(2) further effectively **"reinstated"** the power of the court which existed before the enactment of section 10(1) of the Matrimonial Affairs Act to make an order in accordance with what the parties themselves agreed should be the proprietary consequences of their divorce. What follows from this is that there is no basis for any continued fear expressed in *Thutha* that the court would act as **". . . a mere registry of documents or agreements . . ."**[61] by entering a consent judgment in accordance with the wishes of the parties with regard

[61] At 507G (para [53]).

to the maintenance of a former spouse and the proprietary consequences of the divorce.

[29] The importance of section 7(1) must however not be limited to the legality or competence of the court to make an order as is envisaged therein. Its implications in the wider context of the Divorce Act reaches much further. It also impacts upon the requirement on which the court in *Mansell* and *Thutha* placed reliance on for its findings with regard to the desirability of making a settlement agreement an order of court, namely that the granting of the order should serve some purpose or function, that is, that it should hold some practical or legitimate advantage. Such an advantage will according to *Thutha*, only arise when the order is capable of immediate enforcement without the need to approach the court for further relief. It is this requirement and its content which in essence forms the subject matter of this appeal. What the court in *Mansell* and *Thutha* did was to effectively confine the measure of the beneficial advantage of turning a settlement agreement into an order of the court, to the ease with which the proposed order is capable of enforcement. The question raised by this approach to the functionality requirement of making an order in accordance with an agreement between the parties, is whether it does not place an undue

restriction on the power of the court as envisaged in section 7(1) of the Divorce Act and whether there are not any other legitimate considerations which may be relevant to the decision of the court to exercise that power. As proceedings relating to the dissolution of a marriage are now primarily regulated by statute this question is to be assessed in the context of the provisions of the Divorce Act and its background.

[30] The refusal of the court of a request to exercise its authority as envisaged in section 7(1) of the Divorce Act has the potential of having a negative impact on the relationship of the parties as regulated by the terms of their settlement agreement. On a reading of the subsection, it is evident that the power to make an order in accordance with the agreement of the parties is confined to the court who grants the divorce, and that the order may only be made at the time of the divorce. This is consistent with the interpretation previously given to the phrase **"The court granting a divorce . . ."** in section 10(1) of the Matrimonial Affairs Act.[62] The implication of this is three fold:- Firstly, the parties may not subsequently seek to have their written agreement made an order of the court. Secondly, any agreement in relation to the maintenance of the spouses which is not incorporated into a court order at the time of the dissolution of the marriage would not constitute a

[62] *Schutte v Schutte* supra at 881B – C and 882B – D.

"maintenance order" as envisaged in section 8(1) of the Divorce Act.[63] The power of the court to vary a maintenance order is derived from this section. It gives the parties the right to apply for the variation of *inter alia* a maintenance order **"made in terms of this Act",** if the court finds that there is **"sufficient reason"** to make such an order.[64] The effect of this is that in the absence of a non-variation clause in the settlement agreement,[65] the court is empowered on application of a former spouse, to order a variation of the terms relating to his or her maintenance, or the duty to provide such maintenance. Consequently, should the court decline to make that part of the agreement between the parties dealing with the maintenance of a former spouse an order of the court, it is achieved what could otherwise only have been achieved by a non-variation clause, ie it would not be open to any of the parties to later approach the court for a variation of the maintenance agreed upon as the court would not have the power to do so.[66] By refusing to incorporate it into the court order the parties are thereby effectively denied the benefit of the right created by section 8(1).

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[63] *Schutte v Schutte* supra at 882E.

[64] This provision was introduced to authorise the Court to amend maintenance orders on good cause shown, so as to enable spouses to come to Court **'to redress injustices occasioned by a maintenance order which no longer fits the changed circumstances'**. *Copelowitz v Copelowitz* 1969(4) SA 64 (C) at 74B - C; *Georghiades v Janse Van Rensburg* supra 2007(3) SA 18 (C) at 22D (para [13]).

[65] A non-variation clause has been held not to be against public policy. *Claassens v Claassens* supra; *Maartens v Maartens* supra; *Swart v Swart* 1960(4) SA 621 (C); *Sanan v Sanan* 1978(1) SA 98 (W). This was confirmed by the appeal court in *Schutte v Schutte* supra.

