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IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

CASE NUMBER: 13830/09

DATE:17/07/2009

In the matter between

B, B A — Applicant

and

B, N — Respondent

JUDGMENT

Gildenhuys J

[1] The applicant applies by notice of motion dated 31 March 2009 to have a settlement agreement entered into between them on 10 May 2007, made an order of court. The applicant and the respondent were previously married to each other. They were divorced from each other on 22 October 1986. A consent paper concluded between the parties at that time

was made an order of court. This consent paper was subsequently amended by the parties on several occasions. The latest agreement (of 10 May 2007) was intended to settle all outstanding disputes on the terms and conditions contained therein.

[2] Clause 9 of the agreement of 10 May 2007 (to which I shall henceforth refer as "the settlement agreement") is of importance.

It reads as follows:-

> "9. Full and final settlement
>
> 9.1 Save for any agreement that the parties may enter into in writing, this agreement supersedes all prior agreements and/or arrangements entered into between the parties and, save for the terms contained in this agreement neither party shall have any claim against the other arising contractually, by the statute or otherwise for any reason whatsoever and this agreement is in full and final settlement of any and ail of the claims against and obligations owed or owing by the parties to each other.
>
> 9.2 Further to the above, the parties specifically record that upon signature of this agreement:
>
> 9.2.1 they agree to withdraw all actions and applications under the following case numbers, each party to pay his/her

own costs:

9.2.1.1 case no: 13/3/2-88/02 - in the Randburg Magistrate's Court;

9.2.1.2 case no: 16956/02 - in the Johannesburg Magistrate's Court;

9.2.1.3 case no: A3183/02 - in the High Court of South Africa, Witwatersrand Local Division;

9.2.1.4 case no: 10724/02 - in the High Court of South Africa, Witwatersrand Local Division;

9.2.1.5 case no: 102425/02 - in the Johannesburg Magistrate's Court;

9.3 that the Divorce Order, the 1996 agreement, the May 2004 agreement and the December 2004 agreement are superseded in their totality by this agreement and that as from date of signature of this agreement, they are no longer of any force or effect."

The settlement agreement contains no provision that it be made an Order of Court.

[3] The applicant resides in Johannesburg. He avers that he resided in Cape Town from 2000 to 2008. In 2008 he permanently relocated to Prague in the Czech Republic, where he currently resides. He says that he owns no immovable property in the Republic of South Africa, although he continues to have various interests which requires his periodic return to

the country. The settlement agreement was signed by the applicant in Johannesburg and by the respondent in Sandton. In the settlement agreement the applicant chose the following domicilium adress

c/o David Levithan Attorneys 5th Floor, Hyde Park Corner, Jan Smuts Avenue, Sandton.

The application papers was served at the respondent's domicilium address. He entered an appearance to defend and deposed to an answering affidavit in Hyde Park, Johannesburg.

[4] The respondent raised two defences which are pertinent for purposes of this judgment. Firstly, the respondent contends that this Court, in the absence of an attachment to confirm jurisdiction, lacks jurisdiction to entertain the applicant's claim as the respondent does not reside within its area of jurisdiction. Secondly, the respondent submits that there is no jurisdictional basis upon which the settlement agreement can be made an order of court. The applicant's remedy is to apply for enforcement of the settlement agreement in an appropriate forum by seeking specific relief, and so afford the respondent a proper opportunity to respond thereto. In any event, even if the settlement agreement can be made an order of court, the respondent submits that it will be inappropriate to do so, because it will result in an order that is unenforceable, whether by way of immediate execution or contempt proceedings.

[5] I will firstly deal with the defence that this court has no jurisdiction to hear the matter in the absence of an attachment to confirm jurisdiction- An attachment to found or confirm jurisdiction is not always required in cases where an incola institutes legal proceedings

against a peregrinns. Howie P J held in Bid Industrial Holdings v Strang and Another, 2008 (3) SA 355 (SCA) at 370B-C that-

> "..... the common-law-rule that arrest is mandatory to found or confirm jurisdiction cannot pass the limitations test set by s 36(1). It is contrary to the spirit, purport and objects of the Bill of Rights. The common law must be, and is hereby, developed by abolition of the rule and the adoption in its stead, where attachment is not possible, of the practice according to which a South African High Court will have jurisdiction if the summons is served on the defendant while in South Africa and there is sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient. It goes without saying that the new practice could itself be subject to development with time."

