

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

- (1) NOT REPORTABLE.
- (2) NOT OF INTEREST TO OTHER JUDGES.
- (3) REVISED.

Case No: 65338/15

11/8/2017

In the matter between

K P N

Plaintiff

and

S J S

Defendant

JUDGMENT

HF JACOBS, AJ:

[1] The plaintiff is a 34 year old administrative officer in the employ of the C[....]. The defendant was her husband. I say "was" for they no longer live together as husband and wife and have not for many years. The parties entered into a customary marriage on or about 3 April 2008. They are in agreement that the marriage was validly concluded in terms of the customary law. The marriage was, however, never formally registered. The parties are in agreement that the fact that the marriage was not registered does not affect the validity thereof. From the marriage between them one minor child was born on 17 November 2007. The

minor child resides with the plaintiff and it is common cause that it would be in the best interest of the minor child to have his primary place of residence with the plaintiff, subject to the paternal contact by the defendant. The parties are *ad idem* that the marriage relationship between them has broken down irretrievably.

[2] Central to the dispute between the parties is a written settlement agreement dated 20 June 2013. It is common cause that the plaintiff and the defendant both signed the written settlement agreement, the body of which reads as follows:

"THE PARTIES AGREE AS FOLLOWS:

1. PREAMBLE

- 1.1 *The parties entered into a customary union on 3 April 2008 At [...], which union was never registered.*
- 1.2 *The parties acknowledge that their customary union and/or relationship have irretrievably broken down.*
- 1.3 *The parties have reached agreement with regard to the proprietary and ancillary consequences of the dissolution of the customary union and/or relationship in the event of the above Honourable Court issuing a decree of divorce.*
- 1.4 *The parties agree that they shall, on an unopposed basis seek an order compatible with the provisions of this agreement and that the above Honourable Court shall be requested to incorporate this agreement in the Order of Divorce enabling this agreement to operate as an Order of Court.*

DISSOLUTION OF CUSTOAMRY (sic) UNION

1. *That customary union and/or relationship between the*

parties have irretrievably broken down and parties wish that their customary union and/or relationship bonds be declared dissolved.

2. *That there is one minor child born out of the customary union and/or relationship between the parties.*

PROPERTY

3. *That each party shall keep the property separately owned by them and shall have no claim against each other. Thus parties specifically waive their right to claim against the each other's estate in terms of customary union and/or relationship.*

4. *It is specifically recorded that P K N has taken and removed most of her assets, except for some items, which items shall be removed by her and at her own expense on a date to be arranged with S J S which date must be mutual convenient for both parties.*

5. *It is further specifically recorded that:*

5.1 *K P N is currently in possession of motor vehicle 2006 OPEL ASTRA 1.6 ESSENTIA with Registration number [...], which motor vehicle is financed via Motor Finance Corporation (MFC) and S J S is the registered titleholder thereof and to which ownership is reserved in favour of the MFC;*

5.2 *K P N, shall continue to use motor vehicle 2006 OPEL ASTRA 1.6 ESSENTIA with Registration number [...] until such time when she is in position and qualify for financial assistance to take over repayments in her own names and have the contract with the MFG transferred to her names and/or until such time when*

the purchase price and other costs and charges are paid in full, whichever is the soonest.

5.3 K P N shall make payment to S J S's bank account of all monies due in respect of monthly financing repayments and insurance of motor vehicle 2006 OPEL ASTRA 1.6 ESSENTIA with Registration number [...] and shall further be liable for any fines or other costs incurred in respect to the said motor vehicle while under her use and enjoyment;

5.4 S J S shall in return ensure that there are sufficient funds in his bank account in order to satisfy the monthly financing and insurance payments of motor vehicle 2006 OPEL ASTRA 1.6 ESSENTIA with Registration number [...];

5.5 in the event that K P N qualifies for motor financing, S J S shall sign all necessary forms and/or documents necessary to pass the transfer of the contract and/or ownership in respect of the vehicle to K P N ;

[2nd] 5.5 K P N shall be liable for all costs necessary to effect such transfer;

PROCEEDING ON AN UNOPPOSED BASIS

6. That in the event of there being a need to dissolve the customary union and/or relationship via court proceedings, and in that event the parties agree that the dissolution proceedings will proceed on an unopposed basis, and the contents hereof shall be incorporated as settlement agreement between the parties;

COSTS

7. The parties agree that S J S shall pay an amount of R13 588.44

(THIRTEEN THOUSAND FIVE HUNDRED AND EIGHTY EIGHT RAND AND FOURTY FOUR CENTS) upon signature of this agreement, which amount is in respect of contributions made by K P N towards the joint household expenses contributed during the period of April 2009 to July 2011.

