IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE
Case No: 3118/2021

In the matter between:

AVW	Plaintiff
and	
SVW	First Defendant
ABRAHAM NICOLAS VAN WYK N.O.	Second Defendant
SAN-MARIE VAN WYK N.O.	Third Defendant
JULIAN REID BOSHOFF N.O.	Fourth Defendant
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA	Fifth Defendant

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 20 April 2022

JUDGMENT

DE WET, AJ
INTRODUCTION:

[1] The first defendant filed an application for leave to defend the divorce action after she had signed a settlement agreement on 27 July 2021 ("the consent paper") and after her former attorney had delivered a notice of withdrawal of defence on 6 August 2021.

[2] The application was placed before me in the fast lane on 21 October 2021, it being the date upon which the plaintiff had set down the divorce action on the unopposed roll. For ease of reference the parties are referred to as in the divorce action.

[3] Whilst the application in my view did not warrant a hearing in the fast lane, Mr Pincus SC, on behalf of the plaintiff, relying heavily on the principle that it is in the public interest to finalise divorce matters expeditiously,[1] convinced me to hear and determine the application on the papers. Ms Anderssen, on behalf of the first defendant, had no objection and the application proceeded on this basis. The plaintiff did not file an opposing affidavit and both parties submitted heads of argument as directed.

[4] I granted the first defendant leave to defend on 28 January 2022. A copy of the order is attached hereto marked "X" for ease of reference. These are the reasons for the order.

THE FACTS:

[5] The facts are for all relevant purposes common cause between the parties and can be summarised as follows:

5.1. The plaintiff and the first defendant were married to each other in Mauritius on 10 April 2004, out of community of property with the inclusion of the accrual system.

[1] In S v S and Another 2019 (6) SA 1 (CC) it was held that there is a duty on the courts "to prevent the delayed finalisation of divorce matters"

5.2. One minor child was born from the marriage, namely DVW (the "minor child").

5.3. The plaintiff instituted divorce proceedings against the first defendant on 19 February 2021. The trustees of four trusts, the Nic-Mari Trust, the NSM Marketing Trust, the Titan Marketing Trust and the JD Marketing Trust ("the four trusts"), were joined as parties to the proceedings as second, third and fourth defendants.

5.4. After a notice of bar was served on the first defendant's former attorney, a plea and counterclaim was filed on behalf of the first respondent on 6 May 2021.

5.5. On 22 July 2021 the plaintiff signed a consent paper recording that the plaintiff, the first defendant and the third and fourth defendants had "*arrived at an agreement in regard to the disputes between them.*"

5.6. On 27 July 2021 the first defendant signed the consent paper.

5.7. On 6 August 2021 the first defendant's former attorney of record served a notice of withdrawal of defence wherein it was recorded the first defendant withdraws her aforesaid defence as a result thereof that a settlement had been reached between the parties and a deed of settlement has been drawn and undersigned between the plaintiff and the first defendant.[2]

5.8. On 15 September 2021 the divorce action was set down by the plaintiff's attorney for hearing on 21 October 2021 on the unopposed roll in third division.

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[2] The notice reads: "*1ste Verweerder haar bogemelde verdediging terugtrek, na aanleiding daarvan dat daar 'n skikking tussen die partye bereik is en 'n skikkingsakte opgestel en onderteken is tussen die Eiser en 1st Verweerder*."

5.9. On 15 October 2021 the first defendant's former attorney of record withdrew as attorney of record and on 18 October 2021 the first defendant's current attorney of record was appointed.

5.10. The first defendant's new attorney addressed correspondence to the plainitff's attorney advising that they would be filing a plea and counterclaim on the same day and further requested the plaintiff's attorney to serve his notice of removal from the court roll before midday on 19 October 2021.

5.11. Unsurprisingly the plaintiff's attorney refused to do so and notified the first defendant's attorney on 19 October 2021 that he would not be removing the matter from the unopposed roll.

5.12. As a result of this refusal the first defendant filed a notice of application to uplift the bar to filing her plea and counterclaim. The plaintiff opposed this application and the first defendant's attorneys obtained a date on the opposed motion roll for hearing of this application on 26 January 2022.

