

REPUBLIC OF SOUTH AFRICA



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

Case No: 17045/2002

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

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DATE

In the matter between :

WEICH, MARTHA MARIA

Applicant

and

VAN DER WALT, JACOBUS

Respondent

JUDGMENT

STRYDOM J

[1] This is a contempt of court application in which the applicant, the ex-wife of the respondent, is seeking an order that the respondent be found in contempt of the order of this court made on 17 October 2003 (“the court order”).

- [2] In terms of the court order, a settlement agreement (“the settlement agreement”) between the parties was made an order of court.
- [3] Pursuant to the alleged contempt of court, an order is sought that the respondent is to pay a fine of R100 000, alternatively such other amount as the court may deem fit, and if the respondent fails to pay the fine, the respondent to be committed to prison for a period of two months, alternatively to such other period as this court may determine.
- [4] The applicant asked for the above mentioned sanction to be suspended on the condition that the respondent complies with the terms of the settlement agreement.
- [5] The parties were married to each other for approximately 20 years and lived together at 4 Fitzwilliam Avenue, Bryanston (“the Immovable Property”).
- [6] The settlement agreement contained the following relevant terms which were noted in Afrikaans:

“3.1 Die partye kom ooreen dat die Eiseres vir die res van haar lewe mag woon in die woning geleë te Fitzwilliamlaan 4, Bryanston;

3.2 Verweerder is verantwoordelik vir die betaling van:

3.2.1 Alle huispaaieimente, totdat die huis ten volle betaal is;

3.2.2 Alle versekering, wat voortgesit moet word selfs nadat die huis ten volle betaal is;

3.2.3 Stadsraadsbelastinge, heffings en dienstefooie, vir solank as wat die Eiseres die woning bewoon;

3.2.4 Water en elektrisiteitsrekening, vir solank as wat die Eiseres die woning bewoon;

3.2.5 Die koste in verband met straatsekuriteit en ander sekuriteit wat van tyd to tyd benodig mag word;

3.2.6 Algemene huis- en erfinstandhouding, vir solank as wat die Eiseres in die woning woon

3.3 Die Verweerder is verantwoordelik om Eiseres te voorsien van die gebruik van 'n motorvoertuig vir die res van haar lewe. Die voertuig kan op Verweerder se naam geregistreer bly, maar moet te alle tye in 'n padwaardige toestand wees. Verweerder is aanspreeklik om alle brandstof, versekering en instandhouding van sodanige voertuig te betaal vir die res van Eiseres se lewe;

3.4 Verweerder is aanspreeklik om die Eiseres op sy mediese fonds te hou en alle mediese en tandheekkundige kostes te betaal, en is ook aanspreeklik vir die betaling van alle bybetalings in die verband. Eiseres onderneem om die reëls van die mediese fonds na te kom ;

5

POLIS

Verweerder is die eienaar van 'n Sanlampolis Nr. 42220551. Eiseres is geregtig op 25% van die na-belaste opbrengs van gemelde polis, en Verweerder is verplig om jaarliks gedurende Januarie van elke jaar aan Eiseres bewyse te voorsien dat sodanige polis steeds van krag is, en dat die premies reëlmatig betaal word, en is verplig om Eiseres in kennis te stel wanneer die opbrengs betaalbaar raak;

6

PENSIOENBELANG

Verweerder is 'n lid van die Ernst & Young Groeplewenskerna. Sodra die voordele van die gemelde groeplewenskema die Verweerder toeval sal hy verplig wees om 25% van die netto bedrag aan hom betaalbaar, nadat die belastinglas verreken is, aan Eiseres te betaal. Verweerder is verplig om hierdie bepaling teen die skema

te noteer en is verplig om Eiseres van die bewys van sodanige notering te voorsien binne drie maande na datum van egskeiding.

9.3 Geen wysiging of verandering deur enige party ten opsigte van hierdie ooreenkoms sal as 'n novasie gereken word nie en word sonder benadeling toegestaan;

9.4 Geen variasie, verandering insluiting of weglating van regte of voorregte of aanspreeklikhede, hetsy by wyse van implikasie of uitdruklik met woord en/of handeling sat bindend op partye wees nie, tensy dit vervat is in hierdie ooreenkoms of vervat word in 'n nuwe, verdere skriftelike ooreenkoms en onderteken word deur beide partye;”

[7] The applicant avers that the respondent has failed to comply with clauses 3, 3.3, 3.4, 5 and 6 of the settlement agreement. These clause deal with the matrimonial home, the motor vehicle, medical aid and the applicant's entitlement to the pension interest.