[66] **"Op die keper beskou, kan hulle egter presies dieselfde resultaat bereik deur die bepaling betreffende afstanddoening weg te laat en net nie te vra dat hul ooreenkoms by die egskeidingsbevel ingelyf moet word nie."** Per Van Heerden JA in *Schutte v Schutte* supra at 883F. (After all, the parties can achieve precisely the same result by not including a non-variation clause in their agreement and not asking the court to incorporate their agreement into the court order.) (My translation.)

[31] The third implication relates to the existence, in the provisions of section 7(1) read with section 8(1) of the Divorce Act, of an implied waiver of the right of any one party to seek a variation of any agreement reached in relation to their proprietary rights. The reason for this lies in the fact that section 8 of the Divorce Act provides for the variation of a maintenance order, but not of an order dealing with a division of the assets of the parties. This means that the court is excluded from ordering a variation of any settlement relating to the assets of the parties, and for the parties, in the absence of an agreement to the contrary, to seek such an order.[67] This conforms with the policy underlying the notion of a **"clean break"** or a **"once-and-for-all"** settlement of the proprietary consequences of a divorce, aimed at bringing finality in relation to any issues arising therefrom, thereby allowing the parties to **"put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down."**[68] It is also consistent with section 7(3) of this Act which empowers the court granting a divorce in respect of a marriage out of community of property to, **"in the absence of any agreement between them regarding the division of their assets"** order that such assets, as the court may deem just, be transferred to one of the parties. As in section 7(1) read with section 8(1), the

[67] See paragraphs [45] and [46] of this judgment.
[68] Per Lord Scarman in *Minton v Minton* 1979 1 ALL ER 79 at 87 – 88..

formulation of this section reflects a deliberate choice on the part of the legislature to respect the contractual freedom of the parties in divorce proceedings in relation to their proprietary rights.

[32] What emerges from this is that the making of an order in terms of an agreement as envisaged in section 7(1) brings about a change in the status of the rights and obligations of the parties to the settlement agreement. The reason for this lies in the fact that the terms of the agreement are incorporated in an order of court. The granting of the consent judgment is a judicial act. It vests the settlement agreement with the authority, force and effect of a judgment. **"When a consent paper is incorporated in an order of Court by agreement between the parties in a matrimonial suit it becomes part of that order and its relevant contents then form part of the decision of that Court . . . and must be construed upon that basis"**[69] The most important benefit which accrues to the parties by reason of this change in the status of their rights and obligations under the settlement agreement, is that the court retains authority over its own orders to ensure that the terms thereof are complied with.[70] This in turn gives the parties the right to approach the court for appropriate relief in the event of a failure by one of them to honour the terms of a consent order. Accordingly, by agreeing to their settlement being

[69] Per M T Steyn J in *Hermanides v Pauls* 1977(2) SA 450 (O) at 452 G – H.
[70] See fn 7 above.

made an order of court, both parties effectively commit themselves to comply with the terms thereof and be subjected to sanction by the court should they fail to do so.

[33] This is however not the only benefit or practical advantage of such an order. As indicated, an order as envisaged in section 7(1) of the Divorce Act not only gives the parties the right to later apply for a variation of an agreement in relation to maintenance, it also brings finality with regard to the proprietary rights of the parties. Another advantage is that it enables the court to grant an order with regard to matters it may otherwise not have been able to grant, such as arrangements dealing with the use of an immovable property for residential purposes by the spouse with whom the minor children are to reside, thereby securing a benefit which contributes to the welfare of the children. Further, by reason of the fact that the division of their assets and the rights of the parties in relation thereto are determined by an order of the court, it has the potential of protecting the parties against the claims of third parties. In *Corporate Liquidators (Pty) Ltd and Another v Wiggill and Others*[71] for example it was held that the order had the effect of immediately vesting ownership of the moveable assets in the respective parties without the need for formal delivery.

[71] 2007(2) SA 520 (T).

