IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:95368/2016

22/2/2018

In the matter between:

N A R **APPLICANT**

and

J M R **RESPONDENT**

JUDGMENT

RANCHOD J:

[1] In this matter the applicant seeks an order in the following terms as set out in the notice of motion:

'1. That the respondent be ordered to relinquish and transfer 50% shareholding and/or Interest in all the companies, corporations and businesses held by the respondent as at 02 August 2010 in favour of the applicant within seven (7) days of this court order.

2. That the respondent be ordered to resign as trustee and beneficiary of the Magoeba Manor Trust, IT 9246/00 and to transfer all interest as a beneficiary thereto to the applicant within seven (7) days of this court order.

3. In the event of the respondent failing to act as specified in 1 and 2

above, that the Sheriff/s be authorised to sign on behalf of the respondent to **effect;**

3.1 The transfer 50% of the respondents *(sic)* shareholding and/or interest held by the respondent in all companies, corporations and businesses as at August 02, 2010.

3.2 The resignation as Trustee in the and relinquishment. *(sic)*

3.3 The transfer of the respondents *(sic)* interests as beneficiary in the Magoeba Manor Trust; IT 9246/00.

4. Costs of this application on an attorney and client scale.

5. Further and/or alternative relief.'

[2] Sub-paragraph 3.2 is incomplete but in view of the conclusion I have come to it Is not relevant.

[3] The applicant was married to the respondent on 12 February 1983 but the marriage was dissolved by order of this Court on 5 August 2010. A settlement agreement entered into between the applicant and the respondent was made an order of court. The Divorce Order reads:

'1. That the bonds of marriage subsisting between plaintiff and defendant be and are hereby dissolved.

2. That the agreement between the parties filed of record and marked "X" be and is hereby made an order of this court.'

[4] The relevant sections of the settlement agreement that was made an order of court that are relevant for purposes of this judgment are the following:

'<u>BUSINESS INTERESTAND SHAREHOLDING</u>

Both parties to retain fifty percent (50%) of all shares held by themselves at the date of divorce.

<u>PROPRIETARY CLAIM</u>

13.1 The parties agree that they will retain as their exclusively *(sic)*

movable assets which they respectively have in their possession and under their control.

13.2 The Faerie Glen properties shall be kept by the defendant as her own property.

13.3 The Magoebaskloof property shall be kept by the Plaintiff as his sole property.

NON-VARIATION

The parties agree that this agreement is the sole agreement between them and any variation must be in writing and signed by both parties.'

[5] The respondent raised three points *in-limine* but in her counsel's heads of argument and during the hearing only the first one was pursued seemingly because the other two were more properly dealt with in response to the merits of the claim. I turn then to the point *in-limine.* The respondent says the appellant's claims have prescribed in terms of the Prescription Act No. 18 of 1943. During arguments, counsel for the respondent conceded, as pointed out by the applicant, that the correct Act is the Prescription Act No. 68 of 1969 which is relied upon by the respondent.

[6] The respondent avers that notwithstanding the fact that the settlement agreement was made an order of court, applicant seeks to enforce proprietary rights where the cause of action is based on a contract. Hence the period of prescription relating to a contractual debt applies. The settlement agreement was made an order of court on 5 August 2010. The application was served on the respondent on 9 December 2016 which is more than six years from the date the cause of action arose, i.e. 5 August 2010. Hence, says respondent, the claim has prescribed.

[7] The applicant, however, contends that since the settlement agreement was made an order of court it is a judgment debt and thus the provision of s11(a)(ii) of Act 68 of 1969 applies. The section provides -

'11. Periods of prescription of debts-

The periods of prescription of debts shall be the following:

(a) thirty years in respect of-

(i) ...

(ii) any judgment debt;

….

Hence, says applicant, the judgment debt has not prescribed.

[8] The question that arises is whether a settlement agreement which was incorporated into the divorce order and is made *an order of court* is a 'judgment debt'. In *PL v YL* 2013(6) SA 28 ECG, Van Zyl ADJP (as he then was). writing for a full court, held at para [32] -

> '... the making of an order in terms of an agreement as envisaged in s 7(1) [of the Divorce Act] 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. 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 made an order of court, both parties effectively commit themselves to comply with the terms thereof and to be subjected to sanction by the court should they fail to do so.'

(Footnote 69 is a reference to the judgment of MT Steyn J in *Hermanides v Pauls* 1977 (2) SA 450 (0) at 452G - H.) With respect, I agree with the view of the Full

Court. Accordingly, *in casu* the settlement agreement is a judgment debt. The thirty years prescription period applies therefore the claim has not prescribed.

[9] The applicant seeks enforcement of the order. However. the respondent contends that the judgment does not contain any obligation on respondent to transfer any shares to applicant, to resign as trustee, 'and/or' to resign as beneficiary as claimed in the notice of motion. The applicant seems to rely on an implied term of the agreement which relates to a matter of interpretation and not a judgment *ad factum praestandum* (to perform an act).

[10] The applicant relies on the clause in the settlement agreement which provides that 'Both parties to retain fifty percent (50%) of all the shares held by themselves at the date of divocrce.'

The clause does not clearly say what is to happen to the other 50%. It does not evince an obligation that either party should transfer shares to the other party. It also has to be borne in mind that clause 13.1 of the settlement agreement provides that any variation of the agreement is to be in writing.

[11] In prayer 2 the applicant seeks an order that the respondent resign as trustee and beneficiary of the Magoeba Manor Trust and that all her interest as beneficiary be transferred to the applicant.

[12] It is common cause that the property referred to in clause 13.3 of the agreement *de facto* vests in the Magoeba Manor Trust. The agreement contains no provision that either the applicant or the respondent is obliged to resign as trustee and beneficiary of the trust.

[13] During oral submissions, applicant's counsel emphasised that what the applicant was seeking was enforcement of the court order of 5 August 2010. Given the ambiguities in the relevant clauses of the settlement agreement, in my view, what the applicant probably should have done is seek rectification of the agreement in order to reflect the true intention of the parties.

[14] Where enforcement of a court order is sought it must be readily capable of execution. (See *PL v YL supra* at 498-C para (35]. However, Van Zyl ADJP said -

> '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.'

The learned Judge said further at p50 para [38]-

> 'The findings in *Thutha,* [2008(3) SA 494 (TkH)] 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', is in my view unduly inflexible and restrictive, not only of the powers of the court in s 7(1) of the Divorce Act, but also in relation to the inherent power of the court to compel the observance of its orders.'

Further at para [39] -

> 'The finding in *Thutha* is further premised on the incorrect assumption that the court will only give effect to an order that is readily enforceable.' (Footnotes omitted.)

[15] It seems to me that the parties intended to carry out certain reciprocal obligations in settlement of the divorce matter but the agreement has been worded ineptly. As I said, the applicant should have sought rectification of the settlement agreement or its interpretation, if so advised. But I note that the agreement has a non-variation clause as well.

[16] In the circumstances, the application falls to be dismissed with costs.

RANCHOD J

JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant :	Adv. T Williams
Instructed by:	Mpoyana Ledwaba Inc.
Counsel on behalf of Respondent:	Adv. P.A Van Niekerk (SC)
Instructed by:	Lingenfelder & Baloyi Attorneys
Date heard :	24 October 2017
Date delivered:	22 February 2018