[8] It is alleged that the respondent intentionally fails to comply with the above mentioned clauses of the settlement agreement.

The legal requirements to hold a party in contempt of court

[9] The applicant must prove the requisites of contempt of court i.e. the order; service or notice; non-compliance; and wilfulness and mala fides beyond reasonable doubt. Once the applicant has proved an order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides. Should the respondent fail to advance evidence that

establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.¹

[10] In this matter the order and service or notice is not in dispute. What is in dispute is non-compliance and only if that is established then the respondent averred that he did not act with wilfulness or mala fides.

[11] It is the applicant's case that the terms of the settlement agreement are clear and that the respondent must have been aware that he was acting in contempt of court when he did not comply with the terms of the settlement agreement. This is denied by the respondent who alleges that on a proper interpretation of the terms of the settlement agreement, he complied therewith.

Points in limine

[12] The respondent raised two points *in limine*. The first, he asked this court to stay these proceedings pending an application to be instituted in the maintenance court in terms of section 6(1)(b) of the Maintenance Act, 99 of 1998 for a substitution of the present maintenance obligations arising from the settlement agreement. It was stated to be in the interests of justice to stay the matter. The court is of the view that the proceedings should not be stayed in this court. These proceedings have not even been instituted, and the respondent had ample time previously to have done so.

[13] A further ground to stay the proceedings pending a Constitutional Court judgment in a matter dealing with contempt of court proceedings was abandoned.

¹ Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at para 42.

[14] The next point *in limine* was for the matter to be referred to the applicant oral evidence as the respondent's enshrined rights to liberty and property are threatened by the relief claimed in this matter. It was stated to be a serious matter and fundamental rights are invoked. It would be in the interests of justice to afford the respondent an opportunity to ensure that the settlement agreement is considered in its proper factual matrix.

[15] The applicant opposed the request of the respondent to refer the matter for the leading of oral evidence. I am of the view that this matter should not be referred to oral evidence for this reason. The court will however consider the application and consider whether there are factual disputes of such a nature that a finding cannot be made on the papers. In such a case, applying the *Plascon Evans* principles, a decision will be made on the papers.

Consideration

[16] The main dispute between the parties relate to clause 3 which determined that the applicant may ("*mag*") live in the immovable property for the rest of her life.

[17] It is common cause between the parties that during or about 2009, that is about six years after the court order, the applicant freely and voluntarily elected to move out of the property to go and live elsewhere. After this date, the respondent and his new wife moved into the immovable property and still occupy same. In the meantime, they have spent approximately R5 million on the betterment of the property. The applicant has recently decided that she wants to move back into the property and alleges that her entitlement in terms of the settlement agreement remains intact. This is some 12 years after she vacated the property.

[18] The settlement agreement stipulated that the applicant “*mag*” or translated into English “*may*” for the rest of her life reside in the immovable property. If this clause is interpreted standing alone, it provided the applicant with a right to live in the property for the rest of her life. This clause however should not be interpreted without reference to the other clauses in the settlement agreement which determined that the respondent would be responsible for certain payments “*vir solank as wat die Eiseres die woning bewoon*”² If this phrase is translated into English, it will read “*for as long as the plaintiff resides at the property*”.

[19] In my view, the terms of clause 3 of the settlement agreement provided the applicant with a choice to reside in the property or not to. By use of the word “*may*” it becomes clear that the applicant could have elected either to stay there or not. The fact that such election could be exercised is strengthened by the wording in the mentioned clauses which stipulated that certain payments would be made by the respondent “*for as long as the plaintiff resides at the property*”.

[20] In my view, once the applicant has exercised an election not to reside in the immovable property she could not change her decision to again reside in the property. This is not an abandonment of a right founded in the settlement agreement, but rather an election, which is envisaged in the settlement agreement.

[21] This is further amplified by the fact that the obligations as contained in clauses 3.2.3, 3.2.4 and 3.2.6 expressly envisage that the applicant’s entitlement to elect to reside at the property was not an obligation in the absolute sense, but

² See clauses 3.2.3, 3..2.4 and 3.2.6.

only to the extent that the applicant initially elected to employ same. Once the applicant elected to no longer reside at the property, the obligation as set out in clauses 3.1 and 3.2 were discharged and could not be revived absent written agreement.

[22] As the election was envisaged in the settlement agreement, once exercised, there cannot be any breach of a non-variation clause. Similarly, it is not a waiver of a right which was initially exercised.

