IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG)

JOHANNESBURG

CASE NO: 31340/09

DATE: 2010-12-10

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
DATE SIGNATURE

In the matter between

SUTHERLAND, NATASHA KATE Applicant

and

HOFMEYR, STEFANUS JOHANNES Respondent

J U D G M E N T

VALLY, AJ:

1. On 9 December 2010, at the end of an extremely busy motion court week I had occasion to consider this matter. After reading the papers and after receiving lengthy submissions from counsel for the parties, I delivered judgment in the matter *ex tempore*. Sometime in late April 2011 I received information from my ex-clerk that I was required to make corrections to the typed judgment that I delivered orally on 9 December 2010. This, then is my judgment in the matter.

2. On 14 June 2010 the applicant launched an application in this

Court seeking the following relief:

"1.Within five days of the service of this order, the respondent shall:

1.1 sign the document headed: Agreement of Settlement", being Annexure E2 to the applicant's founding affidavit,

1.2 duly complete a document to be marked annexure A as provided for in clause 1 of paragraph J of the said Agreement of Settlement,

1.3 insert the relevant information in clauses 1.2 and 3 of annexure I and 1.3 of annexure J of the said Agreement of Settlement.

2 In the event of the respondent failing to comply with the terms of prayer 1 above, annexure E2 to the applicant's founding affidavit is declared to be a valid and binding written agreement between the applicant and the respondent, with effect from the date of the granting of this order and the Sheriff of this Court or his or her Deputy is authorised to sign the said Agreement of Settlement for an on behalf of the respondent.

3 The respondent is to pay all the costs of this application on the scale as between Attorney and client."

3. The respondent opposed the application and asked that it be dismissed with costs on a punitive scale.

4. The applicant and respondent are presently married to each other. The marriage has spawned two minor children. The marriage has irretrievably broken down. On 29 July 2009, the applicant issued a combined summons against the respondent calling upon him to meet a case made out by her for a decree of divorce and for other ancillary relief. On the same day the applicant also launched an application in terms of Rule 43 of the Uniform Rules of Court for, *inter alia*, interim maintenance payments, pending the finalisation of the divorce action.

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5. The respondent did not defend the divorce action. Instead, the parties commenced discussions towards concluding a settlement agreement concerning the termination of their marriage in terms of section 7 of the Divorce Act. The said settlement agreement also caters for the proprietary and other consequences of the termination. The agreement was intended to be concluded before 7 December 2009, and was to be made an order of this Court, but for reasons that are identified hereinbelow this was not done.

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6. Early in December 2009 the Rule 43 application was called in Court. Oral argument in the matter commenced before the Court. After a short while, the Court, at the request of the parties, stood the matter down as the parties commenced discussions on the settlement of the divorce action. In the minds

of the parties these discussions culminated in an agreement regarding the divorce. On 3 December 2009 the applicant's attorney wrote to the respondent's attorney stating that, "*we have received our client's instructions to confirm that the above matter* (the divorce action) *has by agreement with your client been settled on the following basis.*" The entire terms of the agreement are then set out in the letter.

7. On the same day the respondent's attorney wrote to the applicant's attorney informing him that the terms and conditions of the Settlement Agreement:

> "... are acceptable to our client save and except for the following amendments which you advised are acceptable to your client:-
> Paragraph 6 ... to be deleted in its entirety and substituted for the following:
> "*The maintenance referred to in subparagraph 5.2 (above) shall automatically escalate annually on the anniversary of the divorce at a rate of 7.5% per annum alternatively as per the price consumer index ("PCI") whichever is the greater.*"
>
> Your counsel will attend Court this morning to postpone the Rule 43 Application *sine die*.
>
> We look forward to receiving the Settlement Agreement in due course."

8. It is clear then that the only problematic term for the respondent was the term concerning the annual escalation of the maintenance payments the respondent would make to the

applicant. The applicant sought an escalation of 10%. The respondent was only willing agree to an escalation of 7.5%. The parties agreed on an escalation of 7.5% or the CPI rate, whichever is the greater. Thus, the parties had settled the dispute which gave rise to the divorce action brought by the applicant. Furthermore, the respondent's attorney indicated that the Rule 43 application was to be postponed *sine die*. This makes sense, as the parties had finalised the divorce action, thus rendering the Rule 43 application superfluous.

9. In my view, the contents of the respondent's attorney's letter of 3 December 2009 indicate that the parties had concluded a binding agreement regarding the terms of their divorce.