5.13. The index prepared by the plaintiff's attorney for purposes of the unopposed divorce action contained the notice of bar but no plea or counterclaim. The first defendant's attorney only became aware that such pleadings had previously been filed on 20 October 2021 and only managed to obtain a copy thereof on 21 October 2021. In her founding affidavit in this application, the first defendant stated that she was under the impression that further steps in the divorce action were stayed pending settlement negotiations and that she was unaware that such pleadings were filed.

5.14. The first defendant's attorney consequently withdrew the application for upliftment of the bar and filed the application for leave to defend.

SUMMARY OF THE PARTIES' CONTENTIONS:

[6] The grounds advanced by the first defendant as to why a decree of divorce incorporating the terms of the consent paper should not be granted as requested by

the plaintiff and why she should be granted leave to defend the divorce action, despite her admitting to signing the consent paper whilst represented, are as follows:

6.1. She is unhappy with the terms of the settlement agreement as:

6.1.1. it did not make satisfactory provision for the maintenance needs of the parties' minor son (this is with reference to the terms of clause 3 of the consent paper);

6.1.2. she believes that the plaintiff had not disclosed the correct values of the assets held by various trusts which the parties had agreed should form part of their respective estates;

6.1.3. she believes the proprietary award was less than what was due to her; and

6.1.4. she had waived her claim for personal maintenance whilst being unable to support herself and did not know what she was waiving (this is with reference to clause 4.1 of the consent paper).

6.2. She anticipates, and it is not disputed by the plaintiff, that her highest net return on the proceeds she is to obatin in terms of the consent paper will amount to R25 000 a month and she will be unable to support herself and the parties' minor child appropriately on this amount.

6.3. She has suffered damages as a result of the misrepresentations made to her by the plaintiff.

6.4. The consent paper cannot be implemented as:

6.4.1. the first defendant is not a beneficiary of the Nic-Mari Trust;

6.4.2. The beneficiaries of the Nic-Mari Trust have not agreed to implementation of clause 5.1.1.2;

6.4.3. The adult beneficiaries have not agreed to their removal as beneficiaries of the four trusts as provided for in clause 6.

[7] On behalf of the plaintiff it was argued that ss 7(1) and (2) of the Divorce Act 70 of 1979 ("the Act") does not afford the court an overiding discretion to go behind the terms of a settlement agreement and that the court has a rather restricted discretion with reference to the full bench decision in PL v YL[3] and as set out by the Constitutional Court in Eke v Parsons[4]. It was further argued that as a waiver of the right to vary a maintenance order embodied in a settlement agreement concluded at divorce has been found not to be contrary to public policy and ousts the discretion of the court in terms of s 8(1) of the Act, s 7(1) of the Act similarly ousts the court's discretion in respect of an agreement that had been reached between the parties at date of divorce.

GENERAL PRINCIPLES:

[8] It is trite that settlement agreements ought only to be made orders of court if: the agreement can be enforeced as an order of court; its wording is clear and unambigious; the enforcement thereof is not dependent on the discretion of a person not bound thereby; and it must provide closure. Making a settlement an order of court changes the nature of the agreement in that it provides the parties with a method to execute thereon.

[9] I wish to emphasise that on the limited evidence before court, I am unable to determine whether:

9.1. the first defendant is entitled to increased maintenance in respect of the parties' minor child or whether the amount agreed upon between the parties is satisfactory and the best that can be effected in the circumstances;

9.2. the first defendant is entitled to spousal maintenance; and

9.3. the first defendant had indeed been misled insofar as asset values are concerned. These issues can only be determined by way of evidence by a trial court should leave be granted.

[10] The practise of incorporating settlement agreements in divorce actions is in line with judicial policy that parties should be encouraged to settle by way of

[3] 2013(6) SA 29 (ECG)
[4] 2016 (3) SA 37 (CC)

negotiation or mediation all aspects pertaining to such litigation. The benefits to the parties and the administration of justice to do so cannot be overemphasised and finds support in the provisions of s 7(1) of the Act which empowers the court to give effect to agreements between parties in respect of the division of assets and spousal maintenance. The same holds true for arrangements in respect of the care, contact and maintenance arrangements in respect of minor or dependent children subject to the inherent and statutory duty of the court.