[34] An aspect that in my view assumes considerable importance in the context of answering the question raised in this appeal, is the general judicial policy favouring settlement, and the role of the court in the encouragement of the amicable resolution of disputes raised in divorce proceedings. It must be acknowledged that the adversarial model of dispute resolution is not well suited to deal with the highly personal and individual nature of the issues which arise in a divorce action. The dissolution of the marriage relationship in a divorce action is an attempt to legally manage one of the most basic and personal relationships. **"Winning is antithetical to family harmony and healthy child development when cooperation and accommodation are priorities."**[72] Section 7(1) of the Divorce Act is an attempt by the legislature to encourage parties to resolve by agreement their financial and proprietary issues. This encouragement lies in the beneficial consequences which follow upon the making of an order as envisaged therein. To borrow the words of Lord Scarman in *Minton v Minton*, **"The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems."**[73] The suggestion that besides legislative support the encouragement of a negotiated settlement also requires judicial support, is in my view not something which is inconsistent with the policies underlying

[72] M K Pruett **"Mental Notes: Reform as Metaphor and Reality"** 44 Fam. Ct. Rev 571, 572 (October 2006).
[73] Supra at 87.

our law. The settlement of matters in dispute in litigation without recourse to adjudication is generally favoured by our law and our courts. The substantive law gives encouragement to parties to settle their disputes by allowing them to enter into a contract of compromise. A compromise is placed on an equal footing with a judgment. It puts an end to a lawsuit and renders the dispute between the parties *res judicata*. It encourages the parties to resolve their disputes rather than to litigate. As Huber puts it: **"A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits."**[74] This was confirmed by the appeal court in *Schierhout v Minister of Justice*[75] it is said that **"The law, in fact, rather favours a compromise (*transactio*), or other agreement of this kind [my emphasis]; for *interest reipublicae ut sit finis litium."***[76]

[35] As a natural progression of the notion that the resolution of disputes by agreement as opposed to litigation is favoured and is in accordance with the policy of our law, any action by the court which has the effect of expressing a willingness to encourage the settlement of disputes must equally be favoured. The use of the power of the court in section 7(1) of the Divorce Act for judicial facilitation and promotion of the settlement of civil actions

[74] Jurisprudence of My Time 3.15.15. See also Voet 2.15.22 and *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008(6) SA 264 (Ck) at 284 C – E (para [38]).
[75] Supra.
[76] At 423.

must therefore constitute a legitimate purpose and exercise of that power. Where the focus in *Mansell* and *Thutha* is on the interests of the court to ensure the effective and orderly enforcement of its own process, the encouragement of an amicable resolution of disputes in divorce proceedings and the benefits which it holds, is focused both on the interests of the court, and that of the litigants. Although these two interests appear to stand in opposition to each other, it is not the case. They both form part and parcel of the wider institutional interests of the court in the efficient administration of justice. The notion that a court order must be readily enforceable has as its purpose the effective enforcement of the pronouncements of the court as a constitutional institution clothed with judicial authority.[77] It serves to promote the institutional interests of the court in the efficient administration of justice.

[36] Similarly, the policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing over-crowded court rolls, thereby decreasing the burden on the judicial system. By disposing of cases without

[77] Section 165 of the Constitution.

the need for a trial, the case load is reduced. This gives the court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently. To the litigants it has the benefit of reducing expenses and the risks which are associated with litigation. I am also of the view that it has the potential to promote a more lasting relationship of cooperation between litigants, particularly in divorce matters where interests such as those of the children stand to benefit. As a matter of common sense, parties are more likely to abide by what they both agreed to, than what they may feel had been forced upon them by the court after a costly and acrimonious trial.

[37] As stated, not only does our substantive law favour the settlement of disputes by way of a contract of compromise, it has always been the practice of the courts in most divisions to, in the exercise of their common law powers, assist the parties by making settlement based orders. The positive force this may have in persuading parties in divorce proceedings to end litigation in an amicable way must be recognised. In a divorce action which is understandably a traumatic and emotionally charged event, the value of the security which the clothing of a settlement agreement with the authority of the court brings in the eyes of the parties is not difficult to see.

It also conforms with the present notion of the introduction of a case management system to reduce over crowded court rolls, and which no doubt has as one of its aims the exploration and facilitation of the settlement of civil cases in achieving that objective.

[38] If one is then to proceed from the premise that the wider interests under consideration is that of the administration of justice, then the court is required, when exercising its discretion whether to make a settlement agreement an order of the court, to give consideration not only to the need to make orders that are readily enforceable, but also to assess the wider impact which its order may potentially have. The findings in *Thutha*, namely (a) that the practice of incorporating the terms of a settlement agreement into an order of court should not be followed, and (b) that no agreement should be made an order of court unless its provisions can be translated into an order upon which the parties thereto can proceed directly to execution **"without redress to further litigation"**,[78] is in my view unduly inflexible and restrictive, not only of the powers of the court in section 7(1) of the Divorce Act, but also in relation to the inherent power of the court to compel the observance of its orders. Its effect is to diminish the importance of the role the court may play in the finalisation of divorce proceedings.

