

**IN THE HIGH COURT OF SOUTH AFRICA**



**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case No: 35598/21**

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: / NO
- (2) OF INTEREST TO OTHER JUDGES: / NO
- (3) NOT REVISED.

**29 September 2022**

.....

DATE

A handwritten signature in black ink, appearing to read "Francis".

SIGNATURE

In the matter between:

**MALANIE HEYNIKE**

Applicant

and

**ADRIAAN VAN DER WESTHUIZEN**

Respondent

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## JUDGMENT

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### FRANCIS-SUBBIAH, AJ

[1] The applicant seeks a declaratory order that the respondent is bound by the terms of the settlement agreement concluded between them and therefore seeks specific performance in terms of this agreement.

#### *Background facts*

[2] The applicant and respondent commenced a romantic relationship in April 2016. The applicant claims that several promises were made to her by the respondent that he wished to dedicate his life to her and remain committed to her until he passed on. Based on these promises she left her matrimonial home of more than 35 years and moved in with the respondent. After several years the respondent ended their relationship during 2020 and 2021. Thereafter the applicant and respondent entered into a settlement agreement signed on 4 February 2021 marked Annexure 'A.' The respondent is the author of the entire settlement agreement where he expresses his intention to support the applicant financially.

[3] The material terms of the settlement agreement are that the respondent will remunerate the applicant for furniture and appliances that will remain in his house, a list of items that she will take to her new residence as well as provide her with monies to purchase new items for her residence. He further undertook to pay the rent, levies and wifi until 31 December 2021. These undertakings amounted to a total of R237 700.00.

[4] Applicant owed respondent an amount of R100,000.00 arising from him settling her vehicle debt. This amount subtracted from the total of R237 700.00 results in R 137 700.00. In addition to this the respondent added an amount of R62,300.00, which is considered to be the vehicle settlement fee, (which amount he wrote off) and paid the applicant a total of R 200 000.00 on 23 January 2021.

[5] The settlement agreement was signed after the payment of the R200 000.00 which confirmed this arrangement. In addition, the respondent undertook to make provision for the applicant in his will under the following terms:

- 5.1 His immovable property situated at 14 Spiral Walk, Woodmead Springs, Sandton would be bequeathed to her in the event of his death;
- 5.2 In the event that the immovable property was sold during his lifetime, she would receive 50% of the net profits;
- 5.3 These provisions were conditional on the basis that the applicant does not re-marry or return to her former life partner Mr Maartens Heynike.

[6] The respondent further undertook to retain the applicant on his medical aid scheme until December 2031, for a period of 10 years, subject to the condition that she did not re-marry or return to her former life partner Mr Maartens Heynike, in which event the medical aid support will cease.

[7] The applicant accepted the obligations created in the settlement agreement and this was common cause between the parties. However, the respondent had a change of mind and on 29

March 2021, informed the applicant that he would no longer be bound by the balance of the terms of the settlement agreement. Following this event, the applicant through her attorneys addressed a letter to the respondent that his conduct amounted to a repudiation of his contractual obligations as set out in the terms of the settlement agreement. As a result, the repudiation was rejected, and he remained liable in terms of the contractual obligations.

[8] Thereafter, the respondent provided a document dated 31 March 2021 entitled “Revised Settlement between Adriaan van der Westhuizen and Heynike” marked Annexure “D”. In this document the respondent withdrew his offer to share the immovable property (house offer) with the applicant and stated that his sons would be the sole beneficiaries to his property. He further unilaterally reduced the medical aid cover from December 2031 to the end of April 2022.

[9] The applicant has however not agreed to the amendment of the agreement concluded on 4 February 2021. This settlement agreement between the parties still subsists. The respondent has not cancelled the agreement. The applicant then sent a second letter of demand to the respondent on 18 May 2021 that the respondent amends his last will and testament in accordance with their agreement to reflect the applicant as the sole beneficiary of the immovable property in question in the event of his demise. He further confirms in writing that if the immovable property is sold, she will be entitled to 50% of the proceeds after deduction of necessary expenses. In addition, that he arranges with the medical aid scheme administrator that she remain on his medical aid scheme or on her own medical aid scheme at his cost. He was informed that if he failed to comply within 10 days of demand the plaintiff will proceed to court for the appropriate declaratory relief.