[11] A new concerning trend appears to have emerged where parties settle a divorce action by signing a settlement agreement with the assistance of their legal representatives only to thereafter, and before such agreement is made an order of court, decide that they no longer wish to be bound thereby. It needs to be remembered that regardless of whether or not an agreement between parties was made an order of court, they are usually bound by such agreement.

[12] In this matter the first defendant, based on the papers before me, signed the consent paper whilst being legally represented and had no issue with the contents of the consent paper for a period of almost three months. Only days before the matter was to be finalised on the unopposed roll the first defendant consulted another attorney and raised very technical, and to some extent convoluted reasons, as to why the matter should not proceed to trial and not be finalised based on the consent paper. Whilst I have some doubt as to whether the first defendant would succeed with her contentions as set out in her affidavit and proposed amendments to her counter claim, a trial court would be the appropriate forum to determine these issues.

SECTION 6 OF THE ACT:

[13] Section 6(1) of the Act[5] prohibits a court to grant a decree of divorce until it had satisfied itself that the maintenance arrangements in respect of a minor or

[5] 6. Safeguarding of interests of dependent and minor children –
(1) A decree of divorce shall not be granted until the court –
(a) Is satisfied that the provison s made or contemplated with regard to the welfare of any minor or depednent child of the marriage are satisfactory or are the best that can be effected in the circumstdances; and

dependent child is "satisfactory or the best that can be effected in the circumstances". In JG vs CG[6] this obligation of a court was confirmed and in SJ v CJ[7] Lamont J in this regard held:

> "*[13] The assessment of the ability of each parent to meet the needs of the defendant daughter requires an investigation into the asset and liabilities, income and expenses (existing and prospective) of each parent. Thereafter the court is required to perform an intricate balancing act to determine to what extent the needs of the dependant daughter can be met by both parents, and the amount inter se which each parent is required to contribute towards those needs.*
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> *[14] In the process of considering the assets and liabilities of the parties the court must have regard to the order it proposes making, effecting a redistribution of assets. The court is required to consider the position of each party as it will be at the end of the redistribution it directs. This is logically so as this is the position which will obtain after the divorce, which is the period when the maintenance is to be paid".*[8]

[14] The first defendant states under oath that the consent paper does not provide adequately for the needs of the parties' minor child and should therefore not be incorporated into an order of court.

[15] In PL v YL[9] it was held:

> *"… that in divorce proceedings the parties themselves cannot, by reaching agreement in respect of [the first category being matters the legislature has committed to the court for detemination and the second category being*

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(2) For the purposes of subsection (1) the court may cause any investigation which it may deem necessary to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance.
(3) The court granting a decree of divorce may, in regard to the maintenance of a dependent child of a marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit.

[6] 2012 (3) SA (GSJ)
[7] 2013(4) SA 350 (GJS) at 352 B-D
[8] Also see BR and Another v T: In re: LR [2015] 4 All SA 280 (GJ)
[9] 2013(6) SA 29 (ECG), paragraph [13] at 35C-D of PL v YL

matters which the parties choose to include in their settlement which the court may, in terms of s 7(1) of the Act, incorporate into an order of court], compromise and dispose thereof without the intervention of the court. It is as a result implicit in any settlement agreement wherein the parties have reached agreement, on any of the matters falling in the first category, that it is subject to the approval of the court. Should the court sanction the terms of the settlement and incorporate it into its order, it represents a decision of the court made on the evidence placed before it. The parties accordingly cannot have any expectation that their agreement to make the terms of the settlement agreement on these issues an order of the court, will automatically be acceded to."

[16] In *Rowe v Rowe*[10] Hefer JA explained it in the following manner when dealing with the recission, on the ground of fraud, of a decree of divorce that incorporated an agreement of settlement:

"… *the Court does not act as a mere recorder when the parties to divorce proceedings in which minor children are involved, settle their differences; it is duty bound to satisfy itself that their arrangements will serve the best interests of the children; and this it can only do on truthful information supplied by the parties".*

[17] It was argued on behalf of the plaintiff that I should accept, despite the statements to the contrary by the first defendant, that the best interest of the minor child is served by the terms of the consent paper as the Family Advocate had considered and endorsed the parenting plan and the consent paper. This argument is without merit. The Family Advocate simply endorsed the consent paper which deals with maintenance in respect of the minor child on the basis that the parties had reached an agreement. No investigation took place and the Family Advocate would not know whether such agreement is the best that can be effected in the circumstances. The court is in any event not bound by the recommendations of the Family Advocate.

