IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 2081/14

DATE: 13 October 2014

J[...] M[...] **PLAINTIFF**

V

M[...]-A[...] M[...] **DEFENDANT**

JUDGMENT

MABUSE J:

[1] The parties in this application are husband and wife. The husband, J[...] M[...], the applicant in this matter, is an adult male who resides in Centurion. He seeks the following order against the respondent:

> " *1. That the purported cancellation by the Respondent of the settlement agreement signed on 30 August 2013 by and between the Applicant and the Respondent is declared invalid and of no force and effect;*
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> *2. That the Respondent must obtain a date on the unopposed divorce roll within five (5) days of the court order and set the divorce down on the unopposed divorce roll and notify the Applicant of such date within three (3) days of such date having been obtained;*
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> *3. That the Respondent should attend court on the said date and take to the stand to finalize the divorce;*
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> *4. That in the event the Respondent fails to obtain a date within five (5) days and or having obtained the date fails to attend court and or having attended court fails to take to the stand, the Applicant is authorized to obtain a date on the unopposed divorce roll, to set the matter down, to attend court and to take to the stand in finalization of divorce, as the case may be;*
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> *5. That the Respondent pays the costs of this application on attorney and client scale;*
>
> *6. Further and or alternative relief "*

[2] The principal issue that the court is called upon to decide in this matter is whether the respondent was correct in cancelling a settlement agreement or not.

[3] The respondent has issued divorce summons against the applicant in which she seeks, among others, an order of divorce. The applicant, having been served with a copy of the divorce summons, indicated his intention to defend the said divorce action by delivering a notice of intention to do so. Subsequently he delivered his plea, the discovery notices and discovery affidavits.

[4] The divorce action was then set down for hearing on 30 August 2013. On 27 August 2013, the parties held a pre-trial conference in the presence of their legal representatives. Adv. S. Strauss, the respondent's counsel, was also present. At the time, the respondent was represented by Marais and Partners. At the said pre-trial conference, the parties reached an agreement. They agreed furthermore that Adv Strauss should prepare a typed copy of the settlement agreement and, having done so, send it by email to the applicant's attorneys for their perusal and in order for them to make amendments if necessary.

[5] On 30 August 2013 the respondent's attorneys raised certain concerns with the draft settlement agreement. Subsequently the parties then decided to hold further settlement negotiations in order to address the issues that were of concern to them. This was done in the boardroom of the New Court Chambers. The parties and their respective legal representatives were present. After some settlement negotiations, the parties eventually reached an agreement. The agreement was reduced to writing after which it was signed on 30 August 2013 by the parties and their witnesses. The respondent has admitted that on 30 August 2013 an agreement was reached; that it was reduced to writing and that she signed it. She admitted furthermore that it was confirmed by a Family Advocate on 2 September 2013. Because of the delay in reaching settlement, the matter could not proceed on 30 August 2013 and had to be removed from the roll. On 2 September 2013 a settlement agreement was endorsed by the Family Advocate.

[6] As the divorce action had been settled, the applicant withdrew his defence of the action so as to enable the respondent to proceed unopposed and to obtain a decree of divorce that would have incorporated as a settlement agreement. On that basis the matter was set down for hearing on 5 November 2013 on the unopposed roll. The applicant was satisfied that the respondent would, on 5 November 2013, proceed with the divorce action without any hassles.

[7] On 5 November 2013 the applicant's attorneys received a telephone call from a Ms. Doussy who informed them that the respondent was unwilling to proceed with the divorce action. No reasons were furnished for the respondent's sudden unwillingness to proceed with the divorce action. On 6 November 2013, the applicant's attorneys, desirous of knowing the reasons for the respondent's sudden change of mind, wrote a letter to the respondent's attorneys and enquired about the reasons. No response was received.