[78] At 508 I (para [55]).

Although in a different context, van den Heever J in *Van Schalkwyk v Van Schalkwyk*[79] aptly described it in the following manner:

"The Divorce Court acts as a clearing house determining all the matrimonial as well as patrimonial issues between the parties."[80]

By expressing a willingness to be part of the process as section 7(1) envisages, the court acknowledges the importance of the role played by alternative dispute resolution mechanisms in the finalisation of divorce proceedings. Further, the importance which the knowledge that the court would be willing to give careful consideration to a request to make an order in terms of section 7(1) brings to the negotiation of the terms of any settlement, must not be underestimated. The inflexible nature of this finding further serves to disregard the policy underlying the provisions of the Divorce Act and the benefit which the amicable solution of disputes in divorce proceedings hold, not only for the parties and any minor children who stand to be adversely affected by the granting of an order dissolving the marriage, but also for the administration of justice in reducing the workload of the courts.

[79] Supra.
[80] At 97.

[39] The finding in *Thutha* is in my view further premised on the incorrect assumption that the court will only give effect to an order that is readily enforceable. That is, that it is either an order *ad factum praestandum*, or *ad pecuniam solvendam*, and that the only appropriate relief for non-compliance is either an application for the committal of the judgment debtor or, following upon an order to pay a determinate sum of money, the issuing of a writ. While it must be acknowledged that the primary purpose of the parties seeking, and the court granting a judgment by consent as envisaged in section 7(1), is to enable the parties to the underlying agreement to enforce their rights, there is in my view no reason to restrict the inherent power of the court to enforce its own orders in this manner. It does not account for the fact that the inherent power of the court in this regard, like its power in terms of section 7(1) of the Divorce Act, is discretionary and is exercised in a manner as dictated by the facts of any particular case.[81] The court is as a result not compelled to commit a party for contempt. It may not only refuse to grant an order for committal, it may choose to grant such other relief as it may find to be appropriate in the circumstances.[82] By reason of the quasi-criminal nature of, and the emphasis on the penal nature of contempt proceedings,[83] the court may choose a less coercive method to

[81] Taitz *op cit* at page 55.

[82] **"Generally speaking, punishment by way of fine or imprisonment for the civil contempt of an order made in civil proceedings is only imposed where it is inherent in the order made that compliance with it can be enforced only by means of such imprisonment".** *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others* 1956(1) SA 105 (N) at 120D – E.

[83] *Fakie NO v CCII Systems (Pty) Ltd* 2006(4) SA 326 (SCA) at 339F (para [26]).

enforce the order, such as instructing same other person nominated by it to make performance to the judgment debtor. It may for example order the registrar of deeds to sign the necessary documents for the transfer of immoveable property, or instruct an officer of the court to seize moveable property and deliver it to the judgment debtor.

[40] The ability of the court to grant orders other than committal for contempt, or the levying of execution leaves it the scope to be innovative in the manner in which it compels compliance with its own orders. It is therefore not uncommon for the court to first make an order compelling the judgment debtor to comply with the terms of the consent judgment on which order the judgment creditor may then subsequently base proceedings for contempt in the event of non-compliance.[84] This may be necessary where the obligation in the settlement agreement was conditional upon some further event. There exists accordingly no reason why a right or an obligation in a consent judgment which is otherwise capable, in the absence of the judgment, of supporting a contractual claim for specific performance, should not also be capable of being translated in subsequent proceedings into an executory order. The advantage of placing the parties to a settlement agreement in a position to make use of such a procedure in the event of non-compliance by

[84] See, for example, *Rossouw v Haumann* 1949(4) SA 796 (C) and *Moipolai v Moipolai and Others* 1992(4) SA 228 (BG).

one of them with the terms of the consent judgment, is that it enables them to approach the court in the same proceedings for relief without the need to institute a fresh action on the settlement agreement as envisaged in the *Thutha* judgment.