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[10] 1997 (4) SA 160 (SCA) at 167 B-C

[18] As indicated earlier there is no evidence before the court at this stage, save for the statements made by the first defendant, in order to determine whether the agreement pertaining to maintenance will serve the best interest of the minor child or not. On this basis alone leave to defend had to be granted.

THE WAIVER AND SECTIONS 7(1) AND (2) OF THE ACT:

[19] The first defendant states that she is not bound by the waiver as contained in clause 4.1 of the consent paper. Whilst it is extremely difficult for me to contemplate what she allegedly did not understand at the time of signing the waiver, this is an issue that can only be determined by a trial court by means of evidence. The same applies to the dispute as to whether the waiver clause is severable from the other terms contained in the consent paper.

[20] Regardless of the enforceability of the written waiver, it was argued on behalf of the first defendant and so indicated in her notice of intention to amend her counter claim, that she is entitled to request the divorce court in terms of s 7(2) of the Act, to make an award of spousal maintenance in her favour.

[21] Sections 7(1) and (2)[11] of the Act, provides the legislative framework within which a court may enforce agreements pertaining to the division of assets and maintenance.

[22] In PL v YL *supra* the court *a quo*, after hearing evidence, refused to make a settlement agreement entered into between the parties an order of court and instead granted a decree of divorce, together with certain orders in terms of the particulars of

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[11] 7. Division of assets and maintenance of parties –
(1) 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.
(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the breakdown of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or marriage of the party in whose favour the order is given, whichever event may first occur.

claim. The findings of the full bench were specifically limited to settlement agreements in the context of divorce proceedings and it was decided on the premis that both parties, at the time the divorce was heard, requested the court to make the settlement agreement an order of court in a manner similar to the situation where parties request the count to grant a consent judgment. The principles highligted in the full bench judgment are:

> 22.1. the court must bear in mind that it obtains its mandate to deal with the matter on an unopposed basis from the agreement itself;
> 22.2. if the court is of the view that the settlement agreement should not be made an order of court, it must inform the parties of the reasons for this view and give the parties an opportunity to address its concerns;
> 22.3. the court must bear in mind that the settlement agreement may be a "package deal";
> 22.4. the court must bear in mind that the agreement may not be capable of meaningful separation, without destroying the consensual basis on which the agreement as a whole is founded; and
> 22.5. the court cannot and will not make an order that amounts to it unilaterally altering the terms of the settlment agreement as it may not draft a replacement settlement agreement for the parties.[12]

[23] The facts in PL v YL *supra* are clearly distinguisable from the facts in this matter. The first defendant herein objects to the agreement being made an order of court and expressly states under oath reasons why the court should exercise its discretion and not make the written agreement an order of court.

[24] In Eke v Parsons *supra* the Constitutional Court confirmed the principle that a compromise is powerfully supported by the law and that the settlement of lawsuits is not only in the best interest of parties but may also serve the interests of the

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[12] In this regard and in the matter of Georghiades v Janse van Rensburg 2007 (3) 18 (C) Griessel J stated: "it constitutes a composite, a final agreement entered into by the parties, purportedly to regulate all their rights and obligations inter se upon divorce" and "for the court now to interfere in that arrangement by varying one component of the agreement, while leaving the balance of the agreement intact, would fly in the fact of the time-hallowed principle that '(t)he court cannot make new contracts of parties; it must hold them to bargains into which they have deliberately entered". I was also referred to the matter of Claassens v Claassens 1981(1) SA 360 (N) which dealt with agreements governing maintenance which should, as held by Didcott J, not lightly be interfered with on the grounds of public interest.

admininstation of justice. The Constitutional Court further warned that a mechanical approach should not be adopted when considering whether to make a settlement agreement an order of court and provided guidelines to courts when considering such request which includes that: the settlement agreement must relate to the *lis* between the parties; it must not be objectionable in law in any way and accord with the Constitution and the law; is must not be at odds with public policy; and hold some practical and legitimate advantage to the parties.

