



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 30488/2019

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

12 October 2022

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In the matter between:

MICHELLE JANSE VAN RENSBURG

Applicant

and

JODY WAYNE GERMISHUIZEN

Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The applicant, Michelle Janse van Rensburg ('the applicant'), claimed the enforcement of an agreement of settlement concluded between her and the respondent, Jody Wayne Germishuizen ('the respondent'), pursuant to action

proceedings that arose out of the termination of a prior intimate relationship between them. The parties concluded the written agreement of settlement on 26 September 2018 ('the settlement agreement'), under case number 6312/18.

[2] The applicant sought an order that the settlement agreement be made an order of Court and costs of the application. The respondent opposed the matter and issued a counterapplication in which he claimed an order that the settlement agreement be declared void, alternatively voidable and costs.

[3] The parties' prior relationship, allegedly a universal partnership according to the applicant, commenced in 2000 or thereabouts. Children were born of the relationship.

[4] On a conspectus of the papers and arguments made by the parties' legal representatives before me, the application did not deal with universal partnerships but rather with settlement agreements concluded between parties.

[5] On 14 February 2018 under case number 6312/18, the applicant *qua* plaintiff, issued the action proceedings referred to afore, claiming judgment against the respondent for proprietary relief arising out of the parties' relationship.

[6] The respondent opposed this application (as well as the action proceedings), on various bases that I shall deal with hereunder. Importantly, the respondent did not deny that he signed the settlement agreement but alleged that he did so as a result of him being under duress at the time and acting under a material misrepresentation, made by the applicant as to the nature of the document, the settlement agreement.

[7] The respondent's counsel, in argument before me, wisely did not rely on the alleged duress or the respondent's allegation that the applicant refused to allow him to

amend the settlement agreement. No case was made out by the respondent on the papers before me in respect of the alleged duress. The averment that the respondent was not permitted by the applicant to make changes to the settlement agreement was disproved on the papers, by the amendments that the respondent did in fact make to the settlement agreement.

[8] The respondent, who described himself as a 'businessman' in his answering affidavit, did not have legal representation at the time that he signed the settlement agreement. The latter document was drafted by the applicant's attorney at the time, based upon proposals made by the respondent.

[9] The applicant explained that the parties concluded the settlement agreement after the issue of the summons in the action proceedings, that the settlement agreement dealt with the applicant's claims against the immovable property, pension interest and company shareholding made in the action proceedings. The settlement agreement included provisions regarding the responsibilities and rights relating to the children born of the parties' prior relationship as well as provisions for what was termed 'spousal maintenance' but effectively amounted to payment of a monthly amount to the applicant, by the respondent.

[10] The respondent's counsel argued that because the particulars of claim in the action proceedings did not include claims in respect of the parties' children or the so-called 'spousal maintenance,' and the application proceeded under a case number different from that allocated to the summons in the action proceedings, I was precluded from making the settlement agreement an order of Court. This was because there was no *lis* between the action and the application proceedings, and because our common law, at this stage of its development, does not permit of a claim for maintenance in

respect of a partner to a universal partnership, being made after the termination of the universal partnership.

[11] The respondent's counsel is correct as regards the development of the common law, however, parking to one side for the moment the issue of the settlement agreement being void, voidable or subject to a misrepresentation, the parties concluded a settlement agreement. The settlement agreement did not contain matter that was unlawful or illegal or *contra bonis mores* and it was signed by both parties, apparently free and voluntarily.

[12] The parties were fully entitled to enter into a settlement agreement, as they did, arising from the action proceedings, and to include therein such matter as they both agreed to include on the agreed terms, even if that matter was not raised by the claims made in the action proceedings. Thus, the fact that the settlement agreement dealt with issues not claimed in the action proceedings, being the issues in respect of the children and the applicant's personal maintenance, to mention only two, is irrelevant to the validity of the settlement agreement.

[13] As to the fact that the common law does not allow for maintenance to be claimed by one party from another after the termination of the universal partnership, it matters not because the parties agreed to the relevant provision. They incorporated what they considered to be the appropriate provision for a monthly payment for the applicant payable by the respondent, in the settlement agreement.