10. On 9 December 2009 the respondent's attorney wrote to the applicant's attorney seeking information as to when the respondent can expect to receive the Settlement Agreement so that the matter can be finalised. On 14 December 2009 the applicant's attorney wrote to the respondent's attorney and annexed a copy of the Settlement Agreement for certain incidental information to be filled in by the respondent and for it to be signed by the respondent.

11. The respondent sat on the Settlement Agreement for three months. On 26 February 2010 his attorney wrote to the

applicant's attorney indicating:

> "We refer to the above matter and wish to advise that we have now had the opportunity of consulting with our client who considered the contents of the Settlement Agreement furnished to us under cover of your letter dated the 14th December 2009.
>
> The terms contained therein are acceptable to our client and once our client has obtained the value of the Insurance Policies as envisaged in terms of 3 on page 19 and 1.2 and 1.3, relating to the motor vehicles, of the Settlement Agreement we will advise you accordingly to enable the original to be furnished to our offices for signature by our client without further delay.
>
> Our further communication will follow." (Emphasis added).

12. The contents of this letter, which was sent on 26 February 2010, reiterate that the parties were *ad idem* that their dispute was resolved on the terms recorded in the Settlement Agreement. However, by 18 June 2010 the Settlement Agreement was still not signed by the respondent. The respondent, for reasons that are made clearer in the paragraphs that follow, refused to sign the Settlement Agreement.

13. This necessitated the present application, which, as I mentioned above, is opposed by the respondent. The respondent furnishes no explanation as to why it took him so long to sign the Settlement Agreement, or to timeously convey to the applicant,

or her legal representatives, the reasons for his unwillingness to sign it. The reasons are furnished in a letter sent by his attorney to the attorney of the applicant. The letter was sent two weeks after this application was launched. It is to these reasons that I now turn.

14. It was a term of the Settlement Agreement that the respondent would appoint the two minor children born of the marriage as sole beneficiaries of certain life insurance policies held in his name. Prior to signing the Settlement Agreement, he came to the realisation that he would be unable to comply with this term. This was conveyed to the attorney of the applicant in a letter sent by his attorney on 9 July 2010. The relevant contents of the letter read:

> "3 Our client, the reasons more fully advanced hereunder, is not in a position to complete paragraph 1.3 under paragraph J of page 20 of the Settlement Agreement the reason being that our client has subsequently ascertained that he does not have in his possession policies of Assurance in respect of which his two children, ..., were nominated the sole beneficiaries.
>
> ...
>
> 6 Consequently our client is not in a position to present a life assurance policy in respect of which the two children have been nominated and appointed as beneficiaries

when same does not exist. Such policies were never in existence at the time annexure "C" [which is a letter dated 3 December 2009 and there is no explanation why this letter was only replied to on 9 July 2010, after the present application was launched] had been concluded and agreed upon between our respective clients.

7 Regrettably our client at that stage was under the *bona fide* but mistaken belief that he had in his possession the life assurance policies in respect of which the two children had been nominated and appointed as sole beneficiaries which as aforementioned our client subsequently ascertained is not the case [there is, also, no explanation as to when this fact was ascertained].

7(sic) Without derogating from the aforegoing and in the best interest of his children we have been instructed to advise that our client will be willing and prepared to nominate and appoint the children as beneficiaries in respect of the Liberty Life policy to the value of R1 million and will undertake to sign all the relevant documentation to give effect thereto. Naturally he will undertake to pay the monthly instalments in order to give effect thereto.

...

23 In the circumstances I am prepared to make [the two minor children] the beneficiaries of my Liberty Life policy which is worth R1 million."

15. Thus, the respondent sought an amendment to the Settlement

Agreement. He requested that clause obliging him to appoint the minor children born of the marriage as sole beneficiaries of all his life insurance policies be removed and that it be replaced with another clause which record that he would be obliged to nominate each of the two minor children born of the marriage as beneficiaries in respect of one of his life policy with the value of One Million Rands (R1m).

16. The matter appeared on the Court roll of 24 August 2010. After being called, it was, by agreement between the parties, postponed *sine die* and the wasted costs of that day were reserved. The applicant asks that the respondent be ordered to pay for those wasted costs. The matter was called again in Court on 6 October 2010. The parties had managed to settle the matter regarding the appointment of the minor children as beneficiaries of the respondent's life assurance policies. This was settled at the portal of Court. However, instead of signing the Settlement Agreement (which was appropriately amended) so that the divorce could be finalised, the respondent raised a new issue. It is one concerning rehabilitative maintenance to be paid by the respondent to the applicant. As a result of this new dispute the matter could not be finalised. Instead the parties agreed to the following order:

"By agreement between the parties, it is ordered that:

1 The respondent shall cause [the children] ("the minor children born of marriage with applicant") to be nominated as beneficiaries of one or more of his life policies of insurance to the extent that each minor child shall be the beneficiary in a total amount of R750 000-00, within 30 days of the date of this order;

2 This application is postponed *sine die*;

3 The respondent shall file a further affidavit by no later than 14:00 on Monday 25 October 2010;

4 The applicant will file her reply thereto by no later than 14:00 on 8 November 2010;

5 The costs occasioned by the appearance on 6 October 2010, is to be reserved."

17. The parties complied with the order and filed the necessary further affidavits. The contents of these affidavits concentrate on furnishing the factual material necessary to resolve this new issue concerning the rehabilitative maintenance to be paid to the applicant by the respondent.