[25] In Maswanganyi v Road Accident Fund[13] it was argued that a decision to settle a case was entirely a matter for the parties in which the presiding judge had no role to play as, once the parties had concluded a settlement, there was no longer a *lis* between them. This, it was argued, had the effect to deprive the court of jurisdiction to adjudicate the non-existent *lis* and that therefore a court's jurisdiction extend only to making the order as requested. The applicant relied upon PL v YL *supra* in support of this argument. Weiner AJA, in the majority judgment, disagreed and held that –

> "*[13] The choice of language in the two paragraphs quoted above from the judgment in PL v YL was unfortunate and gives an incorrect picture of the legal position that arises when parties concluded a settlement agreement. Litigants do not mandate courts to decide disputes, and the language of agency or mandate is inappropriate to describe the judicial function. Nor should the jurisdiction of courts be conflated with the concept of determination of civil disputes that arise in the ordinary course of events. Their jurisdiction to do so is founded in ch 8 of the Constitution and defined in various statutes and the common law. In the case of the High Court, the relevant statute is the Superior Court Act 10 of 2013.*"

[26] The learned judge further held that the jurisdiction of the court to resolve pleaded issues does not terminate when the parties arrive at a settlement of those

[13] 2019 (5) SA 407 (SCA)

issues as such construction would necessarily imply that the court does not have the power to grant an order in terms of the settlement agreement[14].

[27] The position to adopt when a party requests a court to make a settlement agreement an order of court was set out as follows:

> "*[16] The correct position is that the grant of an order making a settlement agreement an order of court necessarily involves an exercise of the court's jurisdiction to adjudicate upon the issues in the litigation. Its primary purpose is to make a final judicial determination of the issues litigated between the parties. Its order is res judicata between the parties and the issues raised by the parties may not be relitigated. The fact that the court's jurisdiction remains intact when the parties settle a case is illustrated by PL v YL itself and the countless cases that come before our courts where parties to a matrimonial dispute settle their differences and the case proceeds on an unopposed basis. Notwithstanding the settlement, the court must have retained jurisdiction for the simple reason that otherwise the parties would not be divorced, as only a divorce order can bring about the termination of a legal marriage. The basic premise on which the appellant's argument was based was therefore incorrect.*"

[28] The majority also disagreed that it was only in circumstances where the agreement contains terms which are unconscionable, illegal or immoral that a court can refuse to make a settlement agreement an order of court with reference to the matter of Eke v Parson *supra*.

[29] In ST v CT[15] the SCA dealt with the enforceability of a waiver of maintenance in an antenuptial contract. In his minority judgment, Rogers AJA expressed the view that it was unnecessary to find whether such a waiver is against public policy and held that:

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[14] See paragraph 15 of the Judgment
[15] 2018 (5) SA 479 (SCA)

"[186]… Section 7(1) provides that a court 'may', not 'must', make an order in accordance with a written agreement of the kind contemplated. If a court considers that there is good reason not to give effect to the written agreement regarding maintenance, it may refrain from doing so and can then proceed to make an order in terms of s 7(2).

[187] Read together, ss 7(1) and (2) do not prohibit an agreement by which a spouse waives her right to maintenance in return for gifts but they do explicitly accord to the court a discretion either to give effect to the agreement in terms of s 7(1) or to award maintenance in terms of s 7(2). The very circumstance that the court has a statutory power to override the agreement shows that an agreement cannot override the statutory power. This flows inevitably from a proper interpretation of the statutory provisions, though it is supported by considerations of policy."

[30] For purposes of the maintenance dispute, the trial court, as stated by Rogers AJA, in terms of s 7(1), should first consider the prevailing circumstances when the agreement was negotiated in order to determine whether there are any reasons to discount it as a result of a power imbalance, oppression, other conduct falling short of unconscionability, the duration of negotiations, the presence or absence of professional advice and the extent to which the agreement at the time of its conclusion was in substantial compliance with the Act[16]. In this regard it was held that:

"*Section 7(1) and (2) of our Act lend themselves admirably to an interpretation allowing us to follow the nuanced and enlightened approach prevailing in England, Cananda and elsewhere – to operate with the saturory scalpel rather than the common-law cutlass. A South African court, considering a claim for maintenance in the face of a prenuptial or postnuptial agreement containing a maintenance waiver (or other maintenance provisions inconsistent with a claim advanced by a spouse at the divorce hearing), should consider a range of factiors in deciding whether to award*

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[16] See par 193

maintenance or … to hold the parties to the contract, The sorts of factors to be takien into account are likely to inculde most of those mentioned in the leading English and Canadial decisions. This interpretation not only accords with the plain language of the sections but seems to me to give better effect to constitutional vlaues – it eschwes paternalistic thinging and promotes party autonomy while at the same time giving the court a generous jurisdiction to prevent unfair outcomes"[17].

[31] I do not agree with the argument that this approach would result in parties being discouraged to settle matrimonial actions by way of negotiation or mediation. Contrary to English law, our courts cannot grant any award pertaining to spousal maintenance after a decree of divorce has been granted and consequently there is a serious and statutory framed obligation on our courts to make the necessary inquiries and to exercise its discretion, even in matters where the parties have reached agreement, to satisfy itself that such agreement does not result in an unfair outcome. Any procedural difficulties this may cause cannot outway the statutory safeguards provided by the Act.

[32] A court's restricted discretion when dealing with applications in terms of s 8 (1) of the Act, is in no way comparable to the exercise envisaged by s 7 (1) of the Act. When an application in terms of s 8 (1) is made, an agreement *inter partes* had already been made an order of court and it should therefore be accepted that a court, in the exercise of its discretion when it granted a divorce order, had already satisfied itself in terms of s 7(1) that such agreement should be made an order of court. The test in applications in terms of s 8 (1) would and should therefore be more onerous.

[33] Whether the first defendant did or did not understand what right she had waived when signing the consent paper and whether she should or should not be bound by such agreement, need therefore not be decided in this application. For the reasons set out above I respectfully agree with Rogers AJA that a court has the

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17 See par 197

statutory power and discretion to override any agreement, including a waiver, in respect of a maintenance claim. It need not be contrary to public policy.

ENFORCIBILITY:

[34] It was further submitted on behalf of the first defendant that the consent paper should not be made an order of court as clause 5.1.1.2 is problematic.

[35] This clause purports to be an irrevocable resolution by the trustees to sell trust property and to pay the net proceeds thereof to the first defendant who is not, at present, a beneficiary to this trust.

[36] In clause 6.2 of the consent paper the parties purport to provide for this in that, *inter alia*, the existing beneficiaries, which include the plaintiff's and the first defendant's minor child, would be removed as beneficiaries and be replaced by the first defendant.

[37] Whether the existing beneficiaries have accepted any benefits under the trust deed or whether the trust has vested or not does not appear from the papers.

[38] Although clause 18.1 of the trust deed of the trusts relied upon by the plaintiff provides that the founder and the trustees may by agreement during the lifetime of the plaintiff amend the trust deed, it is in dispute on the papers whether or not the relied upon trust deeds are in fact the correct trust deeds. Further and even accepting that the plaintiff and the trustees would have the power to amend the trust deed, the consent paper does not, in my view, constitute such an agreement to amend as the plaintiff, as founder, is not a party to the consent paper and there is no evidence that the other trustees in fact signed the consent paper, page 15 thereof not being part of the record.

[39] As I have already found that the court has the jurisdiction to enquire in regard to the waiver and in any event has a discretion in regard to whether a consent paper should or should not be made an order of court, I need not herein, make a finding in

regard to the enforceability of the provisions of clauses 5.1 and 6.2 of the consent paper.

CONCLUSION

[40] Settlement agreements in divorce matters are clearly distinguishable from settlements in other types of litigation as they are primariliy regulated by statute and concern issues of status, maintenance issues which can only be determined at divorce and the best interests of minor and dependent children.

[41] To make such settlement agreement an order of court represents a decision of the court based on evidence placed before it. In the circumstances of this application a refusal to grant leave would have amounted to the court prohibiting the first defendant from having access to the court and to place relevant evidence before it in order for the court to determine the manner in which its discretion should be exercised.

A De Wet
Acting Judge of the High Court

Coram:	De Wet AJ
Date of Order:	28 January 2022
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