[41] That being said, it must be accepted that there exists a need for the court to retain a degree of control over agreements and consent orders and for it to scrutinize settlement agreements, the object in each case to ascertain and make a determination whether the terms thereof are appropriate so as to be accorded the status of an order of the court. It is however important to stress that the court's role is of a discretionary nature which should be exercised in light of all the relevant considerations including the benefits which the granting thereof may hold for the parties, and the general judicial policy favouring settlement. Each matter should be considered on its own merits. What it requires the court to do is to attempt to strike a balance between the different considerations relevant to the exercise of its discretion. It may, depending on the nature of the concerns of the court with regard to the terms of the agreement, be appropriate to opt not to interfere with the terms of the proposed order but to defer any potential concerns to a later date. These concerns may, after all, become academic.

The parties may never return to court to enforce the terms of the order. If the parties do return to enforce its terms, concerns which may at that time still exist may then be addressed. The advantage of effectively deferring concerns about the terms of the order are twofold:- Firstly it serves to promote the settlement of the issues arising from the divorce action in an amicable way and according to the parties own wishes. Secondly, it enables the court to determine, based on the parties own experience of the carrying into effect of the consent order, whether those concerns are real or merely hypothetical.

[42] A criticism levelled by the court in the *Thutha* judgment against the making of a judgment by consent is that the enforcement thereof may result in the application of a hotchpotch of legal principles which raises conceptual difficulties. In *Thutha* the applicant's complaints in the contempt proceedings were that the respondent had failed to pay the amount of the maintenance agreed to in the settlement agreement, and to comply with his obligations with regard to the purchase of a motor vehicle and the transfer of an immovable property. The respondent raised the defence that in exchange for settling the applicant's debts and paying an outstanding bond in respect of the house wherein the applicant was residing, the applicant

agreed to waive the maintenance payment. He further contended that the remainder of the issues were compromised in a subsequent settlement agreement.

[43] In this context the court raised two questions:- The first is whether the respondent was to be compelled to comply with the court order even if his non-compliance may otherwise be contractually excused. The second question was whether it was expected of the parties every time they may agree to change the terms of their agreement to approach the court to apply for a variation of the order. The questions raised do not in my view in practice present insurmountable problems. In proceedings for the enforcement of a consent judgment the nature of the remedy chosen by the judgment creditor for that purpose will inevitably determine the manner in which any defence raised thereto by the judgment debtor is to be dealt with. This means that should the judgment creditor choose to proceed by way of contempt proceedings, the defence raised in *Thutha* will *inter alia* have to be considered against the requirement that the respondent's non-compliance must have been deliberately and *mala fides*.[85] If the reason for the respondent's failure to comply with the terms of the consent judgment was that the applicant had waived or settled her rights therein, or that the

[85] *Fakie NO v CCII Systems (Pty) Ltd* supra at 333 C (para [9]).

respondent may *bona fide* have believed that to be the case, the applicant would have failed to establish that the respondent's failure to comply with the order was wilful and *mala fide*.[86]

[44] Where on the other hand the defence raised is considered in proceedings for a mandatory or prohibitory interdict, that is an order to compel the respondent to do, or to refrain from doing something in compliance with the terms of the consent judgment, it will be assessed against the question whether the applicant has established a clear right for the relief claimed. By way of an example, in *Rossouw v Haumann*[87] the respondent relied on the contractual defence of impossibility of performance. The court held that by reason of the fact that the terms of the agreement, which by consent had been made an order of the court, had became impossible of performance, the applicant had failed to clearly establish a right to the interdictory relief sought.

[45] With regard to the second question raised, once the court has made a consent judgment it is *functus officio*[88] and the matter becomes *res*

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[86] *Ibid*.
[87] Supra.
[88] See *Firestone South Africa (Pty) Ltd v Genticuro A G* 1977(4) SA 298 (A) at 306F - G. See generally Erasmus **Superior Court Practice** at B1 – 306F to B1 – 306G.

judicata.[89] This means *inter alia* that as a general rule the court has no authority to correct, alter or supplement its own order that has been accurately drawn up. Subject to what is said hereinunder, in divorce matters this is in practice effectively only limited to those terms of the order which deal with the proprietary rights of the parties and the payment of maintenance to one of the spouses where there is a non-variation clause. The reason for this is that the general rule is subject to a number of exceptions, in terms of the Divorce Act, the rules of court[90] and at common law.[91] The exceptions in the Divorce Act relate to matters which fall within the exclusive jurisdiction of the court and which that Act requires the court to determine and to grant an order as it may find to be justified. Consequently, orders dealing with the custody, guardianship, or access to and the maintenance of any of the minor children, do not assume the

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[89] *Atmore v Atmore* 1932 TPD 154 and *Keshavjee v Ismail* 1956(4) SA 90 (T).

