

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2529-2021

DATE: 2022-08-31

**DELETE WHICHEVER IS NOT APPLICABLE**

**(1) REPORTABLE: YES / NO.**

**(2) OF INTEREST TO OTHER JUDGES: YES / NO.**

**(3) REVISED.**

**DATE**

**SIGNATURE**

10 In the matter between

AJOODHA: ALASHA (born: RAMJITH)

Applicant

and

AJOODHA: ASIE KUMAR

First Respondent

AJOODHA: REETA DEVI

Second Respondent

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**JUDGMENT**

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**MALINDI J:**

20 Introduction

[1] The applicant seeks an order enforcing a written agreement entered into between her and the respondents on 14 February 2020 (“the Agreement”).

The applicant further seeks the striking out of

certain allegations made in the respondents' answering affidavit.

[2] In the amended notice of motion dated 20 July 2021 the prayers in the original notice of motion have been amended to take into account the passage of time between the launch of the application and the hearing of this matter. The amendment is granted.

10 [3] The terms of the Agreement contended for by the applicant arise out of the last Will and Testament ("the Will") of the applicant's late husband, dated 18 September 2014. Following upon the reading and execution of the will the family members, being the respondents herein, held meetings between themselves and with the applicant and she agreed to renounce her benefits under the Will. In return an agreement for her and her two sons to be maintained by the family and to receive certain benefits as set out  
20 in the Agreement was reached.

[4] The applicant alleges that the family has reneged and are not implementing their obligations under the agreement. She seeks relief as set out in the joint practice note as follows:

“In terms of the agreement the respondents undertook to maintain the applicant and the two minor children, Ashan Ajoodha (Ashan) and Akshan Ajoodha (Akshan) in exchange for the applicant’s renunciation of the benefits under her late husband, Akaash Ajoodha’s (Akaash) Will.”

10 In terms of the agreement, the respondents are liable to make monthly payments directly to the applicant in the amount of R26 900.00 per month. The respondents are currently in default of payment to the applicant in the amount of R436 320.00 for the period December 2020 to March 2022.

In addition, the respondents are liable to make payments directly to service providers in the amount of R81 100.00 per month in terms of the agreement. The respondents are currently in default of payment to the service providers.

20 The service providers have been historically paid directly by the respondents, with the relevant accounts being in the name of the respondents.

The applicant seeks to hold the respondents to their obligations in terms of the agreement.

That the respondents pay the costs of the application.

[5] The defence to the claim is, first, that *bona fide* disputes of facts have arisen in answer and that this matter be struck off the Motion Court roll.

Secondly, they aver an implied term, which itself raises a dispute of fact and would on its own defeat the claim.

Thirdly, that the implied term is currently a subject of litigation which seeks a rectification of the agreement

10 and therefore that these proceedings be held in abeyance pending the outcome in those proceedings.

This forms part of the defence of *lis alibi pendens*.

Fourthly and fifthly, the defences of lack of jurisdiction by this Court over part of the claim and non-joinder in that the two children are not cited, respectively. The lack of jurisdiction point was abandoned.

[6] The defence on the merits is based on the following averments;

[6.1] the amount claimed is incorrect;

20 [6.2] the applicant cannot claim direct payment to her where service providers have been paid exactly in terms of the agreement;

[6.3] some claimed payments were paid before the application was launched;

[6.4] claims based on the applicant's employment in

the family bakery are to be adjudicated at the CCMA, not the High Court and

[6.5] the applicant must take employment to support herself.

[7] Lastly, the striking out application is opposed.

[8] The issues for determination are couched as enquiring into the validity of the Agreement (ANNEXURE "FA1") and whether any implied terms apply.

[9] In the joint practice note it is common cause that:

10           9.1. The respondents entered into a contract, ANNEXURE "FA1".

9.2. The applicant renounced any and all benefits under the will of her late husband.

9.3. The respondents do not dispute the terms of the contract.

9.4. The respondents make monthly payments to service providers in the amount of R105 442.24 and R26 900.00 directly to the applicant.

20           9.5. The respondents have not made payment to the applicant."

[10] Background Facts

Whereas what is common cause is set out in the Joint Practice Note as above, the following background facts are necessary to set out.

[11] In the event that none of the respondents' defences

are upheld they are to be held liable to pay the whole outstanding amount due to the applicant, being R29 900.00 multiplied by the number of months from 30 December 2020 to date of the amended notice of motion or to date of this order. Similarly, they will also be liable to pay all service providers' invoices for the same period until services are no longer consumed, for example, when the children cease going to school.