[8] On 21 November 2013 the applicant's attorneys made a follow-up in another letter. This time they referred the respondent's attorneys to clauses 5.1 and 5.3 of the settlement agreement. For the sake of completeness I set out the contents of clauses 5.1 and 5.3 of the settlement agreement hereunder:

> "**5.***1 Similarly will the Plaintiff elect a vehicle for the benefit of her and the minor child. The Defendant will effect payment as such subject to the purchase price not exceeding R300 000.00 (Three Hundred Thousand Rand). The Plaintiff will become owner of the vehicle and the Defendant indemnifies the Plaintiff against claims by third parties.*
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> *5.3 On registration of the vehicle into the name of the Plaintiff, the Plaintiff will return the vehicle Mercedes Benz, currently in the possession to the Defendant "*

[9] The applicant's attorneys complained that notwithstanding the provisions of clause 5.1 of the settlement agreement, the respondent had failed to elect a motor vehicle and furthermore that she had continued using a Mercedes Benz. They pointed out furthermore that the continued use of the Mercedes Benz would result in its eventual depreciation. They put her in *mora* and demanded that she made her election within five (5) days of 6 November 2013 failing which the applicant would choose any motor vehicle with the value not exceeding R300 000.00 (Three Hundred Thousand Rand).

[10] The Applicant's attorneys' letter of 6 November 2013 opened a pandora of worms. By 26 November 2013 the respondent had enlisted the service of a new firm of attorneys in the matter. They were Shapiro and Ledwaba, the

current attorneys of record. On 26 November 2013 they responded to the Applicant's attorneys' letters. In their reply they:

> 10. (i) Firstly, drew the applicant's attorneys attention to clause 4 of the parties' settlement agreement and accused the applicant of having failed to comply with terms of clause 4.1 which stated that:
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> > "*4.1 The Plaintiff will proceed to find and elect a premises for purposes of her and the minors residency, the reasonable market value not exceeding the purchase price of R1,200,000.00 (One Million Two Hundred Thousand Rand). The Defendant will render and contribute input as to the reasonable security measures on the property. "*
> >
> > It was furthermore stated in the said letter that the applicant had had more than sufficient opportunity to comply with his obligations in this regard but as at 6 November 2012 had failed to do so. The respondent's attorneys indicated furthermore that the respondent would immediately thereafter proceed to find and elect a further immovable property which the applicant had to purchase. They also advised that should he fail to purchase the immovable property so elected, the applicant would be regarded as having repudiated his obligations in terms of the said settlement agreement and that the respondent would accept such repudiation and would proceed to cancel the agreement.
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> 10.(ii) Secondly, they accused the applicant of having failed to purchase the respondent a Toyota RAV 4 motor vehicle valued at R300 000.00 as he had undertaken in clause 5.1 of the settlement agreement. They regarded this as a default and demanded that the applicant purge it within seven (7) days of 26 November 2013. They informed the applicant's attorneys that he failed, within a period of seven (7) days of 26 November 2013, to buy the respondent the said motor vehicle the respondent would regard the applicant's failure to do so as repudiation. She would accept the repudiation and thereupon elect to cancel the settlement agreement.
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> 10(iii) Thirdly, they accused the applicant of having failed to comply with the terms of clause 6.1 in terms of which he had undertaken to pay a sum of R1,500 000.00 (One Million Five Hundred Thousand Rand) or less in favour of the respondent towards her electing and acquiring an immovable property for purposes of rental income. The respondent's attorneys demanded that a sum of R1, 500, 000.00 (One Million Five Hundred Thousand Rand) be paid, within 7 (seven) days of 26 November 2013, into their trust bank account failure of which the respondent would regard it as repudiation and would elect to cancel the agreement.
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> 10. (iv) Fourthly, they alleged that the applicant had failed, as agreed in clause 6.2 of the settlement agreement, to pay a sum of R50 000.00 (Fifty Thousand Rand) to the respondent on or before 15 November 2013. They demanded payment of the said amount within seven (7) days of 26 November 2013 at the pain of failure to do so being considered as repudiation by the respondent and which would lead to the respondent electing to cancel the settlement agreement.