[90] In terms of Rule 42(1) of the Uniform Rules of the High Court, the court may, **"in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary: (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; (c) an order or judgment granted as the result of a mistake common to the parties."**

[91] **"(i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant . . . (ii) The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order (see the *West Rand* case, supra at pp 176, 186 – 7; *Marks v Kotze* 1946 A.D. 29) . . . (iii) The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention (see, for example, *Wessels & Co v De Beer*, 1919A,D 172; *Randfontein Estates Ltd. v Robinson*, 1921 A.D. 515 at p. 520; the *West Rand* case, supra at pp. 186 – 7. . . (iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order (see *Estate Garlick's* case, supra, 1934 A.D 499)."** Per Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro A.G.* supra at 306H – 307G.

character of final judgments as they are always subject to variation in terms of section 8(1) of the Divorce Act.[92]

[46] A further exception to the general rule that an order of court, once pronounced, is final and immutable, is created by section 8(1) of the Divorce Act. As stated, in the absence of non-variation clause in the settlement agreement, it permits the court to rescind, vary or suspend a maintenance order granted earlier. Further, there exists in principle no reason why the parties may not subsequently seek an amendment thereof by mutual consent, or in circumstances where the order through error or oversight does not correctly reflect their agreement.[93] Not only is the mandate of the court to exercise its discretion in terms of section 7(1) of the Divorce Act derived from the settlement agreement, but the consent order itself is based on the terms of that agreement. The legal nature of a consent order was considered by the appeal court in *Swadif (Pty) Ltd v Dyke NO*.[94]

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[92] See paragraphs [11] to [13] above.

[93] See *Fluxman v Fluxman* 1958(4) SA 409 (W) at 412H; *Hodd v Hodd*; *D' Aubrey v D' Aubrey* supra at 208; *Horne v Horne* 1928 WLD 350; *Cloete v Cloete* 1953(2) SA 176 (E); and Caney *op cit* at page 57. The contrary view taken by the courts in *Ex Parte Willis and Willis* 1947(4) SA 740 (C) and *Ex Parte Herman* 1954(2) SA 636 (O) does not acknowledge the consensual nature of a consent judgment and is respectfully suggested to be incorrect. The judgment has as its source the agreement between the parties and serves as the court's authority to grant the order. In *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273 (CA), referred to by Hefer J in *Rowe v Rowe* 1997(4) SA 160 (SCA) at 166A, described the judgment as **"a mere creature of the agreement"** on which it is based. The consensual nature of the judgment is further acknowledged by the fact that any defect in the underlying agreement that existed at the time of the granting of the judgment, that vitiates true consent between the parties thereto, such as fraud or *justus error*, may constitute a ground for the setting aside of the judgment. See *Swadiff (Pty) Ltd v Dyke NO* supra at 939E; *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978(1) SA 914 (A) at 922H – 923A and *MEC for Economic Affairs, Environment and Tourism v Kruisenga* supra at 282B – 283B (para [37]).

[94] Supra.

It was held that where the purpose of the granting of the consent judgment is to enable the parties to the agreement to enforce the terms thereof through the process of the court, should the need therefor arise, the effect of the order is to replace the right of action on the agreement by a right to execute on the judgment. **". . .it seems realistic, and in accordance with the views of the Roman-Dutch writers, to regard the judgment not as novating the obligation under the bond, but rather as strengthening or reinforcing it. The right of action, as Fannin J puts it, is replaced by the right to execute, but the enforceable right remains the same."**[95] The consent order accordingly does not have the effect of eliminating the contractual basis thereof. Rather, through operation of the *res judicata* principle, the judgment constitutes a bar to any action or proceedings on the underlying settlement agreement.[96] The provisions of the agreement are instead to be enforced by the remedies available to a judgment creditor on a judgment. It is of course always open to the parties to abandon the judgment in whole or in part and to enter into a new agreement.[97] Save for the aforegoing, the effect of the consent order is otherwise that it renders the issues between the parties in relation to their proprietary rights and the payment of maintenance to a former spouse, where the agreement includes a non-variation clause, *res judicata,* and thus

[95] Per Trengrove AJA at 944 F – G. See also *Trust Bank of Africa Ltd v Dhooma* 1970(3) SA 304 (N) at 310A.
[96] *Swadif (Pty) Ltd v Dyke NO* supra at 944 G – H.
[97] In *Ex Parte Naude* 1964(1) 763 (D&CLD) Henning J found that a party in whose favour a right that flows from a judgment operates, may waive that right. **"It is clear that the judgment . . . confers a right on the former husband. The right which flows from the judgment may be waived or modified by agreement between the parties."** (At 764G – H).

effectively achieves a **"clean break"** as envisaged by the scheme of the Divorce Act.