- 8. The parties agree that S J S shall be liable for the necessary legal costs and/or fees incurred by K P N pertaining to this agreement, seeking an order compatible with the provisions of this agreement as well as requesting the Honourable Court to incorporate this agreement in the Order of Divorce.*
- 9. The parties agree that S J S shall further pay to K P N the amount of R11 124.00 (ELEVEN THOUSAND ONE HUNDRED AND TWENTY FOUR RAND) upon signature of this agreement, which amount is in respect of half of the legal expenses incurred by K P N I at the Pretoria Magistrates' Court under reference number 00110mai00124.*
- 10. That in the event of the proceedings being instituted at court, each party shall be liable to pay their own legal costs pertaining to the dissolution of customary union and/or relationship.*

PARENTAL RIGHTS AND RESPONSIBILITIES

- 11. The parental responsibilities and rights in respect of the minor child, M J S , as contemplated in sections 18(2) of the Children's Act, Act No 38 of 2005 shall be awarded jointly to the K P N and S J S , which responsibilities and rights, inter alia, may include the following:*

11.1.1 The responsibility and right to:

- 11.1.1.1 care for minor child;*
- 11.1.1.2 act as guardian for the minor child;*
- 11.1.1.3 maintain contact with minor child;*
- 11.1.1.4 contribute to the minor child.*

11.1.2 The responsibilities and rights as guardian of the minor

child shall, inter alia, include the following responsibilities and rights to:

- 11.1.2.1 administer and protect the minor child's property;*
 - 11.1.2.2 represent and assist the minor child in respect of any administrative, contractual or other matter requiring assistance;*
 - 11.1.2.3 grant or refuse consent in respect of any legal matter requiring consent in respect of marriage, adoption, relocation or removal out of the Republic of South Africa, application for a passport, alienation or disposition or encumbrance of immovable assets of the child.*
- 11.1.3 The parties agree that either of them and independently of each other may exercise the responsibilities and rights listed in paragraph 8.1.1.*
- 11.1.4 The parties agree that the consent of both parties shall be required in the exercising of the responsibilities and rights listed in paragraph 8.1.2 above.*

PRIMARY RESIDENCE OF CHILD

- 9. K P N shall be responsible for the primary care of the minor child and the primary residence of the child shall vest with her.*

CONTACT TO MINOR CHILD

- 10. K P N shall have the right to reasonable contact with the minor child at all times.*
- 11. S J S shall have reasonable access to the minor child.*
- 12. Holidays to be alternated.*

COMPLIANCE WITH SECTION 6(5) OF THE CHILDREN'S ACT NO 38

OF 2005

13. *The parties place on record that, insofar as the child is, on The basis of his age and development, incapable of understanding the implication of the dissolution of customary union and/or relationship between his parents and the rights in terms of the Children's Act, the parties undertake to explain such implications to the child and will continue to explain such implications including the terms and conditions of this settlement agreement.*

MAINTENANCE IN RESPECT OF THE MINOR CHILD

14. *S J S shall pay monthly maintenance in respect of the minor child in the sum of R1 500.00, which amount shall increase annually by 10% (ten percent), with the first payment due and payable on the date of signature of this agreement, thereafter on or before the last day of each succeeding month to K P N's bank account.*
15. *S J S shall in addition to the above payments, pay for medical aid, all medical bills not paid by the medical aid, school fees, extra mural and related educational expenses.*
16. *That both parties shall pay for all reasonable costs and expenses in respect of tertiary education of the minor child and that the Parties' liability in respect of the these expenses of the child continue for so long as the expenses are reasonably justified, taking into account the child's academic ability, aptitude and academic progress and means of the parties.*

NON-VARIATIONS AND WHOLE AGREEMENT

17. *This agreement constitutes the whole agreement between the parties relating to the subject matter hereof.*
18. *No amendment or consensual cancellation of this agreement, or any provision or term thereof shall be binding unless recorded in a written*

document and signed by the parties."

