3/11/17

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 2810/2013

In the matter between:

ALEXANDER BABICH — First Plaintiff

ALEXANDER BABICH & ASSOCIATES (PTY) LTD — Second Plaintiff

v

CANDICE NICOLE BABICH — Defendant

JUDGMENT

Bam, J

Appearances: Adv L Hodes SC for Plaintiffs.

Adv M Haskins SC for Defendant.

1. The first plaintiff and the defendant were married for 9 years. They have two children. On 15 May 2013 the marriage was dissolved. The divorce order incorporated a settlement agreement. Part of the contents thereof is in issue in this case.

2. The first plaintiff is the managing (and sole) director of second plaintiff. At the time of the divorce the defendant was employed by second plaintiff.

3. The main issue in this matter turns upon clause 7 of the settlement agreement, including, and more specifically, clause 7.4, which provides for payment by the first plaintiff of the sum of R60 000, 00 per month to the defendant, in perpetuity.

4. It is the plaintiffs' case that the offending parts of clause 7, including the provision for the indefinite payment of the R60 000,00, was never agreed upon and that the first plaintiff, upon signing the agreement, was unaware that that clause was part of the agreement. This is contested by the defendant.

5. The relevant sub-clauses of clause 7 of the settlement agreement read as follows:
(Pleadings – Bundle p29 -30)

"TOKEN MAINTENANCE FOR THE PLAINTIFF AND NON NEGOTIABLE FIXED CASH SETTLEMENT PAYABLE TO THE PLAINTIFF MONTHLY

7.1 The defendant shall pay maintenance to the plaintiff in a sum of R1 per month on or before the third day of each month.

7.2....

7.3....

7.4 In addition to the abovementioned maintenance, it is hereby specifically recorded that in consideration of services rendered by the Plaintiff and/or Plaintiff's employment with Alexander Babich and Associates (Pty) Ltd, irrespective of whether Plaintiff continues to be employed, alternatively resigns from her employment with Alexander Babich and Associates (Pty) Ltd, and whatever the future position of the plaintiff's employment may be, the defendant hereby undertakes to pay to the defendant for herself a Gross sum of R60 000, 00 [SIXTY THOUSAND RAND] per month, which amount shall be payable monthly in advance on or before the third day of each and every month commencing from the third of the month during which this agreement is signed by the parties and by the third day of each and every succeeding month thereafter until the Plaintiff's death. The said amount shall not be capable of being varied, altered or reduced by the Defendant for any reason whatsoever.

7.5....

7.6 It is specifically recorded that, on condition the Defendant pays the abovementioned capital amounts referred to hereinabove on the due date, the Plaintiff shall not be entitled to for any increase of the said capital amount in the form of maintenance.

7.7 Save as aforesaid, the parties shall not be liable to pay maintenance for each other in any amount or form whatsoever.

7.8 In addition to the aforegoing, the Defendant shall bear the costs of all reasonable expenditure in respect of medical, dental, hospital, orthodontic

and ophthalmological treatment required by the Plaintiff, including any sums payable to a physiotherapist, practitioner of holistic medicine, psychiatrist/psychologist and chiropractor, the costs of prescribed medicine and the provision where necessary of spectacles and/or contact lenses. The Defendant shall cover the Plaintiff and retain her as a dependant on his current medical scheme or on a scheme with analogous benefits and he shall pay the monthly subscriptions (and escalations) timeously.

7.9....

8.6 Plaintiffs Provident Fund

8.6.1 The Plaintiff is a member of a Momentum Group Provident Fund with life cover through Alexander Babich and Associates (Pty) Ltd, with reference number: 110116.

8.6.2 The Defendant hereby undertakes to make payment of and shall be liable to effect payment of the premiums payable in respect of said policy until the maturity date thereof and/or upon resignation or departure of the Plaintiff from alexander Babich and Associates (Pty) Ltd.