[23] Moreover, even if the court is wrong in its conclusion that the exercise of an election does not amount to an abandonment or waiver of a contractual right, which was not in writing, then applicant is estopped from relying on the contractual term affording her a right to reside in the immovable property. A party to a contract may be precluded from relying on a non-variation clause by the operation of estoppel by representation.³

[24] As these cases indicate the scope of applying reliance on estoppel remains limited. In *casu*, the applicant left the immovable property during 2009 without any indication that she would at some stage want to move back into this property. The respondent clearly acted on this conduct of the applicant, which was a representation by conduct, and moved into the property with his wife. Between them they spent approximately R5m in the betterment thereof. This they would only have done if they had the honest belief that the applicant was not going to insist at a later stage to move back to the property.

³ See *HNR Properties CC and Ano v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) 479J to 480A; *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) at 278; *Phillips and Ano v Millar and Ano* (2) 1976 (4) SA 88 (W) 93; *Minnitt v Stewart Wrightson (Pty) Ltd and Ano* 1979 (4) SA 151 (C) at 154; and *Omni Technologies (Pty) Ltd t/a Gestetner Eastern Cape v Barnard* [2008] 2 All SA 207 (SE).

[25] If the applicant now wants to assert a right to move back, her previous conduct amounted to a misrepresentation which moved the respondent to act to his prejudice especially if he must now comply with the alleged obligation. The applicant, by making such a representation without reserving her right to re-take occupation thereof, acted negligently as a reasonable person in her position would have expressed her intention that she was only temporarily moving out.

[26] In my view, the respondent has met the requirements of estoppel and the non-variation clause would not be a bar to rely on this defence.

[27] Even if this court is again wrong in this conclusion, then the question remains whether the respondent was in wilful default of the court order and acted with *mala fides*. The respondent under circumstances where the settlement agreement is not unambiguous and open for more than one interpretation was entitled to conclude that the terms of the settlement agreement did not afford the applicant with a right to return to the immovable property after moving out some 12 years prior.

[28] The court finds that respondent's interpretation and consequences of the settlement agreement is certainly arguable and tenable. In his mind he was not acting in contempt of court. Evidence to rebut such a conclusion was presented by the respondent. He did not act with *mala fides* by not providing applicant with the opportunity to again take up residence at the immovable property. The applicant failed to discharge the overall onus to prove beyond reasonable doubt that the respondent acted wilfully and with *mala fides*.

[29] As far as the motor vehicle is concerned, the respondent has provided the applicant with a motor vehicle and tendered to keep the vehicle road worthy. On the papers, and applying the *Plascon Evans* rule, the court must conclude that the applicant has not proven non-compliance with clause 3.3 of the settlement agreement.

[30] The same applies to the obligation to pay the applicant 25% of the Sanlam policy. The respondent alleged that he has paid her R50 000 in this regard and as such, the applicant failed to prove non-compliance with this obligation.

[31] As far as the medical aid is concerned, the respondent was required to keep the applicant on his medical aid. After his retirement the previous medical aid was cancelled and he became a member on his current wife's medical aid. He tendered an amount to the applicant to obtain her own medical aid. As the situation changed after the respondent's retirement, my view is that the respondent is not wilfully disregarding the settlement agreement which was made an order of court. The respondent will be well advised to approach a maintenance court to move for an amendment of the settlement agreement to reflect the current position.

[32] As far as the pension interest is concerned, the respondent has made out a case that this was never meant to be a pension in the true sense of the word. The heading used in the settlement agreement was a wrong description for a life policy. The terms of the clause refers to a life cover which covered respondent's life whilst the respondent was still a partner with the accounting firm Ernst & Young. This has been explained to the applicant on many occasions and it only provided life cover which would be payable on the death

of the respondent. The applicant was nominated as a 25% beneficiary should that event have taken place. In my view, the respondent did not fail to comply with the terms of the settlement agreement in this regard. Moreover, he was not in wilful default or acted with *mala fides*.

[33] The respondent has invited the applicant on more than one occasion to have the matter referred to oral evidence but this invitation was not accepted and the applicant continued to persist in the relief she was seeking. The matter was fully argued and heard by this court and the court is of the view that this application should not now at this stage be referred to oral evidence. The applicant's application should be dismissed with costs.

[34] The following order is made.

The application is dismissed, with costs.

**JUDGE RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Date of Hearing: 25 July 2022
Date of Judgment

Appearances
For the Applicant: Adv. K Howard
Instructed by: WA Opperman Attorneys

For the Respondent: Adv. Van Niewenhuizen
Instructed by: Steve Merchak Attorneys