[6] In the case before me, the cause of action arose entirely within the jurisdiction of this court - the written agreement was concluded in Johannesburg and performance was to be made by payment into the applicant's bank account in Johannesburg. The respondent indicated his connection to South Africa by stating that he has various interests which require him to return periodically to the country. Furthermore, the respondent deposed to his answering affidavit in Hyde Park and not in some foreign location. The respondent has also (in every agreement concluded between him and the applicant) chosen a domicilium address in Johannesburg. All of this takes me to the view that there is sufficient connection between the application and the area of jurisdiction of this Court to render the disposal of the application by this Court

appropriate and convenient.

[7] I turn to the defence that there is no jurisdictional basis upon which the settlement agreement can be made an order of court, and that it will in any event be inappropriate to do so. There is no basis upon which a party can without more approach a court to make an agreement concluded by him or her an order of court. Mr Gilbert, who appeared for the respondent, pointed out that the applicant does not seek judgment in terms of the settlement agreement under Uniform Rule 41. Nor could the applicant do so since there is no litigation underway which allows for the Rule to be invoked. All legal proceedings between the parties are to be withdrawn in terms of clause 9.2 of the settlement agreement. Uniform Rule 41 is therefore not inapplicable. Nor does the applicant seek to vary any existing maintenance order, whether under section 8(1) of the Divorce Act No 70 of 1979 or in the maintenance courts. There is, in my view, merit in these submissions.

[8] Broome JP remarked in Mansell v Mansell, 1953 (3) SA 716 (N) at 721 B-E that-

> "For many years this Court has set its face against the making of agreements orders of Court merely on consent. We have frequently pointed out that the Court is not a registry of obligations. Where persons enter into an agreement, the obligee's remedy is to sue on it, obtain judgment and execute. If the agreement is made an order of Court, the obligee's remedy is to execute merely. The only merit in making such an agreement an order of Court is to cut out the necessity for instituting action and to enable the obligee to proceed direct to execution. When, therefore, the Court is asked to make an agreement an Order of Court it

must, in my opinion, look at the agreement and ask itself the questioin: 'Is this the sort of agreement upon which the obligee (normally the plaintiff) can proceed direct to execution?' If it is, it may well be proper for the Court to make it an order. If it is not, the Court would be stultifying itself in doing so."

Later in the same judgment (at 721 H), the learned judge said:

"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."

[9] Alkema J, in a comprehensive judgment delivered in Thuta v Thuta 2008 (3) SA 494 (TkH), examined the wisdom of the practice prevailing in various divisions of the High Courts of making settlement agreements orders of court. His-judgment contains a synopsis of reported cases on this issue, and also an analysis of the different practices followed in each of the Divisions. In his judgment, he highlights the difficulties which flow from the terms of a contract being embodied in a court order. He concludes his judgment by itemizing (in par [53] at pp 506I-508G) the substantive procedural principles which he found to be well established in all divisions of the High Court in this country.

[10] The following principles enumerated by Alkema J are relevant to this case:

"1. The purpose of a court order, as a final judgment, is inter alia to allow a party to proceed directly to execution. If the order cannot or shouldnot be enforced, for whatever reason, it

should not be made an order of court:.....

3. court orders should not be formulated in a way that compliance therewith is left to the discretion of the person who is bound thereby and, I would add, to the discretion of the sheriff or his deputy (or any other enforcement officer such as a member of the SA Police Service). Such a discretion will offend against the elementary principle that orders should be capable of ready enforcement:.....