[3] The plaintiff claims the following relief:

- "(1) Confirmation of the validity of the customary marriage;*
- (2) A decree of divorce, alternatively confirmation of the dissolution of the customary marriage;*
- (3.1) That the parental rights and responsibilities in respect of the minor child be awarded to both parties in terms of Section 18(2)(a) of the Children's Act, No 38 of 2005.*
- (3.2) That the primary place of residence of the minor child be awarded to the Plaintiff in terms of Section 18(2)(b) of the Children's Act, No 38 of 2005;*
- (4) Division of the joint estate;*
- (5) Payment to the Plaintiff of an amount equal to 50% of the Defendant's net pension interest in his pension Fund Scheme calculated as at the date of dissolution of the customary marriage and payable to the plaintiff in terms of the provisions of Section 37D(1) of Act 24 of 1956;*
- (6) Costs of suit, if opposed."*

[4] In his plea the defendant raises the defence that the patrimonial and other issues and division of the joint estate of the parties had been settled in terms of the written settlement agreement of 20 June 2013. He has not instituted a counterclaim.

[5] In reply the plaintiff admits having signed the settlement agreement but denies that it addresses the patrimonial aspects between them pertaining to the defendant's pension fund interest and immovable properties registered in the defendant's name at the time of dissolution of the marriage. The plaintiff alleges that she was never advised that such aspects are not included in the agreement and if she had been so advised she would not have signed the settlement agreement at all.

[6] Despite the written settlement agreement providing for it to be made an order of Court it was never made an order. The balance of the provisions of the settlement agreement has been complied with. The defendant has remarried during September 2013. There are two children born of his second marriage, the first born on 20 June 2014 and the youngest born on 11 January 2017.

[7] The parties have not lived together as husband and wife since 2010 and the maintenance payable by the defendant to the plaintiff for the minor child is and has been determined over the years by the Maintenance Court. I have not been asked to make any finding in that respect. On the contrary, the evidence of the plaintiff was that she is satisfied that the child is taken care of properly.

[8] The plaintiff testified that when the parties separated she instructed her attorney, Ms Kalobe of the firm F R Pandelani Incorporated Attorneys to assist the plaintiff in obtaining payment of part of the defendant's pension fund benefit and immovable property. The plaintiff said she thereafter received the unsigned settlement agreement from Mr Kalobe and signed it. She mailed the signed document back to Ms Kalobe. The plaintiff did not hear from Ms Kalobe for two years and was later told by her uncle that she should have received benefits from the defendant's pension fund and from his immovable property. The plaintiff was advised by her uncle to see her current attorney.

[9] The defendant and his attorney testified at the trial. They both confirmed the common cause facts. The defendant testified that during the period during which the settlement agreement was negotiated (the parties were not able to supply accurate detail as to the date thereof), the attorneys arranged for a meeting between the parties. The plaintiff informed all concerned through her attorney shortly before the meeting that she would not attend the same. The meeting continued and some time thereafter the settlement agreement was concluded.

[10] The defendant's attorney in all material respects confirmed compliance with the terms of the settlement agreement as far as he was concerned.

[11] The defendant testified that he never discussed with the plaintiff the

settlement agreement or the terms thereof. At all material times he lived as if divorced from the plaintiff and seeks finality.

[12] The settlement agreement of 20 June 2013 is a compromise of the disputes ventilated between the parties at the time. Having regard to its context the settlement agreement had as objective the termination of the marriage relationship/customary union between the parties, care and maintenance of the minor child born of the marriage and certain patrimonial issues. In law the conclusion of a settlement agreement (a *transactio*) is a compromise of the disputes and has the effect of *res iudicata* as far as the disputes between the parties are concerned. The compromise constitutes an absolute defence to any action based on the original dispute between the parties. At the time of its conclusion there was no dispute ventilated by way of pleadings between the parties. It is therefore necessary to determine on the evidence presented exactly what the dispute was or disputes were.

