IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: 2600/2011
Date Heard: 2 August 2012
Date Delivered: 22 August 2012

In the matter between:

U N (born W) Applicant

and

G P N Respondent

JUDGMENT

NEPGEN, J:

1] The applicant is the plaintiff in a divorce action instituted by her against the respondent. In this application the applicant seeks an order that all disputes between them have been settled in terms of a Deed of Settlement, which is annexure "DOS1" to the notice of motion. The respondent disputes that there has been such a settlement.

2] In support of her contention that there has been a compromise the applicant relies upon correspondence between her attorney and the respondent's attorney. Although it is not entirely clear, it does appear as if the applicant also seeks to rely on a conversation which took place between her attorney and the respondent's attorney on 28 May 2012.

3] Compromise is the settlement by agreement of disputed obligations: Christie *The Law of Contract in South Africa* 6th Ed at 473 and *ABSA Bank Ltd v Van De Vyver, NO* 2002 (4) SA 397 (SCA) at 402 G. The question that has to be determined in this matter is whether agreement was reached in respect of all disputed obligations. In this regard it is not in dispute that agreement was reached on all issues but one, that being the manner in which the assets of the parties were to be dealt with. In the circumstances I propose to refer only to what is set out in the papers and the correspondence in respect of this issue.

4] The applicant alleges that on 4 May 2012 her attorney had a meeting with the respondent's attorney during which it was indicated on what basis the applicant would be prepared to settle the divorce action. During the course of this discussion it was indicated that the applicant would be prepared to settle on the basis of the principle of an accrual being agreed upon and that attorney De Jager be appointed as a Receiver, with the powers of a Receiver, to determine the accrual and the terms of repayment. The respondent's attorney undertook to obtain instructions from the respondent in regard to the settlement proposal. On 9 May 2012 the respondent's attorney addressed a letter to the applicant's attorney, which was received on 10 May 2012, in which, *inter alia*, the following is stated:

"After consultation with our client we are instructed that:

1. It is unclear as to what is meant by '50% of the accrual,' as it is our understanding that

it's your client's contention that all of the assets that were accrued in the marriage were ex our client's estate. Our client's argument is that all that has accrued in your client's estate were the fruits of our client's award for his personal damages claim and the normal understanding of the term 'accrual' cannot ever apply.

2. Our client is willing to accept an agreement in terms whereof our respective clients will each receive 50% of the estate to be determined by the Receiver having regard to what is stated in this paragraph.

3. Our instructions are that our client has no objection at all to the services of attorney De Jager as a Receiver but we prefer the use of a local attorney to act as Receiver. This is for reasons of distance and convenience which also relates to the expense of travel which our client, as you know, cannot afford."

5] On 17 May 2012 the applicant's attorney responded as follows to these three paragraphs:

"2. We have consulted with our client and we respond as follows to your client's proposals:

2.1 Ad paragraphs 1 and 2 thereof:

The accrual is a matter of law, will be determined by the Receiver, and once a final decision is made by a Receiver he will decide which party has to pay the other.

2.2 Ad paragraph 3 thereof:

We have previously advised you that attorney De Jager is prepared to undertake this Receivership in Grahamstown. There can therefore be no objection to attorney De Jager attending to the matter as a Receiver."

6] Further on in this letter it is stated that it would appear that the only

outstanding issue is that of the appointment of attorney De Jager as a Receiver. It also seems as if there was an annexure to the letter in which the proposed powers of the Receiver were set out. I say this because there is a statement that once the respondent confirms his satisfaction with the powers of the Receiver as contained in annexure "A" the necessary Deed of Settlement would be drafted for signing.

7] On 23 May 2012 the respondent's attorney addressed a further letter to the applicant's attorney. In this letter it was pointed out that the respondent had an objection to the appointment of attorney De Jager as a Receiver and it was suggested that Adv. Koekemoer be appointed if he was available. Reference was also made to what was stated to be "an oversight" in paragraph 4 of the letter of 9 May 2012, which paragraph dealt with the payment of costs. The letter concludes with the following statement:

> "In respect of the remainder of the proposals we have no doubt our client will accept same. If your client agrees with the above please let us have your settlement proposal for our client's (final) instructions."

8] Thereafter, on 28 May 2012, the applicant consulted with her attorney and accepted all the proposals made by the respondent. She alleges that she instructed her attorney to draft a Deed of Settlement. Before he did so, the applicant's attorney contacted the respondent's attorney telephonically and informed him that the respondent's proposals had all been accepted, that he intended drafting a Deed of Settlement, and wished to set the matter down for motion court on the Thursday of that week. The applicant alleges

that the respondent's attorney indicated that this was in order and that he would discuss the matter with a senior partner in his firm in due course. After this discussion the applicant's attorney prepared a Deed of Settlement and forwarded it to the respondent's attorney on the same day, with a request that the respondent should sign the Deed of Settlement and return it "as soon as possible". This resulted in the respondent's attorney writing to the applicant's attorney on the same day, in which letter the following is stated:

"Thank you for your letter of even date. If paragraph 9 of the Settlement Agreement and paragraph 2.5 of Annexure A (the Powers of the Receiver) envisage the receiver determining in law the ownership of the assets then we are in agreement with the deed of Settlement.

