REPUBLIC OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 21128/2009

In the matter between:

CHARLES GOODRICK **Applicant**

and

PATRICIA GOODRICK **Respondent**

JUDGMENT delivered 08 May 2013

BOQWANA AJ

Introduction

[1] The applicant brought an application for rectification of a consent paper that was concluded between the parties on 10 May 2010 and which was incorporated in a final divorce order granted under the same case number on 19 May 2010. In essence the applicant alleges that the consent paper does not conform to the common intention of the parties regarding the division of their joint estate. The matter was referred to oral evidence by Veldhuizen J on 12 December 2012.

[2] In dispute between the parties is the following:

2.1 whether it was the common intention of the parties that the respondent would be entitled to retain her half share of the net proceeds of the sale of the immovable property (the communal

house of the parties) in addition to receiving a settlement balance of R739 018.00 or whether the respondent would only be entitled to a settlement payment in the total amount of R739 018.00, which amount would include her half share of the net proceeds of the sale of their immovable property.

2.2 whether parties commonly intended that the sum of R739 018.00 would be paid to the respondent from the applicant's half share of the net proceeds or that the aforesaid sum would be paid to the respondent from the total net proceeds, with the balance of the net proceeds of the immovable property accruing to the applicant.

2.3 whether the applicant was apprised by Mr Bertus Hendrikse ('Mr Hendrikse') an attorney at Bill Token and Hendrikse ('BTH') of the meaning and the effect of the consent paper before he signed it, in particular in regard to the contents of paragraph 5.3 and paragraph 5.4 thereof and whether the applicant was in any way misled or defrauded by the respondent and/or Mr Hendrikse as to the meaning and contents of the consent paper he signed, in particular in regard to the contents of paragraph 5.3 and 5.4 thereof.

2.4 Whether parties intended to exclude the motor vehicles being a Pajero and a Toyota Corolla registered in the plaintiff's name from the movable property that each would keep in terms of clause 4.1 of the consent paper

[3] The relevant clauses in the consent paper are the following:

4.1 The parties place on record, that the movable property has already been divided between them and each party will retain the movable property presently in his/ her possession as his/her sole and unfettered property.

4.2.3 The Plaintiff and Defendant shall in equal shares be entitled to the net proceeds of the sale of the said immovable property. For calculation purposes of the net proceeds any capital gains tax payable (if applicable), the outstanding bond, bond cancellation costs, estate agents commission, municipal rates and taxes and other related charges will first be deducted from the purchase price. (Own emphasis)

5.1 First Plaintiff and Defendant has (sic) reached agreement that First Plaintiff will make payment in the amount of R1 089 018.00 (ONE MILLION EIGHTY NINE THOUSAND AND EIGHTEEN RAND) to the First Plaintiff as part of the division of the joint estate. (Own emphasis)

5.3 Defendant undertakes to pay the balance of R739 018.00 to First Defendant from his 50% of the net proceeds, which he will receive from the sale of the immovable property referred to in paragraph 3.2 above. (Own emphasis)

5.4 First Plaintiff and Defendant further place on record that First Plaintiff has already received an amount of R350 000.00 (THREE HUNDRED AND FIFTY THOUSAND) of the amount owing in paragraph 4.1 (sic) above on 16 April 2010.

5.5 Defendant authorises Bill Tolken Hendrikse Inc to make payment of the outstanding balance owing to the First Plaintiff in terms of paragraph 5.3 directly to her.'

[4] The applicant seeks an order deleting the words 'as part' in paragraph 5.1, 'his part of' in paragraph 5.3, 'the 50% of' in paragraph 5.4 and the words 'excluding the motor vehicles' inserted after the words 'the movable property' in paragraph 4.1 and the new paragraph 4.2 be added which read as follows:

'The Defendant will retain the Pajero, CA 349424 and the Toyota Corolla, CA 679 062 as his sole and unfettered property.'

The evidence

[5] The parties were married in community of property before they got divorced on 19 May 2010. It is common cause that they both drew up a document, known as annexure CG1, attached to the applicant's founding affidavit,

before they approached BTH to draw up the agreement on their behalf. The parties both agree that it was their common intention that they would each receive 50% of the joint estate.

[6] The CG1 document reflected the *nett* asset values of each of the parties, the *nett* asset value of the joint estate, the 50% split of the joint estate and the amount that each of the parties would be entitled to at the end. It was apparent from CG1 that the applicant had more assets than the applicant to the *nett* value of R2 579 847.00 whilst the respondent only had R 507 301.00 in her name. The joint *nett* asset value of the estate was recorded as of R3 087 148.00.

