IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 65996/2016

& 65993/2016

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

In the matter between:

P[....] B[....] M[....] C[....] PLAINTIFF

and

L[....] J[....] C[....] DEFENDANT

REASONS FOR ORDER GRANTED ON 3 SEPTEMBER 2019

BASSON J

[1] This matter served before me in September 2019. For some reason the rule 46(1)(c) notice was not brought to the attention of my chambers. A diligent search was immediately done to establish the whereabouts of the notice. I must also point out that my office has also not received any correspondence from the defendant enquiring about the progress in providing reasons which I find quite strange. It was only when the attorneys acting on behalf of the plaintiff enquired about the whereabouts of the written reasons that my office was alerted to the existence of the notice. My chambers has since obtained the court files in these matters and the papers in respect of both matters have been uploaded by the plaintiff on Caselines. My chambers has also obtained a transcript of the proceedings. Herewith my brief reasons for my order.

[2] The plaintiff and the defendant had previously been married which marriage was dissolved by an order of court under case number 71536/2012. In terms of this court order the marriage was dissolved and the settlement agreement between the parties was incorporated in the decree of divorce.

[3] The settlement agreement deals with various issues, *inter alia*, arrangements regarding the minor children (including but not limited to contact rights, medical aid and maintenance) as well as issues regarding the division of various movable and immovable assets.

[4] Paragraph 9 of the settlement agreement specifically provides for *"eise en betalings aan die eiser"*. The defendant does not take issue with any of the other clauses of the settlement agreement except for the provisions in paragraph 9.3 of the agreement.

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[5] In terms of paragraph 9.3 of the agreement read with paragraph 9.3.1 of the settlement agreement the defendant undertook to bind himself as surety and co-principle debtor for the repayment to plaintiff of a debt owing to the plaintiff by a company identified as Nema Gauteng BK in the amount of R 200 000.00 together

with interest on the said amount calculated at the prime interest rate in respect of private loans to clients charged by ABSA Bank and calculated as from the first day of the month following the month during which a degree of divorce is granted and fluctuated as from time to time. In terms of paragraph 9.4 of the settlement agreement the aforesaid amount was repayable by Nema Gauteng BK over a period of 12 months payable monthly in equal monthly instalments in respect of the capital plus interest as aforesaid.

[6] The plaintiff claims that Nema failed to pay to her any of the agreed instalments and/or interest as agreed upon and claims that the full amount plus interest is due owing and payable. She further claims that the defendant has failed to bind himself a surety and co-principle debtor for the proper and prompt repayment of the debt in terms of the court order. The plaintiff demanded compliance by the defendant with paragraph 9.3 of the agreement.

[7] The defendant pleaded that the aforementioned paragraphs amounted to a *pactum de contrahendo* which is an agreement to make a contract in the future. It is further submitted that the plaintiff is effectively seeking relief that is unenforceable because a court usurps the function of the parties in making the agreement for them or on their behalf. The defendant further pleaded that, although the settlement agreement may have taken the form of an accepted offer, paragraph 9 of the settlement agreement lacked *animus contrahendi* in that the terms of the settlement agreement being designed to be agreed and negotiated in the future. In the alternative, and if the court finds that the paragraphs amount to a deed of suretyship, it is pleaded that the deed of suretyship amounts to a credit guarantee as envisaged in section 8(5) of the National Credit Act.[1] Further in the alternative, it was submitted that the claim has become prescribed in that the plaintiff pleaded that the amount of R 200 000.00 shall be paid over a period of 12 months from 1 May 2013 in equal instalments in respect of the capital and interest. The plaintiff instituted action against the defendant on 24 August 2016 and therefore Nema was in default at the latest on 31 May 2013. The defendant asked for an order that paragraphs 9.3, 9.3.2 and 9.4 of the settlement agreement be declared void *ab initio*.

[1] Act 34 of 2005.

[8] It is not in dispute that the defendant failed to bind himself as surety.