[11] On 26 November 2013 the applicant's attorneys replied to the respondent's letter. Largely the applicant's attorneys denied that the applicant had repudiated the settlement agreement in any manner whatsoever. With regard to the point raised in paragraph 10(i) *supra*, they informed the respondent's attorneys that they had been communicating consistently with an estate agent, one Elmarie Theron, regarding the properties that the respondent had shown interest in. They gave an undertaking that the applicant was still prepared to comply with clause 4.1 of the settlement agreement. They also indicated that no purchase price could be paid until an agreement of sale has been signed. On the point raised in paragraph 10(ii) *supra*, they

contended that the respondent had never informed them of her choice of a motor vehicle. They also pointed out that it was for that same reason that on 21 November 2013 they wrote a letter to the respondent's former attorneys in which they put the respondent on terms. On the point raised in paragraph 10(iii) *supra* they pointed out that a sum of R100, 000.00 (One Hundred Thousand Rand) as part payment of the sum of R50, 000.00 (Fifty Thousand Rand) was paid into the trust account of the respondent's former attorneys. They also pointed out that the applicant had been paying a sum of R50, 000.00 (Fifty Thousand Rand) plus a further sum of R6, 000.00 (Six Thousand Rand) for maintenance directly into the respondent's bank account. Finally, with regard to the aspect raised in paragraph 10(iv) *supra* it was stated in the said letter that the applicant was willing to pay the sum of R1,500,000.00 (One Million Five Hundred Thousand Rand) stated in the settlement agreement as soon as the court had confirmed the settlement agreement.

[12] On 3 December 2013, the respondent's attorneys wrote a letter to the applicant's attorneys. Attached to this letter was a copy of their response dated 26 November 2013. They demanded, without much ado, that the applicant comply with the terms of that letter and threatened, once more, that if he failed to do so, the respondent would regard it as repudiation, would accept it and would elect to cancel the settlement agreement.

[13] After another exchange of correspondence between the respective attorneys the respondent's attorneys wrote a letter to the applicant's attorneys in which they cancelled the settlement agreement. The said letter was written on 9 December 2013. As I pointed out earlier, the respondent has in their answering affidavit admitted that she signed the settlement agreement on 30 August 2013. She has furthermore admitted that she decided to terminate the said agreement because the applicant had, according to her, and not according to the advices of her legal representatives, throughout repudiated fundamental terms of the settlement agreement and has exhibited conduct which objectively indicated a deliberate and unequivocal intention by him not to be bound any longer by the contract. All these allegations are made despite the undertakings that the applicant has given and despite furthermore the payments that he made. The cancellation of the settlement agreement was the straw that broke the camel's back. The applicant contends that the respondent's purported cancellation of the agreement is invalid for lack of legal basis.

[14] In her answering affidavit, the respondent does not deny that the applicant had been consistently negotiating with the aforementioned estate agent about the houses in she herself had shown interest. She is unable, in my view, to show that the applicant has not taken any step in order to secure her and the minor child residential accomodation. Accordingly this Court inevitably accepts that the respondent has at least taken steps to comply with clause 4.1 of the settlement agreement at a stage where legally he was not obliged to do so. i will indicate later in this judgment why I hold that at the time it was alleged that the applicant had failed to comply with the terms of the settlement agreement or at the stage the respondent cancelled that settlement agreement, the applicant had not legally failed to comply with any term of the settlement agreement.

15. With regard to her choice of the motor vehicle, the respondent, in my view, is disingenuous. Firstly, she does not deny that up to the stage that she employed new attorneys she had not taken any steps to make a simple selection of a motor vehicle. What is even more surprising is that she knew the type of motor vehicle she wanted the applicant to purchase for her. She does not explain why she failed to make her selection if she wanted a new motor vehicle and if she knew that the applicant would pay for it. She was satisfied with driving the Mercedes Benz. Her failure to select a motor vehicle led to the applicant having to place her on *mora*, which she did not did not deny. That she never considered doing so is clear from her attempts to demand from the applicant that he should purchase her a Rav 4 Toyota motor vehicle. Again I am satisfied that for inexplicable reasons the respondent simply adopted a supine attitude with regard to selecting a motor vehicle. No blame, in my view, can be placed at the feet of the applicant.