#### *Validity of settlement agreement*

[10] The principle question to be answered is whether the agreement of 4 February 2021 is valid and enforceable creating a binding obligation between parties. Flowing from this, whether the applicant is entitled to the relief sought in the notice of motion. The validity and enforceability of an agreement is subject to the general idea that an illegal agreement is invalid and does not create obligations as set out in ***African Dawn Property v Dreams Travel*** 2011 (3) SA 511 (SCA) para 27-28. This has the effect that no claim can be brought to enforce what was promised in the agreement.

[11] The respondent contends that even though he has made an offer the agreement has never been any accepted by the applicant of the offer to share in his immovable property and the medical aid assistance. The applicant only accepted his monetary offer and not the offer of the house and medical aid support. Therefore, on 29 March 2021 he revoked such offers.

[12] In ***Natal Join Municipal Pension Fund v Endumeni Municipality*** 2012 (4) SA 593 (SCA) at para 18, it was held that interpretation is the process of attributing meaning to a contract taking into account the language, the context, the purpose and material (information) known to the parties are to be considered.

[13] In considering the above factors, the facts of this matter demonstrate that the respondent drafted the agreement on 22 January 2021 and on the very next day on 23 January 2021, he paid the monetary amounts to the applicant. It is only on 4 February 2021 that the agreement is signed which confirms the monetary payments and the acceptance of the offer. It was the respondent who authored and drafted the entire document including the acceptance which was simply signed by the applicant. The document does not show any conditional acceptance or the striking out of a term as alleged by the respondent. No terms were deleted in the agreement. The respondent advanced the terms and it was accepted by the applicant. For these reasons the applicant's signature and recordal does not constitute a counter-offer as alleged by the

respondent. The respondent had been making payments in respect of the medical aid assistance in terms of the obligations created by the settlement agreement.

[14] The signatures indicated the intention of the parties and certainly constituted a meeting of their minds. In ***George v Fairmead (Pty) Ltd***, 1958 (2) SA 465 (A) the court stated that ‘when a man is asked to put his signature to a document he cannot fail to realize that he is called upon to signify, by doing so, his assent to whatever words appear above his signature.’ Respondent could not revoke his offer because it was already accepted. This is further evidenced by his attempt to re- negotiate the agreement by providing an amended agreement on 31 March 2021, ‘to revise my agreement that was signed on February 4<sup>th</sup> ...’ which the applicant refused.

[15] In his answering affidavit, the respondent states that he was not in the right frame of mind when he concluded the agreement due to the psychological bullying carried out by applicant. However, no medical evidence is presented to indicate the credence or truth of these submissions to support the contention that no agreement has been created on the house and medical aid assistance.

[16] It is evident that the facts in the applicant’s affidavit are admitted by the respondent together with the facts alleged by the respondent. There is no dispute of fact, it is only the interpretation of the settlement agreement that is disputed. Therefore, the respondent’s version that the offer of the house and medical aid support was not accepted is rejected because it is untenable in the context of the circumstances. It is evident that the entire offer made by the respondent was accepted. Accordingly, a settlement agreement between the parties was properly concluded.

[17] The next stage of this enquiry is whether the obligations arising from the settlement agreement can be lawfully enforced? Are the terms of the agreement against public policy (*contra bonos mores*)? Section 21(1)(c) of the Superior Courts Act 10 of 2013 provides that a High Court has the declaratory power 'in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[18] It is trite that the law of contract forms part of common law which Courts must interpret and develop as set out in s39(2) of the Constitution of RSA. In **Sasfin (Pty) Ltd v Beukes** 1989 (1) SA 1 (A), it was held that in determining whether a contract is contrary to public policy must be done sparingly and objectively. Individual ideas of fairness and propriety should not be taken into consideration when affirming question of public policy. It is the spirit, purport and objects of the Constitution that must be upheld as set out in s39(2). Moreover, it was held in **Juglal v Shoprite Checkers (Pty) Ltd** 2004 (5) SA 248 (SCA) that where a court deems a provision of a contract is unconscionable, illegal or immoral it will not enforce it.

[19] In regard to the status of a thing, such as immovable property, what was said in **Airports Company South Africa v Big Five Duty Free (Pty) Ltd and other** 2019 (5) SA 1 (CC) finds relevance in this matter. Froneman J held at para 13 that '...a settlement agreement between litigating parties can only be made an order of court if it conforms to the Constitution and the law;' The applicant's prayer in regard to the offer of the house that the court directs the respondent to amend his Last Will and Testament to reflect the applicant as the sole beneficiary of the property situated at 14 Spiral Walk, Woodmead Springs, Sandton in the event of him passing has a significant impact on freedom of testation and right to property.