8.6.3 The Defendant shall be obliged to render written proof to the Plaintiff of his compliance therewith upon demand"

6. Mr Alexander Babich testified. He is a financial consultant of occupation and is presently 52 years of age. When they decided to separate he was aware that the defendant was involved in a relationship with another man. He told the court about the negotiations between the parties concerning the settlement agreement. The more important issues were maintenance for the two children born from the marriage, the residence of defendant and a motor vehicle. Bundle A, the discovered documents, prepared by the defendant's attorney of record, contains, *inter alia*, a number of e-mails between the defendant and her attorney concerning the issues addressed in the settlement agreement, e-mails from first plaintiff to his attorney as well as several unsigned drafts of the settlement agreement. In a letter dated 21 January 2013 the first plaintiff's attorney, Barry Whitter, requested a copy of the draft agreement from the defendant's attorney, Geniv Wulz Attorneys. The letter

was not responded to. (Ms Geniv Wulz, who testified on behalf of the defendant, could not find the letter in her records, but conceded that the record of her office messages on that day indicates that her office, on the same day, 21 January, received a telephone call from Mr Whitter in connection with the Babich divorce, and that she was requested to return his call. Bundle A p 220.)

In the meantime, the disputes in respect of the mentioned issues and other aspects became settled and the agreement was signed by both parties on 26 March 2013 at the offices of the defendant's attorney. However, concerning clause 7.4 providing for the payment of R60 000, 00 per month to Ms Babich, in perpetuity, Mr Babrich was adamant that it was never agreed upon. He said on the day he signed the agreement, trusting the defendant and her attorney that everything in respect of the settlement was in order, he signed, unaware that the contested clause was incorporated and part of the agreement. At that stage the defendant was still employed by second plaintiff, which paid her monthly salary. An e-mail from the defendant dated 18 January 2013 directed to her attorney however reflected that she intended leaving second plaintiff and starting her own venture as independent arm of the company. In about October 2013, after defendant had left the employment of second plaintiff, Mr Babich received a phone call from the defendant who drew his attention to the contents of clause 7.4, demanding payment of the R60 000, 00. He then verified what clause 7.4 specifically provided, and approached his attorney, Mr Whitter, (p66) who directed a letter dated 2 October 2013 to the attorney of the defendant. (p2) This Email, *inter alia,* recorded Mr Babich's version of what happened on the day he signed the agreement and that he was advised to approach the court to have the agreement set aside. This letter was not responded to by defendant's attorney and was followed up by a reminder on 4 October (p4) On 25 October 2013 defendant's attorney responded to first plaintiff's allegations and, amongst others, denied that Mr Babich did not read the agreement. In the beginning of 2014 incidents occurred which were followed up by a protection order against the first plaintiff as well as allegations of assault against the defendant. These issues, however, are not relevant to the issue at hand.

Mr Babich said he was never prepared, nor did he intend or agree to pay the R60 000, 00 to the defendant in perpetuity. The defendant, in following up the first plaintiff' default, issued a writ of execution which resulted in Mr Babich's new attorney, Gavin Hartog, to direct an email to defendant's attorney, (P30 to 38) requesting, amongst others, that the writ should be withdrawn. The issue of payment of the R60 000, 00 was referred to as payment of the defendant's salary whilst she was still employed by second plaintiff. In the said letter it was recorded that, in respect of clause 7.4, Mr Babich would claim the following:

i. The clause is unenforceable in that it is in fraudem of the fiscus;
ii. The clause is not sustainable in law;
iii. The defendant is not employed and has not rendered any services to Alexander Babich and Associates (Pty) Ltd; and
iv. The clause does not reflect the parties' true common intention and as such falls to be rectified accordingly.

During cross-examination Mr Babich repeated that he did not read the agreement on the day it was signed, because he trusted the defendant and her attorney and they took advantage of that. He could not say whether he was given a copy of the agreement when he left. He denied the veracity of the defendant's version that he all along knew about, and agreed to the contents of clause 7.4.

7. The defendant, Mrs Babich, (presently 43 years of age), on the other hand, testified that Mr Babich, at all relevant times, was aware of the provisions of clause 7.4, in terms of which he was obliged to pay her R60 000, 00 per month, in perpetuity, as agreed. On the day the agreement was signed, both of them read each clause again, and when necessary had the amendments retyped. The amount she initially, previously, claimed was R80 000, 00 but it was subsequently changed to R60 000, 00. She denied that the said amount had to be paid for only a limited time, and added that it was never discussed. The reason for the payment of that amount in perpetuity was because she had to look after the children.

During cross-examination Ms Babich conceded that at the time of the divorce, she was involved in a relationship with another man. She also conceded that the issue of the motor vehicle took a lot of time and effort to resolve. The amount of maintenance for the children was also an important point of negotiation.