18. It is a term of the Settlement Agreement that the respondent shall pay the applicant a monthly payment of R17 500 for 18 months as rehabilitative maintenance. The clause recording this term reads as follows:

"Maintenance, education and medical aid."

"Steve, [the respondent] shall pay:

1.1 Rehabilitative maintenance to Tasha [the applicant], for a period of 18 months at the rate of R17 500 (SEVENTEEN THOUSAND FIVE HUNDRED RANDS) per month, the first of which payment is to be made on 7 December 2009, and subsequent payments to be effected by not later than the 7th of each and every succeeding month until such time as the full amount has been paid to Tasha;"

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19. Despite the agreement not being concluded by 7 December 2009, the respondent made monthly payments to the applicant in the sum of R17 500-00. The applicant maintains that this payment is not the same as the rehabilitative maintenance she is entitled to in terms of the Settlement Agreement. She maintains that it is payment she would have got had she continued with Rule 43 application, which application was only withdrawn on the day of the hearing because the parties had concluded, albeit orally and through exchange of letters, the
20 Settlement Agreement.

20. She, therefore, seeks an amendment to the clause in the form of a deletion of the words "*7 December 2009*" and the substitution of the words "*the month after the date on which the divorce was granted.*" The respondent opposes this application. He contends

that:

20.1. he had already commenced with payment of the rehabilitative maintenance from 7 December 2009 despite the fact that the divorce was not finalised; alternatively,

20.2. whatever claim the applicant had with regard to rehabilitative maintenance was partially extinguished by virtue of his payments pending the finalisation of the divorce.

21. The two contentions are closely related, however, I will deal with his second contention first.

22. To resolve this issue between the parties it is necessary to have regard to the clause itself. It refers to:

22.1. Rehabilitative maintenance;

22.2. For a period of 18 months;

22.3. In the amount of R17 500 per month;

22.4. From 7 December 2009."

23. The respondent maintains that regard must only be had to the fact that it is from 7 December 2009, and that it is for a period of 18 months. He contends that the words, "*Rehabilitative*

maintenance" must not be given any prominence. Alternatively, if it is to be given any prominence, it must be read in the context of the entire clause, which demonstrate that the parties only intended to conclude an agreement that limited the payments of "rehabilitative maintenance" for a period of 18 months from 7 December 2009. In other words, the obligation to pay would cease after payment on 7 May 2011. If this contention is correct, it would mean that the interim payments the applicant was entitled to pending the granting of the divorce order by the Court ('maintenance *pendent lite*") would be subsumed in the "rehabilitative maintenance". The applicant insists that this is not what she bargained for. She certainly would have no reason not to pursue her claim for interim maintenance *pendente lite,* if the divorce would not have been finalised within days or weeks of the Rule 43 hearing, and she still would have pursued her claim for "rehabilitative maintenance" in the amount of R17 500-00 for a period of 18 months post the date of the divorce.

24. It is common cause that the Rule 43 application was only abandoned at Court because the respondent agreed to bind himself to the terms of the Settlement Agreement, which agreement anticipated that the divorce action would have been finalised by 7 December 2009. The respondent must accept full responsibility for delaying the finalisation of the divorce action. In fact, it was not seriously contended on his behalf that he bore no

blame, or only part of the blame, for the delay. It was also not disputed on his behalf that, but for his unequivocal indication that he accepted the terms of the Settlement Agreement, the Rule 43 application would not have been withdrawn on the day of the hearing. The respondent's version that the parties only bargained for a payment of R17 500-00 for a period of 18 months from 7 December 2009 and that the usage of the words "rehabilitative maintenance" was fortuitous, rather than designed, is, therefore, not consistent with all the facts.

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25. The respondent does not deny that he intended to pay the applicant "rehabilitative maintenance". Hence, the inclusion of these words in the Settlement Agreement has to be given effect to.