[14] **Insofar as the respondent alleged that there was no consensus between the parties in respect of the settlement agreement and that neither party considered itself bound by it, the respondent referred to the applicant failing to allow him contact to the children in terms of the settlement agreement and that the applicant,**

subsequent to the signature by the parties of the settlement agreement, approached the Brakpan Maintenance Court. The applicant commenced proceedings in terms of s 6 of the Maintenance Act, 99 of 1998 ('the Maintenance Act'), rather than seeking an order from that Court based on the provisions of the settlement agreement. The applicant, however, explained that she was advised that because the settlement agreement had not been made an order of court, she was obliged to proceed in terms of the Maintenance Act, which she duly did.

[15] The fact that the applicant invoked the Maintenance Act in circumstances where the settlement agreement was not an order of court, absent anything more in that regard, does not provide a basis for this Court to find that the applicant did not consider herself bound by the provisions of the settlement agreement. Nor does the alleged contact issue in respect of the respondent and the children, or the applicant's sale of a motor vehicle immediately after signature of the agreement in circumstances where the settlement agreement provided that it be sold subsequent to the settlement agreement being made an order of Court.

[16] Turning to the issue of joinder raised by the respondent; that the application should be dismissed because of non-joinder of the bond holder, SA Home Loans Guarantee ('the bond holder') and the pension fund, the respondent's counsel argued that the bond holder ought to have been joined as it had a material interest in the matter.

[17] This arose due to the provision in the settlement agreement that upon the settlement agreement being made an order of Court, the immovable property situated 6 Kirkpatrick Avenue, Brakpan-North ('the immovable property'), "shall become the sole and exclusive property of the plaintiff at date of the Court order". Furthermore, that "the defendant shall indemnify the plaintiff against non-payment to the aforesaid institutions.

... The property shall be transferred into the plaintiff's name once the full outstanding bond has been settled with the financial institution.”

[18] The settlement agreement does not serve to bind or place obligations on third parties who are not parties (and signatories) to the settlement agreement.¹ The applicant's right in respect of the immovable property in terms of the settlement agreement, does not raise a legal interest by the bond holder because transfer is to take place only upon full payment of the mortgage bond. In the interim, the respondent remains the registered owner of the immovable property and the rights of the bond holder over the immovable property remain intact and unaffected by the provisions of the settlement agreement.

[19] The applicant's right in respect of the immovable property under the settlement agreement is, pending transfer of the immovable property into her name, a personal right enforceable against the respondent alone. It is not enforceable against third parties such as the bond-holder and third parties are not bound by that personal right.

[20] Insofar as the respondent's counsel contended that the applicant received more in terms of the settlement agreement than she claimed in the summons, that is correct. The applicant stands to receive more because on the papers before me, the respondent agreed that she be given more than she claimed in the action proceedings. The fact that the applicant stands to receive more than she claimed does not render the settlement agreement void or voidable.

[21] As regards the provision in the settlement agreement dealing with the respondent's interest in the pension fund, the respondent holds a pension fund interest and is a member of the Baird Financial Services Pension Fund with policy number

¹ *Swatif (Pty) Ltd v Dykeno* 1978 (1) SA 928 (A) at 945 (A).

4407955713, administered by Sanlam. The respondent alleged that the applicant's failure to join the pension fund administrator to the application proceedings was fatal. The applicant's counsel correctly conceded that the provisions of Section 37D of the Pension Funds Act, 51 of 1988 ('the Pension Funds Act'), apply only as between spouses.

[22] The respondent's counsel argued cogently that absent the joinder of the pension fund, Baird Financial Services Pension Fund, consideration ought not to be given to augmenting the applicant's rights, if any, in respect of the respondent's pension fund interest by widening the meaning of the word 'spouse' in Section 37D of the Pension Funds Act. This, potentially, would be new law, amounting to a change of the prevailing legal position.

[23] Furthermore, counsel for the respondent contended that the respondent's legal representatives invited the applicant to amend the application and join the pension fund sometime before the matter was argued before me.