Ms Babich further conceded that she and her attorney, Ms Wulz, discussed the issue of maintenance and whether the amount reflected in clause 7.4 would be regarded as maintenance. In this regard Ms Babich was referred to the e-mail correspondence between herself and her attorney, Ms Wulz, on 5 March 2014 (p290). The relevant sentences read as follows:
Par 1 of Ms Babich's letter:

> "1 My maintenance will/don't discontinue should I remarry, Alex and I have discussed it so that can be removed from 7.4 and 7.7."
>
> Ms Wulz's response:
>
> "Please note that all maintenance as defined in the maintenance Act itself, terminates on death or remarriage. Therefore we shall merely take it out of the provision referring to the fact that you are entitled to this amount *in lieu* of your services and it is then not maintenance as defined in the maintenance Act."

Mrs Babich's evidence was corroborated by her attorney Ms Wulz, who confirmed that Mr Babich was well aware of the now contested clause 7.4. Ms Wulz further testified that on the day the agreement was signed, Mr Babich informed her that he was not represented by Mr Whitter anymore. The consultation in respect of the agreement, including the agreed amendments, lasted between 3 and 4 hours. Mr Babich was satisfied with the contents and signed all the pages.

Ms Wulz, however, conceded during cross-examination that she did not specifically draw Mr Babich's attention to the contents and implication of clause 7.4 before he signed, but added that it was not necessary.

Ms Natanja Vosloo, who assisted Ms Wulz with the administration concerning the amendments to the agreement on the day it was signed, and who signed as a witness, testified that she attended to the amendments to the agreement typed.

8. In argument it was submitted by Mr Hodes that it was proved that the offending clause 7.4 was fraudulently inserted.

9. Mr Haskins contended that the plaintiffs failed to prove any fraud, and that the first plaintiff was at all relevant times aware of the existence and contents of clause 7.4, as agreed upon. The R60 000, 00 was clearly not maintenance and there is no reason why a person cannot enter into an agreement with such terms.

10. The first issue to be determined is what the R60 000, 00 payment provided for in clause 7.4 represents. In view of clause 7.1 providing for the payment of maintenance to the defendant the amount in question were not intended to be maintenance at all. Accordingly, the Maintenance Act is not applicable. It follows that the agreement concerning the payment of the R60 000, 00 in clause 7.4 was contractual in nature. In this regard I agree with the submission by Mr Haskins that the parties were entitled to enter into that agreement. It is clearly not *contra bonos mores.* See *Odgers v De Gersigny* 2007 (1) SA 305 SCA.

11. In this matter it is the first plaintiff's case, and it is not a question of the interpretation of what the parties intended, but whether there was in fact consensus in respect of the incorporation of the said clause. It is not a question of mutual error. It has to be decided whether the first plaintiff was, or was not aware of clause 7.4. If he was indeed aware of that clause, or if he should reasonably have been aware of it, it follows that it will be presumed that he did agree to it, and only in retrospect regrets the agreement. In that event, *cadit quaestio,* the first plaintiff cannot escape liability. See *Slabbert v MEC for Health and Social Development, Gauteng* (432/20)[2016] ZASCA,

Par [15] where Potterill AJA discussed the question with reference to *Botha v Road Accident Fund* [2016] ZASCA 97 par [9].

12. In respect of the question whether the parties indeed agreed to the contents of clause 7.4, there are two mutually destructive versions. In considering the factually based versions of the parties alone, it will be virtually impossible to decide the question. It therefore follows that the court has to decide the question against the background of any inherent probabilities.

13. If, on the probabilities first plaintiff was not aware of the existence of clause 7.4, and never intended to enter into such agreement, the insertion of that clause was surely fraudulent.

14. It is trite that the party alleging fraud and applying for the deletion or substitution of such a clause in a contract bears the onus.

15. In respect of the probabilities, the first, and main consideration that springs to mind, is the probability that a divorced husband, well aware of his ex-spouse's infidelity, would enter into a settlement agreement to pay her, a fit and able professionally qualified person of 42, an additional substantial monthly amount of R60 000, 00 for the rest of her natural life, in circumstances where:

    (i) Provision had been made in the agreement for her future maintenance, when and if required, by the standard token R1. (Clause 7.1). This has now materialised in an application in the Magistrate's Court, Randburg;

    (ii) Provision had been made, and agreed upon, for the payment of maintenance for the two dependent children;

    (iii) Provision had been made, and agreed upon, for a motor vehicle;

    (iv) Provision had been made, and agreed upon, for accommodation for the defendant and the children;

    (v) That the defendant will be entitled to that amount even after the children had left home and the defendant having re-married, and/or is earning an income.