26. Having found that the words "rehabilitative maintenance" cannot be ignored and that their import must be given full recognition, it is now necessary to examine whether the applicant is entitled to relief in the form of the amendment of the clause by a deletion of

20 the words "*7 December 2009*" and the substitution in its place of the words "*the month after the date on which the divorce was granted.*"

27. It is clear that in terms of this clause, the words, "rehabilitative maintenance", could only be intended to mean once the divorce

has been concluded. But we know that the divorce had not been concluded by 7 December 2009, hence the only problem with this clause is the contradiction or ambiguity between the words, "rehabilitative maintenance", and the period commencing 7 December 2009.

28. In this regard the application is for an order for the rectification of the Settlement Agreement, and for subsequent compliance therewith. The applicant referred, quite correctly, to the principles regarding rectification of agreements. It is correct, as the respondent's counsel pointed out, that rectification is rarely given, or is only ordered when the applicant has shown not only that there is common mistake but that the common mistake needs to be rectified in order to give effect to the true intention of the parties as recorded in the agreement as a whole.

29. The issue of rectification of a contract is one that is not easily resolved. Courts are inclined to give effect to the words that have been used by the parties to record their common intention, and parties are generally prevented from claiming that they intended something other than that which is conveyed by the words used in the instrument recording their common intention. This is more commonly referred to as the parol evidence rule. At the same time, there is a principle that despite the words used by the parties it is necessary for the courts to ensure that the

true intention of the parties is given effect to, and if this can only be achieved by rectifying the instrument then this must be done. Thus,:

> "The difficulty that the whole object (of the *parol* evidence rule as well as the rule that the true version of the contract must be given effect to) is to reduce the uncertainty by setting up a written contract as a rock of certainty in the shifting sands of conflicting evidence. The best that can be done to meet this difficulty is to ensure that the onus placed on the party seeking rectification is not an onus that is easily discharged."[1]

30. A person seeking to obtain rectification of a contract must show that the facts, "*in the clearest and most satisfactory manner*",[2] entitle him/her to the relief sought. The person must also show that there is a mistake common to the parties, and which mistake can only be dealt with by extraneous evidence. The Court is entitled to have regard to extraneous evidence, where such evidence assists in identifying the true intention of the parties. In short, the Court is to have regard:

> "(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract as a whole, including the nature and purpose of the contract

[1] Christie, RH, *The Law of Contract in South Africa*, 5th Ed at 330.
[2] *Bardopoulos and Maccrides v Miltiadous* 1947 (4) SA 860 (W) at 863.

, ...;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. *Delmas Milling Co Ltd v Du Plessis* 1995 (3) SA 447 (A) at 454G-H; *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (A) at 305C-E; *Swart en Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 200E-201A and 202C; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others* 1994 (2) SA 172 (C) at 180I-J;

(3) to apply extrinsic evidence regarding the surrounding circumstance when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence on their own intentions. Swart's case at 201B, *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 624G; *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1 (A) at 10C-D."[3]

31. While the court entertains extraneous evidence, it will not, however, accept any evidence from the parties regarding their own intentions. The extraneous evidence will only address the ambiguity, uncertainty or contradiction in the contract as a

[3] *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768A-E

whole.

32. The Settlement Agreement, as mentioned before is problematic in that, on the one hand, it refers to, "*rehabilitative maintenance*", but, on the one other hand, it provides for this rehabilitative maintenance to commence from "*7 December 2009*". These two phrases cannot be reconciled: the respondent had no duty to pay rehabilitative maintenance as long as the parties remained married. That obligation, should it be found to be one by the Court or should it be agreed to by party to a divorce proceeding, only arises post the dissolution of the marriage,[4] but as of 7 December 2009 the marriage had not yet been dissolved. Until the finalisation of the divorce, the applicant was only entitled to receipt of interim maintenance *pendente lite*.

33. Finally, it needs be said that the respondent relied on the learning in *Botha v Botha*,[5] for his contention that the payment he made prior to the finalisation of the divorce constitutes the "rehabilitative maintenance" he is obliged to pay in terms of the Settlement Agreement. In that case the applicant sought rehabilitative maintenance from the Court and the Court, exercising its discretion as conferred by s 7(2) of the Divorce Act, refused her claim on the basis that she was not entitled to it

[4] See *Kruger v Goss & Another* 2010 (2) SA 507 (SCA), at [9] Of course, this excludes the interim maintenance payments *pendente lite*.
[5] 2009 (3) SA 89 (W)

as she had already been paid a considerable sum. *Botha* does not hold that payment of rehabilitative maintenance can commence before the divorce, all it holds is that a Court may take these payments into account in exercising its discretion when called upon to order a payment of rehabilitative maintenance upon granting an order of divorce. In this case, the applicant is holding the respondent to his agreement to pay her rehabilitative maintenance after the marriage is dissolved. Her entitlement arises from her agreement with him. Had he not agreed to it then, depending on other facts[6], his case may have taken a turn similar to that in *Botha*.