[24] The intention of the parties as reflected in the provisions dealing with the respondent's pension fund interest in the settlement agreement, demonstrate an intention on the parties' part that the respondent should permit payment of a monetary amount equal to 50% of the respondent's pension fund interest, to be made to the applicant within 60 court days from the date of the court order, being the date upon which the settlement agreement was made an order of court. That much is apparent from the contents of the pension fund provisions in the settlement agreement.

[25] Whilst the provisions regarding the pension fund interest are not enforceable in the form in which they appear in the settlement agreement, the parties' intention that the applicant should receive and benefit from an amount equal to 50% of the

respondent's pension fund interest, is evident from the content of the relevant provisions. In the circumstances, I intend to grant an order that reflects the parties' intention that the applicant benefit from a monetary amount equal to 50% of the defendant/respondent's pension fund interest held with Baird Financial Services under the policy number aforementioned, as at date hereof.

[26] Insofar as the respondent alleged that details in the settlement agreement were inserted after signature thereof by him, the subsequent additions to the settlement agreement amounted only to the number of the respondent's pension fund interest.

[27] As regards the respondent's life policy, the respondent's counsel correctly argued that the relevant provision in the settlement agreement should have stated that the applicant and the children would remain as beneficiaries on the respondent's life policy. Instead, the provision provides that the applicant and three children will remain on the policy, the number of which is reflected in the settlement agreement. Once again, the parties' intention regarding the applicant and the children benefiting from the life policy is apparent. Accordingly, there is no basis upon which the provision in respect of the life policy is not enforceable.

[28] In respect of the debts referred to in the settlement agreement, that provision is not drafted in the most elegant of terms, but it is comprehensible and provides in effect, that the respondent will make payment of the arrear school fees, school fees presently owing, DSTV, cell phone contract, monthly rental derived from the property situated at 16 Holding Road, Benoni Orchards and all contracts currently concluded and/or in use.

[29] The parties know what they intended in terms of the provision; namely that the respondent pay certain debts listed in the settlement agreement and certain monthly

obligations arising from contracts concluded in respect of the parties' cohabitation as it previously existed.

[30] Equally, a clause in respect of the respondent paying a 13th cheque to the applicant that forms part of the provision in respect of the so-called 'spousal maintenance', whilst it is not a provision that is ordinarily encountered in agreements in the nature of the settlement agreement or an agreement arising from the termination of a marriage relationship, it is not unenforceable.

[31] The respondent is a businessman. He was content to engage with the applicant in respect of the settlement agreement and the contents thereof, without the need to invoke legal assistance. The respondent is the owner of at least one immovable property, shares in a company, a pension fund interest and is well able to and does engage in business and related activities in the outside world. The settlement agreement is headed 'agreement of settlement' on the first page thereof. The preamble repeats that the document is an agreement of settlement. Furthermore, the preamble provides unequivocally that the content of the settlement agreement relates to the action proceedings instituted against the respondent in order to declare their previous relationship a universal partnership.

[32] Furthermore, the second paragraph of the preamble states that the parties consent that their relationship was a universal partnership and that the universal partnership had broken down irretrievably.

[33] It is untenable for the respondent to argue in these circumstances that he acted under an alleged misrepresentation as to the nature of the settlement agreement that he was signing. He either signed or initialled each page of the document and signed in

full as the defendant on the last page thereof The document comprising the settlement agreement consisted of 6 pages. Each page was signed or initialled by the respondent.

[34] In addition, the respondent effected the amendment referred to by me afore, to the provision in respect of the monthly rental derived from the immovable property situated at 16 Holding Road, Benoni, Orchards. In addition, the settlement agreement was based on proposals initially made by the respondent and the respondent, in the litigation before me, made a counter-proposal to the applicant, as a substitute to the settlement agreement.

[35] In respect of the applicant's alleged material misrepresentation relied upon by the respondent, the respondent's counsel argued that there was a dispute of fact in this regard, justifying the matter being referred to oral evidence.

[36] It appears to me that there is no dispute of fact in respect of the alleged misrepresentation. Rather, this is a case of the respondent regretting the terms of the bargain made by him in terms of the settlement agreement.

