

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2000/21991

DATE:10/12/2011

REPORTABLE

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

.....
DATE

.....
SIGNATURE

In the matter between:

W, J C P

Applicant

and

W, H (born V)

First Respondent

THE ACTING SHERIFF OF SANDTON

Second Respondent

J U D G M E N T

WEPENER, J:

[1] The applicant seeks the setting aside of a writ and in the alternative a stay of execution of the writ until a determination of the applicant's maintenance liability to the first respondent by the Maintenance Court in Randburg.

[2] First respondent issued a writ pursuant to a divorce settlement agreement which was declared binding by the court when issuing an order of divorce between the parties. The applicant correctly states that a writ can only follow upon a valid court order. He contends that a writ cannot be issued pursuant to a declaration issued by the court at the time of issuing the decree of divorce. In addition, it is argued that the settlement agreement was conditional upon an order of divorce being granted and the deed of settlement being made a court order. These two points go hand in hand. If the declaration is indeed an order of court, the condition was met and the writ can be issued based on the court order.

[3] Mr Cook, on behalf of the applicant, abandoned the first point *in limine* taken in the affidavit, namely, that the warrant of execution was not signed by the Registrar of the High Court and accordingly fatally defective. He, however, relied on *Thutha v Thutha* 2008 (3) SA 494 (Tkh) for the argument that the declaration is not sufficient for the agreement of settlement to be

regarded as an order of court. The learned Judge referred to a number of problems that he could foresee if the settlement agreement is to be regarded as a court order. He, however, made no reference to the case of *Butchart v Butchart* 1996 (2) SA 581 (W) where a practical manner was found to deal with problem areas arising from settlement agreements, should they arise.

[4] The applicant further relied on *Brandtner v Brandtner* 1999 (1) SA 866 (W) where Boruchowitz J held that a declaration as referred to above does not have the effect of converting the settlement agreement into a court order.

[5] However, in *Tshetlo v Tshetlo* 2000 (4) SA 673 (T), Shongwe AJ (as he then was) disapproved of the *Brandtner* case and said at 674G:

“The purpose of a divorce order is to regulate the consequences of the dissolution of the marriage. It would be an absurdity for the Court dissolving a marriage to leave certain important aspects of the consequences of the marriage (and its dissolution, I may add) to chance. Therefore, although the Court used the words ‘declared binding’, it is my view that it meant and intended the usual well-known expression that the ‘deed of settlement shall be incorporated in the decree of divorce’ or ‘the deed of settlement is made an order of Court’.”

[6] Also in *Lebeloane v Lebeloane* 2001 (1) SA 1079 (W), Wunsh J after considering the *Brandtner* and *Tshetlo* matters held that the intention by declaring an agreement binding is to comply with section 6 of the Divorce Act 70 of 1979. Wunsh J said at paragraphs [21] and [22] as follows:

“[21] If the Registrar's order in the Brandtner case was incorrect in that its effect was not to make the settlement agreement an order of Court, it should have been corrected by the Court, which it had the power to do (Roopnarain v Kamalapathy and Another 1971 (3) SA 387 (D) at 389; Isaacs v Williams en Andere 1983 (2) SA 723 (NC)). It was clearly the intention of the parties that the agreement be made an order of Court and that was also the intention of the Judge who dealt with the matter. The defendant could also have been in no doubt as to the status of the agreement which he had entered into with the plaintiff and that it was to have the force of an order of Court. He had agreed to that being the case.

[22] With respect, an order setting aside the writ, such as the one granted in the Brandtner case, should not have been granted on a highly technical ground which was in conflict with the substance of the case. The Court in the Brandtner case said that the plaintiff had a remedy under Rule 41(4) of the Uniform Rules of Court, which entitled her to apply to Court to have the settlement agreement made a judgment. But there is no reason why she should, on the basis that the wording of the order issued by the Registrar did not make the settlement agreement an order of Court, have been put to the cost and trouble of an application and why the Courts should now be faced with numerous applications which may arise in similar circumstances. Furthermore, there could be opposition and quite unnecessary litigation.”

[7] That the parties also intended the agreement of settlement to operate as a court order, is also so in this matter having regard to the fact that the agreement of settlement itself “... *is conditional upon the order of divorce being granted and this Deed of Settlement being made an order of Court*”. I respectfully follow the decisions in this and the North Gauteng Division which held that the settlement agreement indeed forms part of the court order and I cannot find these judgments to be clearly wrong and indeed am of the view that they set out the law correctly and reject the applicant's contention that the applicant's obligation to pay maintenance was not imposed by an order of court.

[8] The applicant's counsel argued that in the event of my coming to the conclusion regarding the court order as I have, that I have a discretion to stay the execution of the writ primarily based on the fact that the applicant attempted to settle the matter with the respondent and that he has now approached the Maintenance Court – the latter fact which was only disclosed in the replying affidavit. Mr Bunn, on behalf of the respondent, argued that the discretion should be exercised against the applicant by virtue of the four following factors: The applicant has been paying maintenance in terms of the court order since 2001 without objection; the applicant has set out no grounds which would entitle him to a reduction of the maintenance amount; the application is not premised on the basis that the applicant cannot afford to pay the outstanding maintenance; the applicant has been advised repeatedly since March 2010 that should he wish to obtain a reduction of the amount of maintenance specified in the settlement agreement, he would have to approach a competent court to do so. This he did not do until faced with the writ in October 2010.

[9] The applicant further contends as follows:

“I humbly submit that I will suffer irreparable harm if the Honourable Court does not stay the writ. It is submitted that the First Respondent will receive monies that she is not entitled to receive by way of the writ, and that the costs of recovering such monies would be prohibitive in the circumstances due to the quantum. Furthermore, if the Sheriff attaches and sells my household goods at an auction, they will not realise the true value, which will be highly prejudicial to myself, as I will be forced to replace the goods at new prices which will be financially devastating.”

The generalised statement is not supported by facts. I may add that the writ is for a nominal amount of R5 342,19 and the applicant will act to his own peril to have his goods sold on auction. The amounts owing by him are made up of short payments over a period of 12 months i.e. an average short payment of approximately R444,00 per month. The applicant describes himself as an adult male director and has not, premised the application on the basis that he cannot afford to pay the maintenance for his son.

[10] In all the circumstances I decline to exercise my discretion in favour of the applicant and the application to set aside or stay the writ is dismissed with costs.

**W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

COUNSEL FOR THE APPLICANT

ADV A L COOK

INSTRUCTED BY

LIVINGSTONE CRICHTON

COUNSEL FOR THE RESPONDENT

ADV S BUNN

INSTRUCTED BY

T G FINE