4. As a matter of principle, if a consent order does not comply with the above requirements of a court order, it should not be made an order of court. The purpose of a court order is not to record the terms of an agreement between the parties ('the Court is not a registry of obligations'), but to give final effect to the judgment which brings the dispute to closure..... "

[11] In casu, the essence of the settlement agreement is encapsulated in the following clauses thereof:

"4. It is agreed between the parties that:

4.1 in full and final settlement of any and all maintenance obligations which Nicholas [the respondent] has to Beryl [the applicant], whether arising out of the Divorce Order, the 1996 agreement, the May 2004 agreement and/or the December 2004 agreement or of any atatutory provisions, the common law, contract or otherwise, Nicholas shall:

4.1.1 pay Beryl R775 000.00 (Seven Hundred and Seventy Five Thousand Rand), ("the capital") on or before 1 January 2009;

4.1.2 continue to effect payment to Beryl of an amount of R5 000.00 (Five Thousand Rand) per month as maintenance. Nicholas will make payment of this maintenance to Beryl on or before the first day of each and every month by way of a direct deposit into Beryl's banking account held in her name, or such other account as nominated by Beryl in writing from time to time;

4.1.3 continue to make payment on or before the first day of each and every month of Beryl's comprehensive motor vehicle insurance, Homeowner's insurance and household insurance directly to the Insurance company concerned.

4.2 Upon the date of payment of the capital amount by Nicholas to Beryl on or before 1 January 2009, Nicholas' obligations to effect payment of the monthly maintenance amount to Beryl and to effect payment of the insurances on Beryl's behalf will cease.

6.1 Nicholas hereby pledges the shares in the Nkwazi Ridge Estate ("the shares") to Beryl as security in respect of his obligations in terms of this agreement, such pledge to be realised in the event of his default. The pledge is annexed to this agreement as annexure "A".

6.2 It is specifically recorded that in the event of Nicholas defaulting, Beryl is obliged to:

6.2.1 first execute her claim against Nicholas in terms of the pledge of shares;

6.2.2 grant Nicholas or his nominee a right of first refusal to match any offer which may have been received for such shares, such right to be exercised and

payment to have been received within 30 (Thirty) days of Nicholas having been informed of the offer received, in writing, by means of the delivery of a copy thereof delivered to Nicholas' attorney, David Levitan, or to Nicholas personally at the domicilium address provided for below;

6.2.3 thereafter, and once Beryl is in receipt of the funds from the sale of the shares, and in the event of there being a shortfall, Beryl may proceed directly against Nicholas or any other assets belonging to Nicholas for the recovery of all amounts owing to Beryl in terms of this agreement."

[12] It is clear from the above provisions of the settlement agreement that in the event of a default in payment of any of the amounts due under clause 4.1, the applicant may not immediately execute through judicial attachment of the respondent's assets. She must first attempt to obtain payment through realising the pledged shares. In doing so, she must give the respondent a right of first refusal. Only after she has done all of that, may she recover any shortfall through a warrant of execution against the respondent's other assets. This runs contrary to the essence of a court order as described above, and is sufficient reason not to make the settlement agreement an order of court.

[13] Furthermore, if the settlement agreement is made an order of court, it may deprive the respondent of any contractual defences he may have. The respondent says that, should the applicant seek specific performance under the present settlement agreement, his defences would include an interpretation of the agreement as to whether a dum casta clause that appears in the consent paper which was incorporated in the divorce order, survives and forms

part of the present settlement agreement, just as the order dissolving the bonds of marriage must survive. The applicant began co-habiting permanently with a certain Mr Rosenbaum from September 2008. It would follow, so the respondent says, that if the dum casta clause survived, the applicant would not be entitled to any payments under the agreement as such payments constitute maintenance. These issues can only be addressed adequately in proceedings for specific relief under the settlement agreement.

[14] It follows that the application cannot succeed. It is hereby dismissed with costs.

A GILDENHUYS

Judge of the High Court

Appearances

For the applicant: Ms G Hardy

Instructed by

Allan Levin & Associates

For the respondent: Mr B Gilbert

Instructed by

David Levithan Attorneys