[37] The respondent alleged that the applicant misrepresented to him that the settlement agreement would be determined finally by a Judge. That statement did not amount to a misrepresentation. The settlement agreement provided that it be subject to the approval of this Court and any additions, omissions or changes that the Court may deem appropriate

[38] Given that the parties provided in the settlement agreement that it be made an order of court, the settlement agreement would be considered and determined finally by a Judge. The applicant's representation did not amount to a misrepresentation and certainly not to a material misrepresentation.

[39] In the circumstances, I am of the view that the alleged dispute of fact can be rejected on the papers as they stand in accordance with *Wightman t/a JW Construction v Headfour (Pty) Ltd and Archar Head*.²

[40] Accordingly, the contention that the settlement agreement is void *ab initio*, alternatively voidable, is without merit. The parties' intention in respect of the various provisions in the settlement agreement is clearly discernible from the settlement agreement. This is notwithstanding the settlement agreement not being a model of clarity.

[41] *Pacta sunt servanda* remains a cornerstone of our law of contract and has been endorsed and upheld by our highest Courts.³ The fact that a contractual obligation voluntarily undertaken is onerous, does not result in it not being enforceable or a party not being held to it.⁴ The respondent signed the settlement agreement. The circumstances of the matter demonstrate that he did so voluntarily and knowingly. It is in keeping with the parties' rights to dignity that the respondent should be held to his contractual undertakings and his obligations.

[42] The respondent referred to *Mansell v Mansell* as quoted in the matter of *Eke v Parsons*, that agreements are not to be made court orders simply for the asking. *Mansell* emanated from that KwaZulu-Natal Division and is not a decision of this Court. This Division considers it appropriate to make settlement agreements dealing with children, maintenance and issues arising from divorces and similar litigation, orders of court in the event that the parties seek such an order, as the parties did. Furthermore, the applicant sought an order that the settlement agreement be made an order of Court in terms of the application proceedings.

² *Wightman t/a JW Construction v Headfour (Pty) Ltd & Archar Head* 2008 (3) SA 371 (SCA).

³ *Botha & Another v Rich NO & Others* 2014 (4) SA 121 (CC) ('Botha') at para [23].

⁴ *Bock & Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA).

[43] The fact that the respondent denies that the settlement agreement should be enforceable against him is a reason, in itself, to order that the settlement agreement be made an order of Court.

[44] The settlement agreement arose from litigation in this Court notwithstanding that the case numbers in the trial action and the application differed. The variance in the case numbers is not a reason not to order that the settlement agreement be made an order of court.

[45] By reason of the aforementioned, there is no basis upon which to decline to order that the settlement agreement be made an order of Court. Accordingly, I intend to grant such an order excluding the provisions in respect of the respondent's pension fund interest, in substitution of which I intend to order a monetary payment. Similarly, the appropriate order in respect of the respondent's counter-application flowing from these proceedings, is that the counter-application be dismissed with costs and I intend to make such an order.

[46] As regards the costs of this application, there is no reason why the order in respect of the costs should not follow the determination of the merits.

[47] Accordingly, I grant the following order:

1. The agreement of settlement concluded between the parties on 26 September 2021 under case number 30488/2019, excluding the provisions in respect of the pension fund immediately below the heading 'pension fund' and above the heading 'life policy', is made an order of Court.

2. The respondent is ordered to pay to the applicant a monetary amount equivalent to 50% of the respondent's pension fund interest held with Baird Financial Services under policy number 4407955743 administered by Sanlam, to the applicant within 60 days from the date of this Court order.
3. The respondent is ordered to pay the costs of the application.
4. The respondent's counter-application is dismissed with costs.

I hand down the judgment.

**A A CRUTCHFIELD
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 12 October 2022.

COUNSEL FOR THE APPLICANT:

Ms L L Norman.

INSTRUCTED BY:

Diemieniet Attorneys.

COUNSEL FOR THE RESPONDENT: Ms A Scott.

INSTRUCTED BY: Stander Attorneys.

DATE OF THE HEARING: 26 April 2022.

DATE OF JUDGMENT: 12 October 2022.