[7] As reflected in CG1, the applicant was initially liable to pay to the respondent an amount of R 1 036 273.00. A further amount of R52 745 representing 50% a cash bank account, known as the Park- it account that the applicant held with Nedbank, was added on to the respondent's amount due in a handwritten form. This amount of R52 742 was added to the R 1 036 273.00 due to the respondent, making the final amount due to the respondent in terms of CG1 to be R 1 089 018.00. The applicant paid an amount of R350 000.00 on 16 April 2010 as indicated (by handwriting) in CG1 and in the consent paper, reducing the balance owing to R 739 018.00.

[8] It is common cause that BTH drew up the consent paper on behalf of the parties. The applicant alleges that he approached Mr Hendrikse with the respondent on the respondent's advice was and instructed him to act for both parties as the parties wanted to save costs.. He also alleges that he paid Mr Hendrikse 50% of the legal costs for the consultation. He admits however that Mr Hendrikse had advised him to get his own lawyer but he advised Mr Hendrikse that that would defeat the whole objective of saving costs. The respondent's version, supported by Mr Hendrikse and Leonore Everts ('Everts'), a secretary from BTH, who also testified during oral evidence, is that Mr Hendrikse was her attorney from the onset, who had acted for her since the issuance of the summons in relation to the divorce

proceedings. According to the respondent, Mr Hendrikse advised the applicant to find his own attorney but the applicant insisted that he would represent himself. The significance of this part of the evidence is that the applicant alleges that Mr Hendrikse failed to act in both parties' interests but only protected the respondent's interest as reflected in the consent paper. He further alleges that Mr Hendrikse failed to properly bring to his attention the contents of the consent paper and particularly paragraphs 5.3 and 5.4. These are the key paragraphs which the applicant says did not reflect what was agreed upon in CG1.

[9] These paragraphs reflect that the applicant would pay the outstanding amount of R739 018.00 from his 50% of the proceeds of the immovable property and in the event that the payment is not enough, any outstanding payment would be paid to the respondent within 10 days of the registration of the immovable property.

[10] According to the applicant the value of the house was taken into account when calculations leading to an amount of R 1 089 018.00 owing to the respondent were made and she could not be entitled to be paid an additional 50% from the proceeds of the house. The value of immovable property in CG1 was recorded as R 1 4000 000.00 and divided in half (R 700 000.00) between the parties.

[11] The house was sold for an amount of R 1 630 000.00 long after the consent paper had been signed and parties were divorced. After all the applicable deductions were made by BTH, the balance due to the parties was R983 923.19. The parties were each entitled to 50% of this amount in terms of the consent paper which equalled R 491 961.60 for each. BTH paid to the respondent her 50% (R491 961.60) and also paid the entire 50% proceeds that belonged to the applicant to the respondent to meet the shortfall in conformity with clauses 5.4 and 5.5 of the consent paper. Therefore the respondent received the entire R983 923.19 proceeds of the communal house.

[12] The applicant's issue is that the intention between the parties was that the respondent would be paid an amount of R 1 089 018.00 as a full settlement amount, he paid the R 350 000.00 to reduce the deficit to R 739 018.00 and that balance was to be paid from the proceeds of the house and the balance ,if any, would come to him once sold and not from his 50% of the proceeds only as that would mean that the respondent gets more than what was agreed to and intended by the parties and ultimately does not reflect the parties' intention that each party should get an equal share of the entire joint estate, inclusive of the proceeds of the immovable property.

[13] The respondent agrees that the intention was that each party should get at least 50% of the joint estate but she alleges that the R 1 089 018.00 amount in CG1 was part settlement as she was still entitled to 50% of the proceeds of the house. According to her (further) payment from the 50% of the applicant's proceeds of the house was to satisfy her shortfall of R739 018.00. Her half share could not be taken into account towards payment of the shortfall as that would be akin to taking money due to her to pay herself. She alleges that this was fully known and agreed with the applicant. It was also explained by Mr Hendrikse to both parties before the agreement was signed.

[14] It is common cause that Mr Hendrikse gave both parties a copy of the unsigned agreement to read but the applicant failed or neglected to do so. The parties differ on the extent to which Mr Hendikse went in explaining the terms of the agreement. Mr Hendrikse and the respondent suggest a comprehensive and detailed explanation was done whilst the applicant disputes that. Ultimately, he alleges that Mr Hendrikse would transfer what was in CG1 to the consent paper and did not think of paying that much attention to the detail of the contract. This is disputed by Mr Hendrikse.