[13] Whether or not a settlement agreement is made an order of Court it remains a contract (*transactio*) and may be challenged on the basis of contractual defences such as mistake, fraud, impossibility of performance, illegality and the lack of authority to compromise¹ That has been the practice in our Courts for many years. Our Courts accept that:

"Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in every concept of compromise. This is a circumstance which the Court must bear in mind when it considers a complaint by a dissatisfied party that, had he not laboured under an erroneous belief or been ignorant of certain facts, he would not have

¹ *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A); *Karson v Minister of Public Works* 1996 (1) SA 887 (E) at 893; *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 138-9; *Hlobo v Multilateral Motor Vehicle Accident Fund* 2001 (2) SA 59 (SCA); *Ivorl Properties (Pty) Ltd v Sheriff of Cape Town* 2005 (6) SA 96 (C); *MEC for Economic Affairs, Environment and Tourism v Kruizenga* 2010 (4) SA 122 (SCA); *Wilson Bayly Homes (Pty) Ltd v Maeyane* 1995 (4) SA 340 (T); *Bloubul Boorkontrakteurs v Mclachlan* 1991 (4) SA 283 (T); *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D); *PL v YL* 2013 (6) SA 28 (ECG) at [9].

entered into the settlement agreement".²

"A transactio, whether extra-judicial or embodied in an order of Court, has the effect of res iudicata" is qualified in the same judgment as follows: "It is obvious that, like any other contract (and like any order of Court), a transactio may be set aside on the ground that it was fraudulently obtained. There is authority to the effect that it may also be set aside on the ground of mistake, where the error is iustus on the ground of instrumentum noviter repertum".³

[14] It was common cause from the outset that the plaintiff bears the onus to prove her cause of action and to prove that she is not bound by the terms of the settlement agreement.

[15] The plaintiff blamed her attorney for failing to negotiate division of the pension benefits and other assets of the defendant as she called it during evidence which she alleges formed part of the joint estate. One of the features of the plaintiff's case is that none of the terms recorded by the settlement agreement is challenged by her in these proceedings. From that fact the inference must be drawn that she is content with those provisions and those remain valid. What the plaintiff, therefore, in effect seeks is that the existing settlement agreement be rectified to reflect the parties' true intention or, in the manner formulated, that she seeks an order declaring the settlement agreement as void and unenforceable.⁴

[16] Other than the plaintiff's say-so that she instructed her then attorney of record to negotiate or secure by way of litigation what she now claims, she presented no other evidence to advance her case. The plaintiff failed to call her attorney and there is no corroboration for the plaintiff's evidence that she instructed the attorney as she said she had. No evidence was presented by the plaintiff (or any other witness) that the plaintiff's erstwhile attorney is not available to give evidence. By reason of that failure an adverse inference may be drawn

² *Gollach & Comperts v Universal Mills and Produce Co* 1978 (1) 914 AD at 923D. The underlining is my own.

³ *Gollach & Comperts supra* at 922F.

against the plaintiff to the effect that her erstwhile attorney's evidence would not have supported her version.

[17] It is not an invariable rule that an adverse inference be drawn should a litigant fail to call a witness to give evidence. The decision to draw such an inference must depend in large measure upon "*the particular circumstances of the litigation*" in which the question arises. One of the circumstances that must be taken into account and given due weight is the strength or weakness of the case which faces the party who refrain from calling a witness. It would ordinarily be unsafe to draw an adverse inference against a litigant when the evidence of the opposing party at the close of the case was so vague and ineffectual that a Court could only by a process of speculation or very dubious inferential reasoning, attempt to find the facts.⁵

[18] The settlement agreement⁶ deals extensively with patrimonial aspects of the parties' customary union, division of certain assets and it records in paragraph 3 that the parties specifically waive their right to claim against the other's estate in terms of customary union and/or relationship. Detailed provisions appear from the settlement agreement pertaining to the removal of assets from the common home, possession and use of a motor vehicle, payment of the instalments of the vehicle, maintaining sufficient funds in a banking account and an obligation on the part of the plaintiff to obtain finance for the vehicle if and when she qualifies to do so.

[19] Under the circumstances I draw the inference that the plaintiff's erstwhile attorney's evidence would not have supported her case. Under the circumstances I am of the view that the plaintiff has not discharged the onus to prove on a balance of probability that she is not bound by the terms and conditions of the settlement agreement dated 20 June 2013.

ORDER:

⁴ Record: p 24, par 2 of the plaintiff's amended replication.

⁵ *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 AD at 1330 -H.

⁶ See paragraphs 3, 4 and 5 thereof.

I make the following order:

- (1) The customary union between the plaintiff and the defendant is declared and confirmed valid;
- (2) A decree of divorce incorporating the settlement agreement between the parties dated 20 June 2013 attached to the pleadings as annexure "SJS1".

H F JACOBS

ACTING JUDGE OF THE HIGH COURT

PRETORIA