In the High Court of South Africa
(Eastern Cape, Grahamstown) Case No 3074/2009

Date heard: 12 November 2009
Delivered: 10 December 2009

In the matter between

M J F **Applicant**

and

A F **First Respondent**

ANDRIES FRONEMAN N.O. **Second Respondent**

BETA TRUST ADMIN BK **Third Respondent**

ANTHONY DE VILLIERS N.O. **Fourth Respondent**

Summary [Contempt of Court – applicant seeking enforcement of terms of settlement agreement concluded in divorce action involving transfer of property by Trust into name of applicant. Trust not a party to divorce action – not bound by court order – settlement agreement conferring contractual rights enforceable *inter se.* Nature of agreement establishing obligations enforceable against parties in different capacities – disputed interpretation of terms of agreement – disobedience of order not established – *onus* not discharged - application dismissed].

JUDGMENT

GOOSEN AJ

1) This is an application for the committal of the First and Second Respondents for contempt of court for failing to obey the terms of a divorce settlement agreement which was made an order of court. The Applicant also seeks certain orders compelling the Respondents to comply with the provisions of the court order.

2) The Applicant and the First Respondent were married to each other until the marriage was dissolved on 23 August 2007. An agreement regulating, amongst

other things, the proprietary aspects of the divorce, was concluded by the parties and made an order of court. It is this agreement which Applicant seeks to enforce in this application.

3) The First Respondent is cited in his personal capacity. He is again cited – as Second Respondent – in his capacity as a trustee of the Andre Froneman Family Trust (hereinafter the Trust). The Third and Fourth Respondents are the other trustees of the Trust.

4) The Applicant is a businesswoman who carries on the business of the Lord Somerset Guesthouse at Aliwal North. The immovable properties on which the guesthouse is situated are owned by and registered in the name of the Trust. It is the transfer of these properties into the Applicant's name – pursuant to the terms of the settlement agreement and court order – which lies at the heart of the dispute in this application.

5) The deed of settlement entered into between the Applicant and First Respondent (the Trust was not party to the divorce action) provides as follows in respect of the Lord Somerset Guesthouse[1]:

> 6.2.2 Both the Plaintiff and the Defendant are the only appointed trustees of the Andre Froneman Familie Trust. The children born from the marriage between the Plaintiff and the Defendant are the beneficiaries of the Andre Froneman Familie Trust.
> An option, for a period of three (3) years from the date of signing this agreement by the party signing last is given by the trustees of Andre Froneman Familie Trust to Plaintiff to transfer the fixed properties in her personal name subject to the following special conditions:
> 6.2.2.1 all costs in relation to the transfer of the fixed properties will be for the account of the Plaintiff;
> 6.2.2.2 simultaneous with the registration of transfer of the fixed properties or within a period of ninety days as from date of registration of the fixed properties in the name of the Plaintiff, she will register a mortgage bond over the fixed properties, with a maximum capital amount of R1 000 000 (one million rand) subject thereto that:
> 6.2.2.2.1 the mortgage bond will not be a flexibond;
> 6.2.2.2.2 no further mortgage bonds or any other encumbrances be registered over and against the fixed properties, any existing bonds to be cancelled;

[1] I have quoted only those portions of the Deed which are relevant to the issues as they arise in this application.

6.2.2.2.3 "..."
6.2.2.2.4 "..."
6.2.2.2.5 at date of death of the Plaintiff, the fixed properties will be reregistered in the name of the Andre Froneman Familie Trust at the cost and expense of the Plaintiff and / or estate. The Plaintiff undertakes and is obliged to deliver to the Defendant a guarantee to the satisfaction and acceptable to the Defendant, prior to the registration of transfer of the fixed properties in her name, that the fixed properties will be reregistered in the name of the Andre Froneman Familie Trust so tha the three children born from the marriage between the Plaintiff and the Defendant, will have the benefit thereof as beneficiaries of the mentioned trust;
6.2.2.2.6 "..."