Binding nature of a settlement agreement made an order of court

[9] As the court pointed out in *SA v JHA and others*,[2] all divorce proceedings commence by way of action, often highly contested in the beginning. Most divorce proceedings, however, settle along the way and usually the outcome is a negotiated settlement agreement the terms of which are recorded in the agreement and subsequently made an order of court.[3] There is nothing unusual about this. The court then goes on to say the following:

> *"**The consent order and variation***
> *[13] In PL v YL (above n8) Van Zyl ADJP, writing for a full bench of the Eastern Cape High Court (Grahamstown), dealt extensively with settlement agreements in the context of matrimonial proceedings where the parties have agreed that the terms of their agreement be made an order of court. The following salient points may be extracted from that judgment which are of relevance to this case:*
> *[13.1] When a settlement agreement is concluded in the context of a civil action, its aim is to relieve the court of its duty to decide the issues in the action and, where it has the effect of disposing of the issues between the parties as raised by the action itself, the agreement constitutes a compromise (transactio).*
> *[13.2] A distinction must be made between settlement agreements in divorce actions and those concluded in other types of litigation. This distinction is a necessary consequence of the fact that the dissolution of the marriage relationship and its consequences are primarily regulated by statute and concern issues of status and the welfare of children in respect whereof the court fulfils an important function as upper guardian.*
> *[13.3] The granting of a consent judgment is a judicial act since the terms of the agreement are incorporated in an order of court. Accordingly, the agreement entered into between the parties as envisaged in s 7(1) of the*

[2] 2021 (1) SA 541 (WCC).
[3] *Ibid* at para [11].

Divorce Act brings about a change in the status of the rights and obligations of the parties to the settlement agreement. The act of making the consent paper an order of court vests the settlement agreement with the authority, force and effect of a judgment. 14 Van Zyl ADJP quoted with approval the following comments of MT Steyn J in Hermanides v Pauls:

> *'When a consent paper is incorporated in an order of Court by agreement between the parties in a matrimonial suit it becomes part of that order and its relevant contents then form part of the decision of that Court . . . and must be construed upon that basis.'*

Once a court has made a consent judgment, it is functus officio and the matter becomes res judicata (literally, 'a matter judged'). However, in relation to matrimonial disputes, the general rule that a consent to judgment becomes res judicata between the parties does not necessarily apply in all circumstances.

The principle of res judicata only applies to those terms of the order which deal with the proprietary rights of the parties and the payment of maintenance to one of the spouses where there is a non-variation clause. Orders dealing with custody, guardianship, or access to and maintenance for any of the minor children do not assume the character of final judgments as they relate to matters which fall within the exclusive jurisdiction of the court and are always subject to variation in terms of s 8(1) of the Divorce Act or the relevant provisions of the Maintenance Act."

[10] The court then concludes that once a settlement agreement is made an order of court, it must be construed as a judgment of the court and as such is a judgment debt.[4] Accordingly, the 30 year prescription period applies to such agreement.

[11] The defendant is trying to undo the obligations he agreed to in the settlement agreement and which has been made (by agreement) an order of court. He cannot do so. His obligations in terms of the signed agreement which was made an order of court are clear and he is bound by it. I am further in agreement with the comments

[4] *Ibid* at para [15].

expressed by the Constitutional Court in *EKE v Parsons*[5] regarding the status of settlement agreements that have been made an order of court:

> *"[41] Where the parties themselves, through a settlement agreement reached with legal representatives present on each side, prefer to dispense with the strictures of a rule and request that the court recognise this preference by means of a consent order, for one party suddenly to perform a volte-face and demand strict adherence with that selfsame rule borders on the ludicrous. Justice between the two litigants demands that their settlement agreement, which was made an order of court, must be given effect. After all, a court's duty is to do justice between litigants. In this instance justice demands that Mr Eke be held to his bargain."*

[12] The defendant now pleads that he did not have the necessary *animus contrahendi* to conclude an agreement in terms of which he will bind himself as surety and co-principle debtor in respect of *"eise en betalings aan eiser"*. Clause 9 is but one of the clauses in the settlement agreement which regulates and settles the divorce litigation between the parties. To now claim that he did not have the necessary *animus contrahendi* particularly where the agreement specifically states that *"die partye onderling ooreenkoms bereik het omtrent die verdeling van bates"* is simply disingenuous. The defendant is seeming quite happy to be bound by the settlement agreement as a whole but not to the agreement reached in respect of *"eise en betalings aan eiser"* (clause 9 and more in particular clause 9.3). The defendant also does not explain why he then signed the settlement agreement in the first place and why he waited until September 2019 to suddenly raise the absence of an intention to bind himself as set out in clause 9 of the settlement agreement.