[20] Du Toit, F in **'The constitutionally bound dead hand" the impact of the constitutional**

***rights and principles on freedom of testation in South African Law*** 2001 Stell LR 222 at 224 expresses the well-established importance of freedom of testation as follows:

‘Freedom of testation is considered one of the founding principles of the South African law of testate succession: a South African testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner he deems fit. This principle is supplemented by a second important principle, namely that South African courts are obliged to give effect to the clear intention of a testator as it appears from the testator’s will. Freedom of testation is further enhanced by the fact that private ownership and the concomitant right of an owner to dispose of the property owned (the *ius disponendi*) constitute basic tenets of the South African law of property.’

[21] The respondent contends that to deny him of his right to freedom of testation would be akin to disregarding the founding principle of human dignity. The right to dignity allows the living and the dying the peace of mind of knowing that their last wishes would be respected after they have passed on.

[22] Arising from the surrounding circumstances I am of the view that this provision is not enforceable by this court as it will deprive the respondent his right of testation. Our law allows freedom of testator and contractor. The court should only involve itself at the stage of enforcement. So, the court should not give direction as to how parties should frame such documents. If the courts take on the duty of directing what terms may be included or excluded, at the pre-contract stage, then there may be insurmountable conflict if a court is approached at enforcement stage. Courts should not pre-judge matters. For example, if the applicant pre-deceases the respondent, and the court does not allow the respondent freedom of testation then there is possibility of considerable injustice done on the death of the respondent. So bottom line is the courts hands are tied now, but it may not be so at enforcement stage. In these circumstances it will be contrary to public policy because testamentary law provides that a testator has freedom at any time prior to death to change his testamentary beneficiaries.



[23] Similarly the relief claimed upon sale of the respondent's house is also subject to a suspensive condition that has not yet arrived. A right or title to share in 50% of proceeds of sale after deductions in the event of sale of the immovable property has not been fully canvassed before this court. A vested right is deemed to be unconditional and the burdens imposed will be unduly burdensome now, but it may not be so at enforcement stage. The ancillary relief claimed is therefore premature. The applicant concedes that an imposition on the respondent not to take out any further loan and/or bond over the property and draw on the current mortgage bond so as to increase the liability of the property is a limitation to the property rights of the respondent and such ancillary relief is to be rejected.

[24] The medical aid offer made by the respondent was conditional upon the applicant's re-marriage or return to her former life partner. Respondent submits that this condition has the effect of discouraging marriage and should therefore not be enforced. I am of the view that an individual like the applicant may exercise her own choice to enter marriage or not. The ever - changing needs of society, currently neither discourage or encourage marriage, it is an integral part of human dignity to exercise the freedom of choice to marry or remain single. Respondent's submission is rejected.

[25] In respect of the medical aid offer and acceptance, the respondent has the applicant on his medical aid and as per the settlement agreement agreed to retain the applicant on his medical aid scheme until December 2031, for a period of 10 years, subject to the condition that she did not re-marry or return to her former life partner Mr Maartens Heynike, in which event the medical aid support will cease. On the basis that the respondent is bound by the settlement agreement and no factual evidence is advanced that this position has changed. He shall continue to perform in accordance with the agreement as justice demands that an agreement properly concluded must be honoured. The Constitution and the values enshrined in it support the consideration when the interests of both parties are balanced.

[26] In regard to the applicant's prayer to be retained on a specific type of medical aid plan, being the "*Discovery Classic Saver Health Plan*" or a similar plan until December 2031, or for alternative medical aid to equal value of R 5586.00 per month, no case is made out for the amended relief as the settlement agreement only pertains to keeping her on the respondent's medical fund. In the circumstances such ancillary relief is rejected except to the extent and value that medical support is provided for in the settlement agreement.

[27] I see no reason why costs should not follow the result as the applicant has been substantially successful.

[28] **In the result it is Ordered that:**

- a] The respondent is bound by the terms of the settlement agreement concluded on 4 February 2021;
- b] The respondent is directed to retain the applicant on his medical aid scheme until December 2031, unless the applicant remarries or returns to her previous life partner;
- c] The respondent is ordered to pay the costs of the application.



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**R. FRANCIS-SUBBIAH**

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

Counsel for the Applicant:

Adv Posthumus

Counsel for the Respondent:

Adv Van Nieuwenhuizen

Date of Hearing:

17 August 2022

Date of Judgment:

29 September 2022

**The judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to Caselines. The date and time for the hand down is deemed on 29 September 2022 at 15H00.**