6) The deed makes provision for the conclusion of a lease agreement in the event that the Applicant (who was plaintiff in the divorce proceedings) not exercising the option to have the properties transferred into her name. It is however common cause that the Applicant did indeed exercise the option and accordingly the provisions relating to the terms of the lease agreement are not relevant to this application.

7) The fundamental dispute which animates this application concerns the question as to whether the Respondents have failed to comply with the obligations imposed upon them by the terms of the settlement agreement, in particular to transfer the properties into the name of the Applicant.

8) An applicant seeking the committal of a respondent for civil contempt of a court order must allege and prove (a) the existence of a court order binding upon the respondent; (b) its service on the person accused of contempt of the order; and (c) non-compliance with its terms.

9) Once these requisites are established, in the absence of evidence raising a reasonable doubt as to whether the accused person acted wilfully and *mala fide*, all the requisites of the offence will have been established (*Fakie N.O. v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)*). An accused person does not bear a legal burden to disprove wilfulness and *mala fides*. All that is required in order to avoid conviction is that evidence be led that establishes a reasonable doubt (*cf.Uncedo*

Taxi Service Association v Maninjwa 1998 (3) Sa 417 (E); Uncedo Taxi Service Association v Mtwa 1999 (2) SA 495 (E); Burchell v Burchell [2006] JOL 16722 (E)).

10) It is common cause between the Applicant and the First Respondent that the order which was made in the divorce action is binding upon both of them. Applicant contends however that the deed of settlement which was made an order of court was signed by both the First Respondent and herself in their representative capacities as trustees of the Trust. On this basis it is contended that the deed of settlement and the court order is similarly binding upon the Trust. The deed nowhere however reflects this in terms. It refers throughout to the plaintiff and the defendant to the action and in appending their signatures the parties thereto are identified as plaintiff and defendant.

11) It is indeed so that the deed of settlement envisages that the plaintiff and defendant were required to act in their capacities as trustees to secure certain aspects of the agreement. Thus the deed:

a) Records that they are the only trustees of the Trust;
b) Requires that on option be given by the Trust to the Applicant to transfer the property into her name;
c) Provides that pending the exercise of such option to transfer the property the Applicant shall be entitled to lease the property from the Trust; and
d) Stipulates that the agreement in respect of the lease of the property shall bind future trustees.

12) In my view the deed of settlement may well be capable of a construction that places binding obligations upon the Trust and the facts may well establish that the plaintiff and defendant also intended, by entering into the agreement, to bind the Trust. That however does not assist the Applicant in relation to the primary relief sought.

13) It is common cause that the Trust was not a party to the divorce action. Nor was it joined prior to the deed of settlement being made an order of court. A trust is cited in legal proceedings by joinder of the trustees of the trust in their representative capacities, since the assets of a trust vest in the trustees (*see Land and Agricultural Bank of South Africa v Perker and Others 2005 (2) SA 77 (SCA) at par. 10; Rosner v Lydia Swanepoel Trust 1998 (2) Sa 123 (W) at 127B; Brunette v Brunette and Another N.O. 2009 (5) SA 81 (SE)*). Thus whilst the court dealing with the divorce action was entitled, in its discretion, to incorporate the terms of the settlement in an order of court, it could not thereby have bound a party who was not a party to the action before it in terms of such order.

14) At best for the Applicant the deed of settlement establishes a contractual relationship *inter se* between the Applicant and the Trust.

15) Mr *Heymans*, who appeared for the Applicant, did not argue for a finding of contempt to be made against the Third and Fourth Respondents, apparently because they, as trustees had played no particular role in the non-compliance with the order. He nevertheless urged me to find that the court order bound the First Respondent in his representative capacity as trustee and that - should I find that all the other requisites for a finding of contempt are present - the Second Respondent should be held to be in contempt and appropriately punished.