16. I am satisfied that apart from, in my view, unnecessarily blaming the applicant the respondent is unable to effectively deal with the allegations raised in the founding affidavit. It is mindboggling that after she took part in the deliberations to reach a settlement while she was being assisted by her legal team which included

eminent counsel such as Advocate Strauss and after she had signed the settlement agreement, she must now turn around and find fault with it. She stated in her answering affidavit that the provisions of the settlement agreement are in some respects vague to such an extent that it would render the agreement void. If that were the case Advocate Strauss and his legal team would have been the first to find that out. In the premises I agree with the argument by Mr Moleele that the respondent is desperately searching for a scapegoat in order to withdraw from the settlement agreement.

17.1 am satisfied that the applicant has tried his best to comply with the terms of the settlement agreement even at a stage when he was not legally obliged to do so. For the following reasons I agree with the Applicant's view that the purported cancellation of the agreement of settlement is invalid and lacks merit. Firstly, the settlement agreement was signed by the parties on 30 August 2013 in anticipation of the divorce action that was scheduled for hearing on the same date or subsequently on 5 November 2013 when it could not be heard on 30 August 2013. When the parties signed it on 30 August 2013, it was a common intention of the parties to tender it into court during evidence, with all its imperfections as the respondent hás now found out, as proof of the resolution of issues in dispute between them. Furthermore it *was always* their intention to present it to Court during the tendering of evidence so that the Court could confirm it and so that the obligations and the rights arising from it could be confirmed. When the matter did not proceed, the obligations to act in terms of the settlement agreement did not arise and the respondent had no right to enforce compliance.

[18] Secondly, the settlement agreement that the Applicant and the Respondent had entered into on 30 August 2013 was subject to two events, one express and set out by the parties themselves and the other one implied by the law. On page 2 of the settlement agreement, it is recorded, among others, that:

> "**...** *should it please the above honourable court to grant the decree of divorce. "*

Besides, in practice settlement agreements are handed into court during the hearing of divorce matters. This settlement agreement was prepared in anticipation of hearing the divorce action by the parties. The parties' common intention was to be bound by its terms only after they would have sought and obtained the approval of the court. The parties had envisaged that the agreement would be confirmed simultaneously with the granting of the order of divorce. Accordingly in the absence of an order of divorce a court could not treat the settlement agreement independently of the divorce action. The parties were aware of this position hence the above phrase.

[19] The parties' intention to link the confirmation of their settlement agreement to the granting of an order of divorce is akin to themselves setting up a condition in their agreement that suspends the operation of the agreement until that particular event takes place. It is like a suspensive condition. What happened on 5 November 2013 is a classical example of the uncertainty of the occurrence of the event. When everybody thought that the divorce action would go through, it did not.

> "*A true suspensive condition in a contract has the effect of postponing the operation of the contract until the happening of some uncertain future event. "* See Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1983(1) SA 398 (A) at 432 B-D. If the condition to which the agreement is subject to is not fulfilled, the parties to such an agreement are in the same position as if they had not contracted. During the period while it is uncertain whether a condition is fulfilled or before the condition is fulfilled, neither party can unilaterally resile from the agreement and more importantly neither party can claim performance under such an agreement from the other.
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> > "*Pending the fulfilment of the suspensive condition, the parties are clearly in a contractual relationship from which neither may literally resile."*

See Wille's Principles of South African Law 9th Edition page 794. See also Odendaalsrust Municipality v

New Nigel Estate Gold Mining Company Limited 1948(2) SA 656 at pp 666 to 667 where Van den Heever stated that:

> "*It is clear that food has confused two notions. The contract (in modern sense, now that aii contracts are consensual) is binding immediately upon its conclusion; what may be suspended by a condition is the resultant obligation or its exigible content (Inst. 3.15.6). Until the condition is fulfilled, the obligation is neither enforceable nor capable of being performed. "*

[20] Thirdly, every settlement agreement concluded by the parties to a divorce suit and tendered into Court as evidence that the disputes between the parties have been resolved and setting out how such disputes have been sorted out is subject to scrutiny by Court hearing the divorce action. For instance section 7(1) of the Divorce Act which provides that:

> "*A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other***."**

As the section says "may" and not "*shall*, the court has a discretion in the matter and may refuse to make an order of court in accordance with the terms of the settlement agreement of which it disapproves, for example, on the basis that the stipulated amount is oppressively high or absurdly.

Again s 6 of the Divorce Act 70 of 1971 provides that:

> "(1) *a decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances;* **......"**
>
> *(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage**,** make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of or the child)**....."**

See also section section 7(4)

[21] As the courts are given powers to vary maintenance orders and settlement agreements made by the parties, it would be absurd if they were compelled to act merely as rubber stamps. Any attempt by one party to enforce compliance by the other party with the terms of any settlement agreement in any divorce action before the court confirms it will amount to an attempt to take away the discretion that the court exercises over such settlement agreements.

[22] Now applying the above principles to the current matter, having found that the parties' settlement agreement was binding on the parties, the respondent was not entitled before the settlement agreement was confirmed by a Court, to demand performance of the terms thereof by the applicant. The applicant was, in terms of the law, not obliged, to perform in accordance with the terms of the settlement agreement until it had been made an order of court. More importantly, the respondent may not unilaterally resile from the agreement. The settlement agreement remains binding on the respondent. Accordingly I find that the respondent's purported unilateral cancellation of the settlement agreement was invalid. It must therefore be set aside.

[19] What is of crucial importance to this court is that she has admitted firstly, that she personally was a party to the settlement negotiations and secondly, that she signed the settlement agreement. She allowed the matter to be enrolled on an unopposed basis but decided the very same day of the matter not to proceed with it. No

reasons were furnished by the respondent why she had decided to change her mind. This is despite the fact that the settlement agreement contained the following clauses to which she has knowingly agreed:

> "*And whereas the parties are desirous in settling the matter and have come to an agreement concerning the proprietary issues flowing from the dissolution of the marriage. "*
>
> 11.1 The parties agreed that the agreement be made an order of court and/or be incorporated in an order of court, as the case may be. The agreement is binding on the parties upon the signature of the fast person signing. "
>
> 11.2 This agreement is an agreement in full and final settlement of all disputes existing between amendment and the defendant arising from the divorce action and any amendment shall only be valued and binding if in writing and signed by both parties thereto. "

[20] Her attorneys' letter dated 26 November 2013 failed to furnish reasons why on 5 November 2013 she decided against continuing with the divorce action and even more importantly her attorneys failed *to* raise any complaint against the settlement agreement. It is equally important to notice with dismay that she has not come up with any new propositions or amendments to the settlement agreement notwithstanding her claim that the agreement contained imperfections. She simply decided to hold the Applicant to ransom and to cause him to spent unnecessary costs to launch this application. I have considered ordering her to pay the costs of this application as I am of the view that this application was unnecessary and was brought purely because of her conduct.

[21] I will not order the respondent to place the matter on the roll. It is open for the applicant to do so if the respondent does not do so.

Accordingly I make the following order:

> 1. The purported cancellation by the respondent of the settlement agreement entered into by the applicant and the respondent on 30 August 2013 is hereby declared invalid and of no forcing effect and is accordingly set aside.
>
> 2. The respondent is hereby ordered to pay costs of this application on attorney and client scale.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Attorneys for the Applicant: S. N. Moieie Incorporated

Counsel for the Respondent: Adv. N Erasmus

Instructed by: Shapiro & Ledwaba Incorporated

Date Heard: 20 August 2014

Date of Judgment: 13 October 2014