We do require that the duties include, inter alia, a determination as to whether or not a donation took place, whether such donation was to Plaintiff or to the joint estate, whether, if it is found that a donation took place, the enforcement of clause 7 of the ante-nuptial agreement is just and equitable in the circumstances and, after such findings, to finally determine the ownership in relation to the assets. Furthermore the receiver shall receive evidence and argument in respect of the dispute of fact on these limited issues.

In the light of the above we suggest that the decision of the Receiver be final and binding on the parties."

9] The applicant's attorney responded to this letter on 29 May 2012. In paragraphs 2, 3 and 4 of that letter the following is stated:

"2. The Powers of the Receiver are clearly spelt out and do not require interpretation.

3. We confirm that the Receiver will have absolute discretion and as indicated in the Powers.

4. Our failure to deal with any of the issues raised in your letter should not be construed as an admission thereof."

The letter referred to as “your letter” is the letter from the respondent’s attorney dated 28 May 2012.

10] On the same day, namely 29 May 2012, the respondent’s attorney addressed a letter to the applicant’s attorney in which the following is stated:

> “It has become clear to us that a receiver is only able to determine the division of the assets in accordance with an Order of Court. It is not for the receiver to make the determination of ownership and or the accrual. It is therefore impossible for us to accept the terms of the settlement as they stand.”

11] The letter concludes by stating that an amended “consent paper” would be provided to enable the Receiver to “exercise his powers effectively”.

12] On 30 May 2013 the applicant’s attorney wrote to the respondent’s attorney placing on record that the matter had been compromised “on the basis of the correspondence between the parties”. Later that day the applicant’s attorney received an amended Deed of Settlement from the respondent’s attorney. This was in identical terms to the Deed of Settlement which had been prepared by the applicant’s attorney and forwarded to the respondent’s attorney, save for the addition of an additional paragraph, namely paragraph 9A.

13] It is in the light of the aforegoing that I must determine whether or not the matter has in fact been settled between the parties. It is not clear precisely when the applicant alleges that such settlement was reached,

but in argument before me it was contended that the opening paragraph of the letter of 28 May 2012 addressed by the respondent's attorney to the applicant's attorney "unequivocally determines" (para 10 of the applicant's heads of argument) that the terms of "DOS1" were agreed upon. It was contended that what is referred to in the aforesaid paragraph of that letter is precisely what is intended by "DOS1".

14] I am unable to agree with this contention. In the first place, the request in the letter of 23 May 2012 that the applicant's attorney should submit his settlement proposal in order to obtain the respondent's "(final) instructions" is a clear indication that what was required was a proposal, in the form of a Deed of Settlement or otherwise, to enable the respondent's attorney to obtain the instructions of the respondent as to whether or not he would be prepared to settle on those terms. The discussion that took place on 28 May 2012, when the applicant's attorney informed the respondent's attorney that he intended drafting a Deed of Settlement, and which elicited the response that this was in order, means nothing more, in my view, then that such Deed of Settlement could be prepared and would then be submitted to the respondent to obtain his instructions in regard thereto. In addition to all that, once the Deed of Settlement had been obtained, the letter of 28 May 2012 was written by the respondent's attorney. It is quite clear from this letter that the respondent and/or his attorney was uncertain as to the precise meaning and effect of the Deed of Settlement that had been drafted. If that was not so then there would have been no purpose in questioning exactly what it meant. Even if it is to be accepted, as

contended on behalf of the applicant, that what was intended was what was stated in the first paragraph of such letter, this does not alter the fact that there was uncertainty on the part of the respondent and/or his attorney as to the precise meaning thereof. This is made quite clear when the remainder of that letter is considered.

15] As I have pointed out, a compromise is reached when the disputed obligations of the parties are settled by agreement. There can be no such settlement without an agreement. For as long as the respondent was uncertain as to what the terms of the Deed of Settlement meant, I do not see how it can be suggested that he agreed therewith. Whatever the Deed of Settlement may actually have meant and whatever the applicant's attorney thought it meant is not relevant insofar as the question of determining whether or not there was an agreement is concerned. In this regard the applicant's attorney, instead of removing whatever uncertainty there was in the mind of the respondent and/or his attorney, merely replied that the powers of the Receiver were clearly spelt out and did not require interpretation.

16] In the light of all the aforegoing I am unable to conclude that the respondent, either personally or through his attorney (accepting that his attorney had the power to bind him) agreed with the terms of the Deed of Settlement which had been drafted by the applicant's attorney. Having come to this conclusion the application cannot succeed.

17] The question of costs remains. Both parties sought an order that the other party's attorney should be ordered to pay the costs of the application *de bonis propriis*. As the respondent has been successful, there can be no question of him being required to pay any costs and costs should follow the result. Insofar as an order is sought that the appplicant's attorney should pay the costs of the application *de bonis propriis*, it is my view that no justification exists for making such an order. The applicant has stated on oath that her attorney was at all times acting on her instructions. In addition, there can be no doubt that her attorney genuinely believed that a settlement had been reached. This is clear from his conduct after forwarding the Deed of Settlement to the respondent's attorney. In all the circumstances no special costs order is warranted.

18] The application is dismissed, with costs.

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JJ NEPGEN
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT: Adv Cole, instructed by
Wheeldon Rushmere & Cole

FOR THE RESPONDENTS: Adv Hodge, instructed by
Netteltons Attorneys