IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 47536/2009

DATE: 2010-02-05

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

25 March 2010 .....
SIGNATURE

In the matter between

FELICITY DELPHINE SCHENK **APPLICANT**

and

ROBERT JAMES SHOLTO DOUGLAS **RESPONDENT**

J U D G M E N T

VAN OOSTEN, J: In this application the applicant seeks payment by the respondent of certain monies. The applicant and the respondent were involved in an intimate relationship since about 1972 from which a child was born in 1973. They, however, never married but lived together as a family until approximately 1994 when, according to the applicant, the

"relationship was clearly at an end". It was at this time, the applicant states, that "the respondent and I verbally agreed that the respondent would pay me the sum of R1 000 000 in lieu of the obligations we believed he owed me as his companion for approximately twenty years and as the mother of our son".

The applicant further states that "no specific or express date" for payment of the amount was discussed between them but that it was her understanding that "the date of payment of this amount would be when the respondent could afford to pay me" and that she always regarded this as "my retirement package".

By way of background it is necessary to refer to a further agreement alleged by the applicant in terms of which the respondent would pay for:

> *'16.1 my medical aid;*
> *16.2 my car insurance;*
> *16.3 an annual trip to the United States of America to visit our son, together with $1000 for spending money;*
> *16.4 maintenance of R4 000 per month. This amount was subsequently reduced by agreement to R3 500 per month after the respondent paid me the sum of US$10 000, which payment is referred to hereunder;*
> *16.5 the levy contributions due to the body corporate in respect of the respondent's flat in Benmore. …, and*
> *16.6 the electricity costs due in respect of the Benmore flat.*
> *17.1 It was also agreed that I would have life long tenure in the respondent's flat situated at […..] Benmore, Sandton, Gauteng…where I currently reside and have done so since 1987'.*

It is common cause between the parties that the respondent, during September 2008, paid the amount of US$10 000 to their son. The applicant says and it seems to be common cause that this amount should be deducted from the R1million which the respondent still owes her. No further payments, she further states, were made and she therefore, in prayer 1 of the notice of motion, claims payment by the respondent of the sum of R917 400.00 being "being an amount of R1m…less US$10 000… the exchange rate of which, as at September 2008, was R8.26…(the capital sum)".

In prayer 2 of the notice of motion the applicant claims payment by the respondent of the sum of R3 500 per month from December 2008 to date of payment of the capital sum. The notice of motion contains three further claims (prayers 3, 4 and 5, relating to the expenses referred to in para 16.1, 16.2 and 16.6 quoted above), but those were not pursued in argument before me. I am accordingly required to determine only the applicant's claim for payment of the capital sum of R917 400 and the sum of R3 500 per month from December 2008 to date of payment of the capital amount. The date December 2008 has this significance: that is when the parties according to the applicant were involved in a heated argument which resulted in the respondent from then onwards not making any further payments.

At first blush one cannot escape a certain feeling of uneasiness when regard is had to the terse information and details given by the applicant as to the conclusion of the agreement she relies upon. Counsel for the respondent went further and expressed her misgivings in a point *in*

limine to the effect that the applicant has failed to show a cause of action for want of any particulars as to the exact date upon which as well as the place where the agreement was concluded and moreover what the precise terms thereof were. Read in context and viewed against the background facts of this matter, however, there is no merit in counsel's contention. Odd as it may seem, as it will become apparent, the applicant's version as to the conclusion of the agreement gains considerable momentum and in fact is corroborated by the version of the respondent. The point *in limine*, therefore, is dismissed.

10 The starting point is the applicant's instruction to her present attorneys of record to pursue her claims against the respondent and the respondent's response thereto. Mr van Niekerk, of the applicant's attorneys, discussed the applicant's claims with the respondent in an attempt to come to an amicable settlement. In an email to Van Niekerk dated 29 April 2009 the respondent expressed himself as follows:

> 'The position is briefly as follows. Over 15 years ago (any relationship we might have had, had ended long before this & we were to all intents and purposes leading separate lives, although staying in the same flat). I offered & agreed
20 a settlement with Felicity (*ie* the applicant) totalling a million rand. Nothing more, nothing less. It was agreed that I would cover certain expenses from an 'assumed' income from it & the balance would be paid as a cash allowance. In any event, I never had, nor do I now have a million rand cash or near cash available. This arrangement was not discussed with anyone else nor was it reduced to writing, the basis being trust'.