16) There is no merit in the submission. The Trust was not a party to the divorce action and accordingly no order could be nor was made which binds the trustees of the Trust. Accordingly the order made in that action does not apply to the Trust as represented by the trustees. They can accordingly not be held to be in contempt of the order. I shall hereunder revert to the further orders sought against the trustees of the Trust in this application.

17) Insofar as the charge of contempt by the First Respondent is concerned, no difficulty arises in regard to the general proposition that an order was made which

is binding upon him. Nor was it suggested that the First Respondent was unaware of the order by reason that it had not been served upon him. On the contrary, it is apparent from the evidence before me that the First Respondent is well aware of the fact that an order of court binds him to certain obligations undertaken in the deed of settlement. The fundamental question however is what those obligations are and whether they have been breached.

18) Mr *Heymans* quite correctly pointed out that the core problem concerns the interpretation and application of clause 6.2.2.2.5 of the deed of settlement.

19) That clause envisages that the properties transferred into the name of the Applicant will be transferred back into the name of the Trust upon the death of the Applicant. All costs and expenses associated with such transfer are to be for the account of the applicant or her deceased estate. The clause further provides that the Applicant is obliged to furnish a guarantee to the satisfaction of the First Respondent that the properties will be reregistered in the name of the Trust.

20) Mr *Heymans* argued that the fact that the properties have not yet been transferred into the name of the Applicant establishes non-compliance with the order. What remained to be considered, according to the argument advanced, was whether the facts establish that the failure to transfer the property is wilful and *mala fide*.

21) The argument however, loses sight of two important aspects. Firstly, the obligation to transfer the properties into the name of the Applicant cannot be that of the First Respondent. The properties are registered in the name of the Trust. Accordingly only the trustees can act in relation to the trust property and therefore only the Trust can give effect to the transfer of the properties.

22) Secondly the obligation to effect a transfer of the property into the name of the Applicant is not unconditional, nor is it an obligation which flows from undertakings

required to be fulfilled by only one party to the transaction. Leaving aside for the moment the fact that it is the Trust – by way of conduct on the part of the trustees – which must give transfer, it seems clear enough that clause 6.2.2.2.5 requires the Applicant to deliver a guarantee to the satisfaction of the First Respondent as a condition precedent to the transfer being effected.

23) The clause casts this obligation upon the Applicant. It requires only that the First Respondent be satisfied that the object of the clause be met. The terms of the guarantee that is required are not specified, nor is the period within which such guarantee must be furnished stipulated.

24) The Applicant contends that clause 6.2.2.2.5 must be read in the context of clause 6.2.2.2 as a whole and that, so read, the guarantee required of the Applicant is no more than a guarantee that the property will, on the death of the Applicant, be re-registered in the name of the Trust. This is so, so the argument goes, because clause 6.2.2.2 deals extensively with the financial arrangements applicable to the transaction. In this regard, it was submitted that provision is made for the registration of a bond for a fixed period and fixed amount. The fact that a maximum period of 10 years is stipulated for the bond implies that it should have been settled in full before re-registration in the name of the Trust occurs. There is accordingly no basis for the guarantee to deal with settlement of outstanding liabilities or for that matter to deal with liability for taxes and the like.

25) Since the First Respondent has adopted the attitude that the guarantee should address these and other matters, so the Applicant argued, he is *mala fide* and wilfully attempting to avoid fulfilling obligations imposed upon him by the terms of the court order.

26) There are two difficulties with this argument. In the first instance clause 6.2.2. is silent as to what should occur in relation to any outstanding financial obligations arising from the registration of a bond over the properties should the Applicant die before the term of the bond expires or it is settled. The clause is also silent as to

the basis upon which and the mechanism by which the Applicant's estate is to be bound by the provisions of clause 6.2.2.2.5.

27) Furthermore, the argument presupposes that the "obligation" imposed by clause 6.2.2.2.5 (i.e the obligation to signify satisfaction with the guarantee) is one imposed on the First Respondent in his personal capacity rather than in his capacity as trustee (i.e. as Second Respondent). In this regard it is important to record that the Applicant contends that the agreement was signed by the parties thereto in both their personal and representative capacities. If one accepts that that is so it follows that the agreement sought to and indeed did impose obligations on the parties in their respective capacities.