10 [12] The implied term challenge based on the fact that the payments referred to above cannot be in perpetuity as the circumstances prevailing at the time of signature may change is superfluous. No rectification of the agreement is required in this regard. If and when circumstances do change the respondents are at liberty to approach the Court for a variation of the agreement.

20 As the third respondent, who is the deponent to the answering affidavit says, this agreement is akin to a maintenance agreement. The respondents have no right to determine on their own, without a court order, to reduce or stop any of the payments in terms of the agreement. This does not amount to a dispute of fact, but of law.

[13] To the extent that the respondents allege that all but two payments had been paid at the time of the

application the Court is capable of evaluating that on the evidence before it. It does not give rise to a genuine dispute of facts, but a computation problem. As stated above, if the agreement is valid and not subject to any rectification the respondents are liable for outstanding payments and all prospective payments until varied by a court of law.

10 [14] The applicant has pleaded that she is not making any claim regarding the injuries suffered by her son. This requires no further attention.

[15] A reconciliation of payments made by the respondents and payments made by the applicant directly to the service providers is also easy of assessment. The respondents do not deny liability, but the computation thereof. This is not a real and *bona fide* dispute of fact.

20 [16] The non-joinder argument is also flawed. The minor children cannot potentially seek any relief different from that which is in the agreement. Neither would they be prejudiced by any relief sought by the applicant. They have no independent interest that cannot be represented on their behalf by their mother, who is the signatory to the agreement. Were it so a curator *ad litem* would be appropriate to appoint.

The Merits

[17] The respondents allege that the applicant's version is that the agreement or payments to her were subject to the pleaded implied terms. This is not so. Paragraph 27 of the founding affidavit does not say so.

[18] In respect of the payments to service providers the respondents plead that all amounts due have been paid prior to the launch of the application. The applicant accepts proof of such payments as set out in Annexures AA4 and AA5, but disputes proof of others  
10 as only the invoices received from service providers are annexed. However, this can be easily resolved by an order that the respondents pay all outstanding payments otherwise they would be in contempt of Court. The only consideration would be how to deal with multiple payments where the applicant alleges to have had to pay the service providers directly due to the default by the respondents.

[19] The rest of the averments have little to do with the respondents' obligations under the agreement or the  
20 reasons why the respondents believe the applicant not to be conducting her social life to the moral standards that they approve of. I will deal with this in the application to strike out certain matters contained in the answering affidavit.

[20] The applicant prays for the payment directly to the



service providers for services rendered in terms of the agreement. This amount accounts for the period of 13 November 2020 when the respondents stopped these payments to date of the amended notice of motion or to date of this order. For obvious reasons, because the respondents are bound by the agreement, they have to pay for all outstanding amounts to all the service providers and to continue doing so until the agreement is varied by an order of the Court. This  
10 would include other service providers that the agreement provides for their payments. It furthermore includes restoring services that have since been terminated by some service providers as a result of non-payment.

[21] The order that this Court will give because of the liability of the respondents will also account for the increases in respect of each of such claims and that the increases in respect of each must be applied in terms of clause 21 of the agreements.

20 Application to Strike Out

[22] The applicant seeks an order striking out paragraphs 8, 41, 2, 51, 52, 53, 54, 55, 72, 73, 74, 75, 76, 77, 78, 79, 80, 86, 87, 89, 90, 91, 92, 93, 96, 97, 98, 113 and 114 of the answering affidavit. These allegations are self-evidently scandalous, vexatious and irrelevant to

the proceedings. They do not advance the respondents' defence, but are merely made in order to scandalise the applicant in an attempt to justify the respondents' resort to breach of the agreement. These stand to be struck out.

[23] The respondents contend that these paragraphs address the merits of the application. This assertion is a disguised attempt at besmirching the applicant's character.

10      The Law

[24] The above conclusions have been arrived at after considering the basic and trite principles of our law. The respondents entered into the agreement freely and voluntarily. They must honour the agreement.<sup>1</sup> No cogent argument was advanced to persuade the Court why the agreement should not be enforced, such as in the instance of fraud. The respondents have not discharged the onus that they bear in this regard.<sup>2</sup> .

20      [25] The submissions that a *bona fide* dispute of facts has arisen in these proceedings is not borne out by the facts that are common cause and those that are alleged by the respondents. No real, genuine or *bona fide* dispute of fact has arisen in all the instances where such is alleged by the respondents. Those

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<sup>1</sup> *Beadica 231 CC and Others v Trustees For The Being Of The Oregon Trust and Others* [2020] ZACC 13.