The content of the "agreed settlement" alleged by the respondent

in this email is squarely on all fours with the applicant's version. The "assumed income" he referred to was obviously and quite clearly the income the applicant would have received by way of interest had the amount been paid to her then. Further of importance is the reference to the "balance", which he stated would be paid as a "cash allowance" to cover the applicant's monthly expenses. In a follow-up email to Van Niekerk, dated 17 May 2009, the respondent again referred to the agreement, this time expressing himself as follows:

> 'The crux of the matter is the private settlement that Felicity & I made of 1million rand. This was or there was. Nothing more, nothing less. The monthly 'expenses' of about R10 000 was based on an assumed income from this sum. So I have not 'reduced' her expense allowance at all. In fact, I believe an assumption of 12% after tax should be regarded as fairly generous? It's just that the expenses have increased beyond the R10 000 pm figure. (now R9 500pm). If I were to pay her R1mill, then she would need to vacate the flat, the 'allowance' would fall away, she would need to refund the usd10 000 (or deduct it) & she would need to take over certain expenses I have paid directly, including car insurance, medical aid etc. all included in the 'expenses''.

Against this I turn to the version of the respondent as set out in his answering affidavit in this application. Significantly, except for a general denial, he fails to deal directly with the applicant's allegations concerning the conclusion of the oral agreement relating to the payment of R1 000 000. The only direct reference thereto comes much later in the answering affidavit where he stated as follows:

> '38. When this dispute arose I went to see her attorney at

> Eversheds, Mr Peter van Niekerk to explain the situation and try to resolve the matter amicably. I tried to explain to him that our agreement had been for a notional payment of R1 000 000 to the applicant in the form of benefits and cash to a maximum of R10 000 per month. This was further to be reduced by my payment of $10 000 to her, via our son, resulting in an overall monthly exposure by me of R9 500. He has misinterpreted this, and insists that the R9 500 per month is due in cash over and above the other benefits. This is manifestly not so. But I was not legally represented at that meeting, and my emails to him appear to be badly worded'.

The version the respondent now proffers clearly contradicts the contents of the earlier emails to Van Niekerk I have referred to. It is only now that the notion of a "notional payment of R1 000 000" in the form of benefits and "cash to the maximum of R10 000 per month" has been introduced. But this version in itself leaves a number of questions unanswered, such as when the obligation was to commence, when it would end and why it was assumed. These questions are all raised by the applicant in her replying affidavit. The respondent has moreover failed to set out the amount he has thus far paid in alleged reduction of the capital and what the amount of the overpayment is (as was alleged in a letter by his attorney dated 4 July 2009), nor was there any reference at any stage prior to him consulting with his attorney and the correspondence that ensued, to the obligation in these terms.

Considered against the background facts of this matter, in particular the relationship that had existed between the parties prior to the breakdown thereof, the accumulation of assets during the time they lived

together as husband and wife and, finally, that the agreement was concluded much by way of what otherwise would have been a “divorce” settlement, the probabilities, in my view, quite clearly tip the scale in favour of the applicant's version. It follows that she is entitled to the relief sought in prayers 1, 2 and 7 of the notice of motion.

In the result grant an order in terms of prayers 1 as amended, 2 (as amended by me) and 7 of the notice of motion. The order accordingly now reads as follows.

ORDER

1. The respondent is ordered to make payment to the applicant of an amount of R917 400 within 90 days of the date of this judgment.
2. The respondent is ordered to make payment to the applicant of a sum of R3 500 per month from December 2008 until the date of payment of the capital sum in 1 above.
3. The respondent is ordered to pay the costs of this application.
4. Leave is granted to the respondent to approach this Court on the same papers to obtain an amendment, if required, of the 90 days period referred to in paragraph 1 above within five days of the date of this order.

Counsel for the applicant	***Adv SA Nathan SC***
Counsel for the respondent	***Adv A Willcock***

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