28) A reading of the deed of settlement indicates that this is precisely what the agreement achieves. Clause 6.2.2 deals with the basis upon which the Applicant will enjoy the benefit of property held by Trust during her lifetime. The clause seeks to regulate and manage the use of trust property. In my view it is more probable than not that clause 6.2.2.2.5 requires that the First Respondent act in his capacity as trustee. Thus to the extent that it imposes obligations upon him they are imposed upon him in that capacity and not in his personal capacity.

29) Accordingly, to the extent that he has failed to comply with such obligations that failure may found a breach of his contractual obligations which would vest the Applicant with appropriate contractual remedies. Such failure cannot, for the reasons already set out, establish a basis for contempt proceedings since the "obligation" does not arise by reason of a court order binding upon the First Respondent in his capacity as trustee.

30) Even if I am wrong in this regard, the evidence establishes a dispute between the parties as to the nature and effect of clause 6.2.2.2.5.

31) The divorce was finalised during August 2007. It is clear from the correspondence between the legal representatives of the parties that a number of disputes arose in relation to the execution of the terms of the deed of settlement. Not all of these are

germane to the present dispute. What is significant however is that correspondence relating to the transfer of the immovable properties in terms of clause 6.2.2.2.5 indicates that the parties have differing interpretations of the clause.

32) On 6 February 2008 First Respondent's attorneys wrote to Applicant's attorneys in the following terms:

> "4. ad para 6.2.2.2.5 – Ek het u meegedeel dat u klient verplig is om 'n waarborg aan my klient te lewer wat vir hom aanvaarbaar en tot sy teveredenheid sal wees dat registrasie van transport van die vaste eiendomme in naam van u klient oorgedra sal word in die naam van die Andre Froneman Familie Trust. U het onderneem om 'n onvoorwaardelike onderneming op skrif aan my klient te gee wat onderteken is deur u klient en het ons verder ooreengekom dat u klient 'n Prokurasie om Transport te Gee sal ondertkeken wat deur my klient gehou sal word and dus aangewend sal word soos uiteengesit in hierdie klousule. U is van mening dat my klient verskanste regte het ingevolge hierdie klousule."

33) In reply hereto the Applicant's attorney responded, on 13 February 2008, in the following terms:

> Ad paragraaf 4:
>
> Hierdie is 'n bepaling wat ek nie werklik weet of dit afdwingbaar gaan wees nie, maar dit is inderdaad so dat die bedoeling van die partye was dat die onroerende eiendom na ons klient se afterwe terug getransporteer sal word in die Froneman Familie Trust onderworpe uiteraadrd aan die voorwaarde dat die kinders gebore uit die huwelik die voordeel daarvan sal ontvang.
>
> U moet aan ons verskaf 'n onderneming warmee u klient tevrede sal wees vir ondertekening deur ons klient.

34) I pause to note here that this attitude, expressed by the Applicant's attorney, can hardly have engendered confidence that the terms of the deed of settlement would give rise to the intended result. It is noteworthy too that despite the agreement that the Applicant would furnish an unconditional guarantee and an appropriate Power of Attorney, this was not furnished.

35) On 5 March 2008 Applicant's attorneys furnished a guarantee. The letter states that the guarantee is annexed "vir wat dit werd mag wees". The "Onderneming" provides that the Applicant gives an undertaking to comply with clause 6.2.2.2.5 and notes her "toestemming / ondernemeing dat daar gehoor gegee sal word aan die bepaling soos vermeld hierin".

36) Following this correspondence a number of matters arose which inevitably delayed the further progress of any transfer of the property. These included questions as to the liability for the payment of transport duty; the necessity to obtain sworn appraisals and valuations of the properties and tax certificates in order to facilitate the transfer of the property.