<sup>2</sup> *AB v Pridwin Preparatory School 2019 (1) SA 327 SCA*.

instances are not material and, in as far as scandalous and vexatious matter was alleged it is struck out. They do not inhibit the Court from deciding the matter on paper or motion proceedings.<sup>3</sup>

[26] The rectification that is sought in this case must be one that remedies a common continuing intention of the parties which is not reflected in the agreement.<sup>4</sup> The respondents have only complained that the applicant cannot enjoy the benefits of the agreement in perpetuity. It cannot be seriously contended that this is the expectation of the applicant. The implication that certain benefits will terminate as and when the circumstances change is self-contained in the agreement. For example, upon the applicant's death or remarriage and upon the cessation of the consumption of any such services under ANNEXURE "FA1".

[27] I am satisfied that no legal principle asserted by the respondents supports their case. None of such authorities require the cessation of the implementation of an otherwise efficient contract and whose subject matter is unrelated to the subject matter in other proceedings.

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<sup>3</sup> Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 to 635 and Wightman trading as JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at [13].

<sup>4</sup> PV v EV (843/2018) [2019] ZASCA 76.

Costs

[28] Clause 22.2 of the agreement provides for payment of costs by a defaulting party. It is inevitable that the clause envisage that the aggrieved party must not be left out of pocket as a result of proceedings to remedy any breach of the agreement. The respondents are therefore liable for costs on an attorney and client scale.

10 [29] The respondents shall similarly pay the costs of the striking out application on the scale as between attorney and client.

Conclusion

[30] Therefore, the following order is made:

1. The first, second and third respondents, jointly and severally, the one paying the others to be absolved, make payment to the applicant of an amount of R436 320.00 for the months of December 2020 to March 2022, both months included, within 10 (ten) days of date of this order;
  2. The first, second and third respondents, jointly and severally, the one paying the others to be absolved, make payment directly to the service provides of any amounts outstanding for the services listed below, in accordance with
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updated account statements to be provided by the service providers, and insofar as such amounts are not paid up to date of this order, for the months of December 2020 to March 2022, both months included as follows:

- (a) Arrears maths tuition for Ashan;
- (b) Arrears science tuition for Ashan;
- (c) Arrears tuition for Ashan at Horizon Star Academy;
- (d) School fees for Akshan;
- (e) School fees for Ashan;
- (f) Medical aid subscriptions (children and applicant);
- (g) DSTV;
- (h) Wi-Fi;
- (i) Household and vehicle insurance;
- (j) Vehicle trackers.

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3. The first, second and third respondents, jointly and severally, the one paying the others to be absolved, make payment to all other service providers for the services set out in ANNEXURE "FA1" to the founding affidavit, in such amounts as are necessary and required and which are not included as prayed for in paragraph 2 above, which have not been paid, and which include the

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rates, taxes and levies in respect of the applicant's residence at 50 Leadwood Drive, Meyersdal Nature Estate, Meyersdal, Alberton.

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4. The first, second and third respondents, jointly and severally, the one paying the others to be absolved, in addition to the amounts referred to in prayers 1, 2 and 3 above, make payment of all further amounts that may become due, owing, and payable in terms of ANNEXURE "FA1" to the founding affidavit, either to the applicant or to the relevant service providers, from April 2022 henceforth. The increases referred to in clause 21 of ANNEXURE "FA1" shall apply hence forth.
5. The first, second and third respondents, jointly and severally, are ordered to reinstate, with immediately effect, all services and benefits in terms of the agreement that have lapsed as a result of non-payment to service providers.
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6. The agreement annexed to the founding affidavit, as ANNEXURE "FA1" is made an order of this Court.
7. The following paragraphs of the first, second and third respondent's answering affidavit dated 22 February 2021 are struck out in their entirety.  
[7.1] Paragraphs 8, 41, 42, 51, 52, 53, 54, 55,

72, 73, 74, 75, 76, 77, 78, 79, 80, 86, 87,  
89, 90, 91, 92, 93, 96, 97, 98, 113 and  
114.

[8] The first, second and third respondents, jointly and severally, the one paying the others to be absolved, pay the costs of this application, including the costs of the application to strike out, and on the scale as between attorney and clients.

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**G MALINDI J**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION**  
**JOHANNESBURG**

FOR THE APPLICANT: Adv. J. Khan  
INSTRUCTED BY: B. Malan Attorneys Inc

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2529-2021-ke  
2022-08-12

16

JUDGMENT

DATE OF THE HEARING:

10 March 2022

DATE OF JUDGMENT:

31 August 2022