[47] From experience, and having discussed the matter with my colleagues at the other courts in this division, I hold the view that considering the large number of divorce matters which are finalised by the granting of consent judgments, it is only in a very small percentage of cases where parties do return to court to complain of non-compliance with the terms of their settlement agreements. After all, parties are aware that unless the agreed order translates into a decree to do or refrain from doing something, or order the payment of a sum of money that is determinable, relief by way of contempt proceedings, or the levying of execution, would not be possible and are therefore not remedies which are immediately available. It may instead be necessary for them to return to court to first obtain a further order translating a right or an obligation in the settlement agreement into a judicial command or prohibition before bringing proceedings for contempt. Nevertheless, while there are weighty reasons why a court may not apply exacting scrutiny to the terms of a proposed order at the time of the divorce action, the fact remains that the court is vested with a discretion and may insist that the parties effect the necessary changes to the proposed terms as a

condition for the making of the order. The institutional interests of the court are not subordinate to the wishes of the parties.

[48] When considering a request to incorporate a settlement agreement into its order, the court hearing the matter must bear in mind that it obtains its mandate to deal with the matter on an unopposed basis, and to exercise its authority in terms of section 7(1) to make an order as envisaged therein, from the agreement itself.[98] That being so, should the court decide to decline to accede to the request of the parties to make their settlement agreement a consent order, the parties should be informed of its concerns and be given the opportunity to adequately address them. While it may be that each term of their agreement may notionally constitute a separate agreement as suggested in *Claassens v Claassens*,[99] the suggestion that parts thereof should be left to the terms of the agreement while others are incorporated into the order, requires careful consideration. As correctly pointed out by Mr Paterson, the validity of the agreement as a whole may be subject to it being made an order of the court. It may very well be that the defendant in the action withdrew his or her opposition to the action on the basis that their settlement will become a court order. Whether a settlement agreement may be subject to a resolutive, or for that matter, a

[98] See paragraphs [14] and [24] of this judgment.
[99] Supra at 362G.

suspensive condition in any particular case is to be determined with reference to the terms thereof. Tied-in with this is the fact that the process of reaching a negotiated settlement on issues such as maintenance and the property of the parties may include a **"give and take"** situation, where certain rights may have been relinquished as a trade off, so to speak, in exchange for others.[100] In other words, the settlement agreement may constitute, what has been referred to as a **"package deal"**[101] and the terms thereof may not be capable of meaningful separation and without destroying the consensual basis on which the agreement as a whole is founded.

[49] If the concerns raised by the court are not adequately addressed, and it is not prepared to grant the order agreed upon, it must refuse to endorse the proposed order and leave it to the parties to elect to either be content with their agreement or parts thereof not being incorporated into the court's

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[100] **'Agreements governing maintenance often cover other topics too. They are frequently compromises over hotly contested issues of all sorts, and the product of hard and protracted bargaining. Everyone with experience of negotiations in matrimonial cases is well aware of that. Questions of "guilt" and "innocence", fundamental to the wife's claim for alimony while the 1953 Act lasted and not entirely irrelevant to it since then, may have been disputed. So may the amount she needed, and how much of that the husband could afford. Property had perhaps to be settled or divided, maintenance for children to be resolved. The alimony eventually agreed can seldom be isolated from such surroundings. Like the rest of the compromise, it is the result of give and take. Sometimes it is more than the Court is likely to have awarded the wife had there been none and, in return for a concession elsewhere, she has won by contract what she could not have expected from the litigation. On other occasions it is less, but some contractual benefit the Court would never have decreed has compensated her for the difference**.' Didcott J in *Claassens v Claassens* supra at 371.