37) According to the Applicant the final outstanding valuation, which was required, was furnished during October or November 2008 and that thereafter nothing further needed to be done in order to enable effect to be given to clause 6.2.2.2.5 of the deed of settlement. The Applicant argues that the failure thereafter to give effect to the terms of the court order indicates that the First Respondent does not intend to give effect thereto and that he is *mala fide* and wilful in his disobedience of the order. In support of this the Applicant points to the fact that the First Respondent's attorneys failed, despite repeated requests to do so, to point out in which respects the Applicant had failed to honour her obligations in terms of the deed of settlement. Although neither counsel for the parties sought to make much of it, the papers disclose that the First Respondent at some stage indicated his preparedness to give transfer of the property provided that the Applicant submitted to and passed a polygraph lie detector test. This request related to an alleged attempted assassination of the First Respondent. This, it was suggested, is indicative of the First Respondent's attempts to frustrate the implementation of the deed of settlement.

38) The First Respondent disputes this. He alleges that the Applicant has not furnished him with a guarantee which is to his satisfaction. The only guarantee provided by the Applicant is that referred to above which, so it is argued, is meaningless and does not meet with his approval.

39) In his answering affidavit he contends that, as a trustee of the Trust, he is under a fiduciary duty to ensure that the Trust's assets are maintained for the benefit of the beneficiaries. It is for this reason that he has sought assurance that the immovable property will be unencumbered and in the same condition as it is presently when it is re-transferred into the name of the Trust. It is also for this reason that he has raised the possibility of an endorsement on the title deeds of the properties in order to ensure that the terms of the deed are honoured on the death of the Applicant.

40) The First Respondent's answering affidavit does evince a supine attitude in relation to the terms of the guarantee that would be to his satisfaction. He appears to have adopted the attitude that it is for the Applicant to produce a guarantee which is to his satisfaction and that he will not set out what he requires. Whilst this certainly indicates an obstructive and obfuscating attitude, which does not inure to his credit, it does not necessarily establish that he is in wilful disobedience of obligations imposed upon him or even *mala fide.*

41) The central difficulty in relation to the terms of the deed of settlement and accordingly the Court order is that the reciprocal duties and obligations are not defined in precise terms, nor are they required to be carried into effect within a prescribed period. The parties appear to have divergent interpretations of the nature of the obligations. The applicant considers that nothing more need be given than a general commitment to honour the terms of clause 6.2.2.2.5.

42) The Applicant's argument in regard to the interpretation of the clause is somewhat confused. On the one hand it is contended that the requirement that a guarantee should be provided is so vague as to render it void for vagueness and accordingly unenforceable. If that is so it is difficult to envisage how it could be found that the

First Respondent's failure to signify his satisfaction with a guarantee furnished by the Applicant could ever render him in wilful non-compliance with the terms of the order.

43) On the other hand it is contended that the deed of settlement clearly makes detailed provision for the transfer and re-transfer of the property, regulates the financial considerations that ought to apply and that once a guarantee is furnished the First Respondent must of necessity signify his satisfaction.

44) In contrast to this the First Respondent sees the clause as requiring him to act in accordance with his duties as trustee and that a number of contingencies not catered for in the deed of settlement must be addressed prior to the transfer of the property into the name of the Applicant. It is with this in mind – as appears from the correspondence adduced in evidence before me – that the First Respondent proposed a wholly different resolution of the matter, namely the establishment of a separate *inter vivos* trust into which to transfer the properties. The capital beneficiaries of this trust would be the beneficiaries of the Trust whereas the income beneficiary would be the Applicant. In this way it would become unnecessary to effect a transfer of the properties upon the death of the Applicant. I need not, for present purposes, consider the merits of this proposal. The applicant considers it to be another instance of the First Respondent simply "shifting the goal posts". In my view it reflects rather the different interpretations of what is required of the parties in their various capacities.