(vi) The defendant had left the employment of the second plaintiff and was not entitled to any further compensation.

16. Taking the above into consideration, it must be weighed up against the probabilities of the explanation that the first plaintiff, nevertheless, although all the needs of the defendant and the children had been catered for in the maintenance clauses, and for reasons, that may be sentimental or emotional, was prompted to agree to the contents of clause 7.4.

17. Although such clause will not be *contra bonos mores,* in my view the answer is obvious and glaring. To have entered in to that agreement, considering it from both angles, is totally unmotivated and without reason. It follows that the probabilities that first plaintiff would not have entered into that agreement, favour he first plaintiff. It seems more logical that clause 7.4 was originally linked to the defendant's employment with second plaintiff and the salary she earned whilst still employed by second defendant, as submitted by Mr Hodes.

18. The remaining issue to be addressed is whether the first plaintiff was unaware of the existence of clause 7.4 in the circumstances. In this regard he testified, as alluded to above, that he trusted the defendant and her attorney. Although it appears that it may be argued that he was negligent in this respect, it remains clear that he would not have consented to the contents thereof.

19. Accordingly it is found that the plaintiffs succeeded, on a preponderance of probabilities, to prove that there was no mutual consensus between the parties concerning the contents of clause 7.4, more specifically the issue of payment in perpetuity.

20. Relief claimed by plaintiffs –

CLAIM ONE

1. An order that this matter be referred to a Maintenance Court to hold an enquiry and make a determination as to the quantum of maintenance payable by the first Plaintiff in respect of the Defendant.

CLAIM TWO

2. An order that clause 7.4 of the settlement agreement:
   2.1 be declared payment in respect of services rendered by the Defendant to the Second Plaintiff;
   2.2 be deleted in the entirety by virtue of the fact that:
      2.2.1 the First Plaintiff's obligation contained herein has been extinguished by the fact that the Defendant is not employed by and does not render services to the Second Plaintiff;
      2.2.2 the clause does not contain the common intention of both parties; and
      2.2.3 the clause is *contra bonos mores*.

FIRST ALTERNATIVE CLAIM TO CLAIM TWO

3. In the alternative to prayer 2 and the sub-clauses thereto an order that Clause 7.4 of the settlement agreement be deleted in its entirety as it is *contra bonos mores* by virtue of the fact that it precludes variation.

SECOND ALTERNATIVE CLAIM TO CLAIM TWO

4. In the further alternative to the relief sought in prayer 2:
   4.1 an order declaring the provisions of clause 7 are illegal and unenforceable; and
   4.2 an order declaring that the provisions of clause 7.4 are illegal and unenforceable.

CLAIM THREE

5. An order declaring that clause 7.8 of the settlement agreement be deleted in its entirety, alternatively, that it be varied to read as follows:

"7.8 That the Defendant shall retain the Plaintiff as a dependant on his current medical aid scheme and pay the monthly subscriptions therefore for a period of 24 months following the grant of the decree of divorce."

CLAIM FOUR

6. An order declaring that clause 8.6 and the sub-clauses thereto as contained in the settlement agreement be deleted in their entirety.

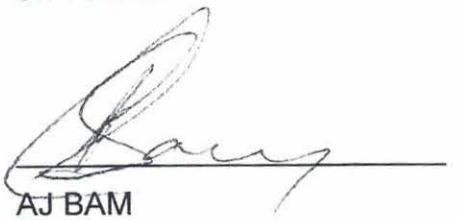
7. Defendant is ordered to pay the costs on the scale as between attorney and client.

21. In view thereof that a maintenance claim is pending before the maintenance court at Randburg, no order in respect of claim 1 is called for. In respect of claims 3 and 4, the issues addressed form part of the maintenance and should be dealt with by the maintenance court, and no order will be made in.

22. In view of the conclusions the defendant is liable to pay the costs as claimed.

ORDER:

1. Ad claim 2:
   Clause 7.4 of the settlement agreement is deleted in its entirety.
2. Costs: Defendant is ordered to pay the costs as between attorney and own client.



AJ BAM
JUDGE OF THE HIGH COURT
3 NOVEMBER 2017