[101] **"While the present consent paper does not contain a non-variation clause as such, it is clear from the terms thereof that the parties – through a process of give and take – arrived at an overall compromise, which was embodied in their consent paper as a 'package deal'. The desire to achieve a clean break between the parties after a period of three years is evident from the terms thereof, read as a whole. In these circumstances, a Court should, in my view, be slow to find that 'sufficient reason' exists for the variation of the original maintenance order."** Griesel J in *Georghiades v Janse Van Rensburg* supra at 25C (para [20]).

order, or to proceed to trial. By reason of the fact that the proposed order as envisaged in section 7(1) of the Divorce Act is based on an agreement between the parties, and the jurisdiction of the court is limited to the relief which the parties seek before it on an unopposed basis, what the court cannot do, and should refrain from doing, is to proceed to make an order that would amount to it unilaterally altering the terms of the settlement agreement. With regard to the welfare of the minor children, an issue that for the reasons stated earlier[102] falls within the exclusive jurisdiction of the court, I am of the view that should the court decline to make an order in accordance with the agreement of the parties, ie that it is not satisfied that on the evidence placed before it the agreement best reflects the interests of the minor children, both parties should at the very least be given an opportunity to place further evidence before the court before a final order is made.

[50] Turning then to the order made by the court *a quo* in the present matter, counsel were in my view correctly *ad idem* that it erred in making an order in terms of the relief claimed by the first appellant in paragraphs 2 and 3 of his particulars of claim, and that the appeal should as a result be allowed. With regard to what was in the best interests of the children, the court had

[102] See paragraphs [11] to [13] above.

to make an assessment and decision on the evidence placed before it. The evidence consisted of that of the first appellant who asked for the terms of the settlement agreement in this regard to be approved by the court, and the evidence of the Family Advocate who, after due investigation, found the terms of the proposed order to be in the best interests of the minor children. There was accordingly no evidence to support a conclusion that the relief claimed by the first appellant in his particulars of claim best represented the interests of the children.

[51] Insofar as the granting of an order for forfeiture of benefits by the court *a quo* is concerned, this order is in conflict with the terms of the settlement agreement. By asking the court to make an order in the terms of that agreement, the first appellant had effectively abandoned any relief claimed in his particulars of claim which is in conflict therewith. An order for forfeiture of benefits will not be made unless it is claimed by the plaintiff.[103] To grant such an order when it was effectively abandoned would mean that relief was granted which was not sought, and that the court was making a contract for the parties. A further difficulty with this part of the order is that no evidence was placed before the court *a quo* to determine, firstly, whether

[103] *Geard v Geard* 1943 EDL 322 at 327 and *Harris v Harris* 1949(1) SA 254 (A) at 264.

or not the second appellant in fact stood to benefit if a forfeiture order was not issued, and if so, whether that benefit was undue.[104]

[52] Having regard to the terms of the settlement agreement and the evidence placed before the court *a quo*, there exists in my view, on an application of the principles referred to in this judgment, no reason why the request of the parties that their settlement agreement be made an order of the court should not be acceded to. The order proposed in respect of the minor children and the rights of the parties in that regard are couched in terms consistent with a **"parenting plan"** as envisaged in section 4 of the Children's Act, and which is routinely entered as a court order as envisaged in section 24, read with section 29 of that Act. There is nothing therein which appears to be adverse to the wellbeing of the two minor children and which raises any real concern. The same position applies to the parties' arrangement in respect of their assets. Although it may not be capable of entitling either of them to proceed directly to execution, it may be cured by an appropriate order in the event of either of the parties failing to honour the terms thereof, such as authorising an officer of the court to execute the required documentation

[104] In terms of section 9(1) of the Divorce Act an order for forfeiture of benefits may only be granted if the court **". . . is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."** See *Wijker v Wijker* 1993(4) SA 720 (A).

and perform the actions necessary to effect transfer of the second appellant's share in the immovable property to the first appellant.

[53] Accordingly, and for these reasons I would allow the appeal and make no order as to costs. It is proposed that the order of the court *a quo* be set aside only to the extent that it grants relief in terms of paragraphs 2 and 3 of the first appellant's particulars of claim, and that it be substituted with the following order:

"It is ordered that the deed of settlement marked "B" is hereby made an order of this Court."

_____

D VAN ZYL

JUDGE OF THE HIGH COURT

I agree

_____

P MAJEKE

ACTING JUDGE OF THE HIGH COURT

I agree

_____

C MEY

ACTING JUDGE OF THE HIGH COURT

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Date Heard: 18 March 2013

Judgment Delivered: 01 August 2013