[15] The applicant also wants the consent paper to be rectified to exclude the motor vehicles. The relevant clause 4.1 of the consent paper dealing with movable property states that: '*parties want to place on record that movable property has already been divided between them and each party will retain*

the movable property presently in his/her possession as his/her sole and unfettered property.' The applicant's argument is that the Toyota Corolla currently used by the respondent is registered in his name and paid by him. He alleges that its reflection under his name in CG1 suggests that. If the respondent wanted it she should pay for it. According to him BTH erred in not excluding the motor vehicles from clause 4.1 as contemplated in CG1.

[16] The respondent's version is that she was using the Toyota Corolla while the applicant used the Pajero. The parties had been separated for five years and the applicant had never demanded the Toyota Corolla from her. She suggests that the motor vehicles which they had in their possession were included in the movable property referred to in clause 4.1. I have quoted above.

Analysis

[17] Rectification is a well established common law right. It provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It thereby enables effect to be given to the parties' actual agreement.[1] In **Tesven CC and another v South African Bank of Athens (1999) 4 All SA 396 (A) at paragraph 16** the Court held that:

' to allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed and so overthrow the basis on which contracts rest in our law: the application of no contractual theory leads to such result.'

[18] It is not necessary for the plaintiff to show that there was a prior contract entered into between the parties *per se* as pronounced in **Meyer v Merchants Trust Ltd 1942 AD 244 at 253** where the Court held:

'Proof of an antecedent agreement may be the best proof of the common intention which the parties intended to express in their written contract, and in many cases

[1] See Intercontinental Exports (Pty) Ltd v Fowles 1999 2 SA 1045 (SCA)

would be the only proof available, but there is no reason in principle why that common intention should not be proved in some other manner, provided such proof is clear and convincing.'

[19] Turning to the facts of this case, both parties agree that their common intention was that there would be a 50/50 split of the joint estate at the end of the day. The parties having been married in community of property, it is clear that CG1 was drawn with that common intention in mind.

[20] On proper analysis of CG1 it is clear that that document was more than just a list of assets and liabilities. It is a document that assigned values of the joint estate as agreed by the parties and included calculations which led to a result that culminated in an amount of R 1089 018.00 due to the respondent. In other words this document formed the basis upon which the joint estate was to be shared or settled between the parties. Parties decided to put a deemed net value of R 1 400 000.00 next to the immovable property and divide such value in equal amounts of R 700 000.00 each. The important issue here is that when the amount due to the respondent was determined the value of the house was part of those calculations.

[21] In my view the applicant's version sounds more probable that the amount of R739 018.00 had to be paid from the net proceeds of the sale of the house and the balance paid to him. By doing this he took a risk that should the house sell for less he would have to meet the shortfall but if it sold for more or the shortfall was paid up then the balance would come to him.

[22] I am not convinced by the respondent's version that each party was entitled to 50% of net proceeds of the sale of the house over and above the amounts agreed to in CG1. The basis for this claim remains unclear to me. Counsel for the parties, particularly for the respondent brought a number of annexures with calculations trying to convince the Court of how the respondent would be disadvantaged by the applicant's argument. This in my view is indicative of the difficulty the respondent had in trying to convince the court that her version was more probable. In any event, these various scenarios that Ms Pratt relied on in attempting to illustrate the 'fairness or otherwise' of the applicant's

version to the respondent were not the basis of the calculations in CG1 or the consent paper.

[23] I did not get a satisfactory answer from the respondent on why the value of R1 400 000.00 would be included in the CG1 document if the value due to her in CG1 was not intended to be a settlement figure in respect of the joint assets. Had the value of the house not been included in the calculation in CG1 then one could say it would be proper that the shortfall be paid from the 50% of the applicant's net proceeds of the sale of the house. For the reasons above, I find it highly improbable that parties would agree that each would be entitled to an extra 50% of the net proceeds of the house over and above the settlement values calculated in CG1, which would result in the respondent being paid 1 089 018.00 plus 50% of her net proceeds and a shortfall of R739 018.00 being paid from the applicant's 50%.

[24] That clearly puts the respondent's share out of kilter with the common intention of splitting the joint estate 50/50. The consent paper, insofar as that issue is concerned is not in conformity with the underlying intention between the parties.