34. The common cause facts in this matter clearly demonstrate that the parties intended the "rehabilitative maintenance" payments to commence only after the divorce was finalised. It is not disputed that the divorce was to be finalised by 7 December 2009. That, after all, is the reason for aborting the Rule 43 application. That is the reason for the payments to commence from that date and for the payments to be regarded as 'rehabilitative maintenance". Thus, to the extent that the Settlement Agreement provides that this payment commenced before the finalisation of the divorce it fails to capture the

[6] The facts would cover: "*the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the break-down of the marriage ... and any other factor which the court may take into account.*" See s 7(2) of the Divorce Act.

common intention of the parties. And, to the extent that the respondent made payment to the applicant regarding her maintenance, these payments are akin to interim maintenance payments *pendente lite*. This, after all, is what the respondent was facing when called to Court to answer to the applicant's claim brought in terms of Rule 43. In conclusion, the respondent's first contention that he commenced payment of the rehabilitative maintenance prior to the divorce is not correct.

35. I, therefore, hold that the applicant has shown that there is a need to rectify the Settlement Agreement to reflect the true intention of the parties.

36. I now need to deal with the issue of costs. It is common cause between the parties that there are costs of two previous occasions that need to be determined, that stood over and that need to be determined by this Court. They were the costs regarding the matter being called before this Court on 24 August 2010, and the costs of the matter being called on 6 October 2010.

37. There is some dispute between the parties as to whether there was a need for the matter to have been called or set down for 24 August 2010. The respondent's version is that the applicant had filed its replying papers only on 20 August 2010, which

necessitated the postponement. The applicant's retort is that, "But, you set it down on the 19th and only gave us one day to file the replying affidavit. It was therefore unnecessary for the respondent to have set down the application for that date". It is my view that, given that neither party is free from blame on this matter, it is best that the matter of costs remain one where each party bears its own costs for that date.

38. I now return to the issue of costs for 6 October 2010. This is the cost order that arises from the application appearing before Court as a result of the resolution of the issue involving the insurance policies. That issue was resolved in a manner which resulted in both parties having to make a concession in terms of their demands. It is therefore not correct to say that either party has won. One party demanded the insurance policy to the amount of R1-million should have been taken out for the benefit of each of the two children, the other party insisted that the insurance policy should have only been for the amount of R500 000 each for the two children. Both parties were forced to concede. There is no doubt that the concession is in the best interest of the children. It can never be said that only one party acted on behalf of the benefit of the children. I therefore take the view that each party should bear its own costs for that day.

39. As regards the costs of this application as a whole, it has to be

noted that the applicant has been successful. She is entitled to her costs. Mr Silver asked that the order caters for these to be taxed on an attorney and client scale. I disagree. The respondent's conduct in this matter is not free from criticism but it cannot be said that his case was so devoid of merit that he acted frivolously and vexatiously by pursuing it. For this reason I hold the view that the applicant should be awarded the costs she incurred in bringing this application and those should be taxed on a party and party scale.

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40. In the result, the following order is made:

1 The document headed "Agreement of Settlement", being annexure E2 of the applicant's founding affidavit is amended in the following respects:

Clause 1, including sub-paragraphs 1.1 to 1.3 of paragraph (g) of the said agreement, is deleted and substituted with the following:

1.1 The words "*December 2009*" in paragraph F are deleted and substituted with the words *"the month after the date on which the divorce was granted."*

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2 Within five days of the service of this order the respondent shall sign the document headed "Agreement of Settlement", being annexure E2 to the

founding affidavit, as amended in terms of paragraph 1 above.

3 In the event of respondent failing to comply with the terms of paragraph 2 above, annexure E2 to the applicant's founding affidavit, duly amended in terms hereof, being the said settlement agreement, is declared to be a valid and binding written agreement between the applicant and the respondent, with effect from the date of granting of this order and the Sheriff of this Court or his or her deputy is authorised to sign the said settlement agreement for and on behalf of the respondent.

4 The respondent is to pay the costs of this application.

5 Each party is to pay its own costs for the hearing of 28 August 2010.

6 Each party is to pay its own costs for the hearing of 6 October 2010.

Vally AJ

Acting Judge of the High Court

For the applicant:	Adv M Silver with Adv S Rose briefed by Kenny Verhage & Associates
For the respondent:	Adv A Macmanus briefed by Leslie Cohen attorneys
Date of Judgment:	10th December 2010