45) The question that arises is whether, on a careful consideration of all of the facts placed before me, the evidence establishes that the First Respondent has in fact failed to comply with an obligation imposed upon him by the terms of the court order. In my view it does not.

46) The further question is whether the First Respondent is obliged by the terms of the order to state what form of guarantee will meet with his satisfaction. Whilst the agreement envisages that the parties will act reasonably and in good faith, the

relevant clause does not require that the First Respondent should stipulate conditions to be set out in a guarantee which would meet with his satisfaction. His failure to do so does not constitute a failure to comply with an obligation imposed upon him by clause 6.2.2.2.5 of the deed of settlement.

47) Even if I am wrong in coming to this conclusion, the further difficulty is that on the evidence before me, the proper interpretation of the effect of clause 6.2.2.25 is in dispute. In these circumstances, it cannot be said that the First Respondent's conduct, based upon his interpretation of the clause is so manifestly unreasonable as to suggest that he is wilfully and *mala fide* seeking to avoid an obligation imposed upon him by the deed of settlement.

48) It follows therefore that the Applicant has not discharged the onus of establishing beyond a reasonable doubt that the First Respondent is guilty of contempt of a court order. The application must accordingly fail.

49) The Applicant, however, also seeks certain directory orders against the Respondents, namely:

a) That they be ordered to effect transfer of properties within 30 days of the date of granting the order; and
b) That in the event that they fail to do so that the Registrar be authorised to sign all documents necessary to give such transfer.

50) In regard to these orders, it is difficult to conceive how the Trust can be compelled to effect transfer when there is no effective guarantee in place regarding the re-transfer of the properties to the Trust upon the death of the Applicant. In the circumstances such an order would not be competent.

51) In respect of the order compelling the First Respondent to comply with the deed of settlement, also sought in the Notice of Motion, little point would be served by such order, since the same difficulties as have arisen in this matter may arise again. A court order must be effective, enforceable and immediately capable of execution by

the sheriff, his deputy, or members of the South African Police Service. An order to comply with the deed of settlement would not constitute an effective order.

52) The facts of this matter and, in particular the terms of the deed of settlement which was made an order of court, illustrates the difficulties that may arise when a deed of settlement entered into between parties to a suit is incorporated in an order of court. As was noted by Alkema J in *Thutha v Thutha 2008 (3) SA 494 (Tk) at par 14* the remedy of contempt of court:

> ".....is a far cry from any of the remedies available to an innocent party claiming a breach of contract. In the latter case, the remedy is either specific performance or a claim for damages, with or without a cancellation of the contract. The case before me is only concerned with the alleged wilful refusal or failure to comply with an order of court, and with the imposition of a penalty in order to vindicate the court's honour consequent upon the alleged disregard of its order, and to compel performance in accordance with the order.

53) Contempt proceedings serve an important public function of vindicating the integrity of the Courts and of ensuring that the rule of law is upheld. Enforcement of an order by way of contempt proceedings can only occur if the order is, in its terms effective and capable of immediate execution. Where this is not so it is to be doubted that it constitutes an order of court at all (*see Thutha v Thutha (supra)*). In such circumstances enforcement by way of committal for contempt whether or not including a further order to comply is not possible.

54) This is such a case. I have already found that non-compliance has not been established and that a further order compelling compliance would generate the same difficulties that have already arisen. I do not consider that it is appropriate to fashion, by way of a further court order, what would amount to an addendum to the agreement already concluded between the parties. In my view, to the extent that the Applicant is aggrieved by the First Respondent's failure to comply with the terms of the agreement, she is entitled to sue, contractually, for specific

performance or such other contractual remedy as may be appropriate in the circumstances.

55) In the result I make the following order :

The application is dismissed with costs.

_____
G. G. GOOSEN
ACTING JUDGE OF THE HIGH COURT

For the Applicant: Mr P J Heymans *instructed by* Nettletons

For the Respondents: Mr S J Reinders *instructed by* Nolte & Smit