[25] In his book *Principles of the Law of Contract*, (6 ed at page 154) AJ Kerr makes the following remarks:

> 'Strictly speaking, how the error came about is not relevant to the question of rectification, but it is of interest to note that while the disparity between what the parties intended and what appears in the written document may result from a bona fide mutual mistake made by accident, it may also result from an intentional or negligent act of one or of both of the parties, or from one of the parties, or from one of the parties snatching a bargain, or from the use of standard form documents 'not adapted to record correctly what had been orally agreed before they were completed.'

[26] It is possible that the error was caused by one or a combination of the situations that Kerr refers to. At the end of the day, how the error came about is not the primary issue to be determined. What is important is to find on the balance of probabilities what the true intention of the parties was. When the

courts refer to common mistake it is not that the mistake must be mutual, but the underlying agreement must have been.[2] I therefore find that the underlying agreement provided for a 50% spilt of the entire joint estate inclusive of the immovable property and not for an extra 50% share of the net proceeds of the immovable property.

[27] As regards motor vehicles I am not satisfied with the applicant's version that the parties intended the motor vehicles to be the excluded from clause 4.1. The respondent's version is in my view more persuasive in that the reality accords with what is in the consent paper. Motor vehicles are movable property and the applicant was using the Pajero which was in his possession while the respondent used and still has in her possession the Toyota Corolla. It seems to me, the issue of the vehicles was an afterthought and not really a key issue when one has regard to the conduct of the applicant on this aspect. The parties had been separated for 5 years before the divorce and continued to use those cars separately for all those years. Clause 4.1 accordingly is not inconsistent with the reality of the parties at the time of the signing of the agreement notwithstanding the vehicles being registered under the applicant's name.

[28] Brand JA in **Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd**[3] held that:

'Though this deserves some credit for ingenuity, it is clear that the remedy of rectification is not one which easily lends itself to a fallback position by way of afterthought. It is a settled principle that a party who seeks rectification must show facts entitling him to that relief 'in the clearest and most satisfactory manner' (per Bristowe J in *Bushby v Guardian Assurance Co* **1915 WLD 65** at 71; see also *Bardopoulos and Macrides v Miltiadous* **1947 (4) SA 860** (W) at 863 and *Levin v Zoutendijk* **1979 (3) SA 1145** (W) at 1147H - 1148A).' (own emphasis)

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[2] Trust Bank of Africa Ltd v Frysch 1976 2 SA 337 (C) at 338 E-G.

[3] 2004 (6) SA 29 (SCA) at 38J-39

[29] The applicant has not shown his entitlement in 'the clearest and most satisfactory manner' on the aspect relating to the vehicles. The test is what the underlying agreement was and in my view the underlying agreement was for each party to keep the movable property (that would include the motor vehicles) that they each had in their possession as their sole and unfettered property. The aspect dealing with motor vehicles in the applicant's rectification application must accordingly fail.

[30] Turning to costs, I have given careful consideration on this issue. I take note of the fact that costs orders were made in respect of the postponement of 22 November 2012 where the applicant was ordered to pay wasted costs occasioned by the postponement and costs of the proceedings as at 12 December 2012 that costs for those proceedings would be costs in the cause.

[31] In respect of these proceedings I have taken into account the fact that this matter flows from a matrimonial dispute where each party have expressed their respective financial difficulties during the course of their evidence. Further, the applicant had signed the agreement without reading it and for that he is not entitled to costs in my view. On the other hand the respondent has opposed this application in an instance where the common intention was clearly set out in CG1. In that regard it is just that each party pay their own costs.

[32] Oral evidence went on for a number of days which in my view was a bit excessive having regard to the fact that parties did not depart materially from what was set out in the affidavits.

[33] Given all those considerations, I exercise my discretion not to order costs against any of the parties.

[34] I therefore make the following order:

1. Rectification of paragraphs 5.1, 5.3 and 5.4 of the consent paper is granted as follows:

1.1 The words *'as part'* in the last sentence of paragraph 5.1 are to be deleted;

1.2 The words '*his 50% of*' in paragraph 5.3 are to be deleted;

1.3 The words '*the 50% of*' in paragraph 5.4 are to be deleted.

2. The rectification application in respect of the insertion of '*excluding motor vehicles*' in paragraph 4.1 and the insertion of a new paragraph 4.2 is dismissed.

3. No order is made as to costs.

NP BOQWANA

Acting Judge of the High Court

APPEARANCES

FOR THE APPLICANT: Adv E JJ Spammer

Instructed by: Coetzer Attorneys C/O Hayes Inc., Cape Town

FOR THE RESPONDENT: Adv T-M Pratt

Instructed by: De Klerk & Van Gend Inc., Cape Town