

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 29115/2013

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

KAIRUZ, MARY THERESE

Applicant

And

LEWITTON, DEREK

Respondent

J U D G M E N T

TSHABALALA, J:

[1] This matter was initially set down as an application to hold the Respondent to be in contempt of the court order of Judge Kgomo of the 2nd July 2010 under Case No 21165/2010 and for various other reliefs. This

judgment contained a settlement agreement which was made an order of the court.

[2] The application was set down for hearing on the 10th November 2014, having been issued on the 8th August 2013. The parties shall be referred to as in the main application. On the 6th November 2014 the Respondent launched the application for the rectification of the settlement agreement and to file a further affidavit. This application was set down for hearing on the 10th November 2014 i.e. on the same date that the contempt application was scheduled for hearing.

[3] The Applicant opposed the application but did not, due to the time constraints, file any papers in opposition.

[4] The Applicant sought to rectify the settlement agreement on the basis that it did not correctly reflect the parties' intention and sought to file a further affidavit in order to deal with certain issues that were raised in the Applicant's 4th and 5th affidavits and to give an update on the present status of the dispute or issues between the parties.

[5] The Applicant opposed the application for rectification on *inter alia* the following grounds:

5.1 The allegation that the settlement agreement incorrectly reflected the parties' intention was never raised as a defence by the Respondent since the divorce order was granted in 2010.

5.2 The parties have been to court when the Applicant sought an amendment of her prayers which amendment had a direct bearing on the clause that the Respondent now seeks to rectify.

5.3 The wording of the clause sought to be rectified is clear and unambiguous and incapable of an interpretation different to the one contended for by the Applicant.

[6] The relevant clause of the settlement agreement is:

"7.1 It is recorded that the Plaintiff is the registered owner of shares in the private company namely ITA Software, which shares are fully paid up, as well as options to purchase additional shares.

7.2 The parties have agreed that the Defendant shall acquire control over 5000 of the said shares, currently held by the Plaintiff, which the Plaintiff further hereby agrees to transfer to the Defendant.

7.3 The Defendant's 5000 shares, after transfer thereof into the name of the Defendant, and/or any proceeds to be derived from the sale of such 5000 shares, will only be used in the Defendant's name and may never be commingled with any assets of another and will be placed in a trust."

[7] The rectification sought to be introduced read as follows:

“The proceeds of the ITA shares are to be paid directly into a trust formed in accordance with clause 7.2 of the Settlement Agreement and not first to the applicant in her personal capacity.”

[8] The application to amend the Notice of Motion by the Applicant which was granted by Judge Makume on the 11th March 2014 sought an order to compel the Respondent to pay the proceeds of certain ITA shares to the Applicant for her to pay them into a trust.

[9] Confronted with such an application, the Respondent did not then launch an application for rectification nor did he contend that the order sought by the Applicant was not competent in accordance with the terms of the settlement agreement.

[10] The judgment of Makume J dealt extensively with clauses 7.2 and 7.3 of the settlement agreement and in particular with who the proceeds of the ITA shares should be paid to and what should happen with such proceeds after payment.

[11] From the 19th March 2014 until the date when the Respondent launched his application to rectify the settlement agreement the Respondent understood the effect and implication of Makume J’s judgment. For a period of seven months, he did nothing to correct the “*mistake*” which I am satisfied was not shared by both parties. See also clause 7.2 of the settlement agreement which expressly allocates control of the shares to the Applicant.

[12] Worth nothing is the fact that the application to rectify the settlement agreement was launched two court days before the set down of the contempt application by the Applicant.

[13] The judgment of Makume J spells out the conduct of the Respondent which discouraged and frustrated the Applicant from setting up the trust. See the email addressed by the Respondent to the Applicant on the 3rd June 2011 at page 319 and the judgment of Makume J at page 515 of Bundle 6 in which the Respondent states that he is putting up the trust and will not put away money into any trust that he has not established.

[14] The Respondent referred me to certain correspondence between the parties on the basis of which he contended both parties believed that their agreement (clause 7.3) provided for the proceeds of the ITA shares to be paid directly into a trust.

[15] The Applicant on the other hand referred me correspondence from Respondent's attorney to the effect that "*all communication between the Respondent and the Applicant/attorney will be without prejudice and that no settlement will be reached unless an agreement is signed by all parties*". This in essence confirmed the non-variation clause of the settlement agreement. No agreement was reached between the parties. As a result none of the clauses were altered.

[16] In so far as an application to rectify clause 7 of the settlement agreement is concerned, I am satisfied that there is no ambiguity in its contents and the mistake, if any, was not mutual. My view is further strengthened by the contents of clause 7.2 of the settlement agreement.

[17] A delay of four years from the date of divorce and seven months from the date when the judgment of Makume J was handed down is unreasonably too long for the Respondent to have waited until the eve of the contempt application to launch the application to rectify the settlement agreement.

[18] I am also of the view that the Respondent is attempting to have a second bite at the cherry in launching the rectification application.

[19] For these reasons, this application must fail.

[20] As regards the rest of the application which deals with issues which were raised for the first time either in the replying or subsequent affidavit/s of the Applicant, which have no bearing on the rectification application leave to file a further affidavit should succeed.

[21] To the extent that such affidavit contains new facts/material that warrant a response, the Applicant is given leave to file a response thereto without raising any new facts which may in turn necessitate a reply from the Respondent.

[22] Accordingly I grant the following order:

1. Leave to file the additional further affidavit is granted.
2. Leave to rectify clause 7 of the settlement agreement is refused.
3. The Respondent is ordered to pay the costs occasioned by the two applications and the postponement of the application that was initially set down for hearing on the 10th November 2014.

N D TSHABALALA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING : 10 November 2014

DATE OF JUDGMENT : 12 December 2014