[13] Clause 9.3 of the settlement agreement contains no ambiguity in respect of what the parties' intention was: In order to settle *"eise en betalings aan die eiser"* arising from the divorce litigation between the two parties, the defendant bound himself as surety and co-principal debtor in respect of the repayments of the mentioned amounts by the defendant's new company to the plaintiff. Firstly, apart

[5] 2016 (3) SA 37 (CC).

from the fact that the terms of the clause is clear, the intention of the defendant to bind himself in these capacities is clear.

[14] But, having said this, what the defendant fails to appreciate is the fact that this is a court order: To now argue that he did not have the *animus contrahendi* is now moot: The defendant is ordered in terms of a court order to bind himself as surety and co-principal debtor.

[15] In the alternative the defendant claims that this deed of suretyship amounts to a credit guarantee as envisaged in section 8(5) of the National Credit Act[6] (*"NCA"*). Again, the defendant fails to appreciate that the plaintiff is not relying on a deed of suretyship – she relies on a court order which is binding on the parties. The defendant's obligations in terms of the court order are clear.

[16] Moreover, even if regard is had to section 8(5) of the NCA (on which the defendant relies in support of his argument) there is no merit in this submission. Section 8(5) of the NCA reads as follows:

> "*An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies."*

[17] What constitutes a *"credit agreement"* was pertinently considered in *Shaw and another v Mackintosh and another*.[7] In that matter the appellants became co-principal debtors for the repayment of an admitted debt. The question was whether this agreement was a credit guarantee in terms of section 8(5) of the NCA. This section contemplates three kinds of agreements: a credit facility, a credit transaction or a credit guarantee. The court concluded as follows:

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[6] Act 34 of 2005.
[7] 2019 (1) SA 398 (SCA)

> *"However, s 4(2)(c) of the NCA provides that this Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction. Mackintosh was not a credit provider in terms of s 40 of the Act. He was not in the business of providing credit. The agreement was a once-off transaction and not falling within the ambit of the provisions of the NCA. It was rightly not suggested that the arrangement could be both a credit guarantee and a credit transaction in terms of s 8(4)(f) of the NCA (see JMV Textiles v De Chalain Spareinvest 14 CC and Others 2010 (6) SA 173 (KZD). The agreement between the appellants and Mackintosh thus falls outside of the scope of the NCA. For these reasons the appeal must fail."*

[18] The simple point in this matter (apart from the fact that the defendant's obligations are contained in a court order), is that the plaintiff was not a lender or credit provider as contemplated by the NCA nor can it be said that Nema was a borrower and a consumer under the NCA.

[19] The last point raised on behalf of the defendant is one of prescription. There is no merit in this submission. Section 11(a)(ii) of the Prescription Act[8] provides that a period of 30 years is applicable in relation to any debts in terms of that Act. The defendant's obligations in terms of the court order have not yet prescribed.

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[20] The facts pertaining to the second matter are exactly the same. The second matter relates to paragraph 9.3.2 and relates to an entity Twinhills (Edms) Bpk and the obligations in respect of this entity which are the same as in respect of Nema Gauteng Bpk. In respect of Twinhills the amended plea contains one extra allegation which is that the defendant states that he *"does not have knowledge of an entity known as Twinhills"*. There is no merit in this submission and begs the question why the defendant signed the settlement agreement in which specific reference is made to his obligations in terms of clause 9.3.2 in respect of an entity identified as Twhinhills if that entity did not exist. Curiously, if regard is had to the defendant's

[8] Act 68 of 1969.

plea, the defendant does not plead that he has no knowledge of an entity known as Twinhills it is only in the amended plea that the defendant now claims total ignorance.

Order

[21] In the event an order was made in both matters as contained in paragraph (a) on page 5 of the Particulars of Claim with the defendant to pay the costs in both matters.

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AC BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 August 2021.

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