

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

CASE NO: 14530/2009

DATE: 26 APRIL 2010

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

P[...] **N[...]**

Applicant

And

D[...] **N[...]**

Defendant

JUDGMENT

MATO JANE J

[1] The applicant seeks an order compelling the respondent to sign necessary documents relating to the sale and transfer of the parties former matrimonial home. The respondent brings a counter-application in terms whereof respondent moves for an order compelling applicant to pay in terms of the settlement agreement.

[2] The background to the application is that the parties were married to each other, in community of property. This marriage was dissolved by an order of Court on the 30 November 2007. In terms of the settlement agreement which was made an order of court the parties agreed as follows:

4.1. The parties agree that on a current valuation of the current matrimonial home located in Lenasia, the Plaintiff agrees to pay the Defendant an amount equal to half the value of the matrimonial home, equalling an amount of R500 000.00 (five hundred thousand rand) within a period of 3 ½ (three and

one half) months after the date of the granting of a decree of divorce herein.

5.1 Save as may be specifically provided for herein, each party shall retain such assets as may be currently in their possession and of which they have use, as if same was their sole and exclusive property, and shall be responsible for the payment of such debts as may have been incurred by such party in relation to such assets.

[3] The applicant contend in his founding affidavit that he was under the impression that he would be able to obtain a mortgage bond over the parties former matrimonial home which would have enabled him to make payment of R500 000.00 to the respondent and that he has paid an amount of R159 000.00 towards a vehicle for the respondent, which amount is to be offset against the R500 000.00 owing to the respondent.

[4] The respondent, correctly in my view, contend that clause 4.1 above does not require that the property must be sold or bonded first before applicant makes payment to the respondent. Further, the payment of R159 000.00 was in lieu of the vehicle that respondent had at the time of the divorce and was bought for the benefit of the respondent in terms of clause 5 of the settlement agreement.

Applicable Law

[5] It is trite that when interpreting a clause in a contract, the language used by the parties must be given its ordinary grammatical meaning to establish the common intention of the parties unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument, having established the literal meaning of the words or phrases in question, one must have regard to context, background and surrounding circumstances. See **Coopers & Lybrand v Bryant 1995 (3) SA 761 (A) 767E-768E**.

[6] This statement of the law and the fact that the agreement between the parties contains a non variation clause effectively disposes off applicant's contention that payment to respondent was subject to him obtaining a bond over the property or selling the property. The agreement must be honoured.

[7] The applicant rendered no reply to respondent's answer that in terms of the agreement, she kept a Mercedes Benz C200 kompressor that was being paid for by applicant. As applicant could not afford the monthly instalments on the Mercedes Benz, by agreement, applicant sold and replaced the said Mercedes Benz with a new Toyota corolla, which he paid for in cash for R159 000.00.

[8] Respondent contends that the said amount of R159 000.00 cannot be set off against the R500 000.00 owed to her by the applicant as she was entitled to retain a motor vehicle and be paid the amount of R500 000.00.

[9] Clause 9 of the settlement agreement state that no indulgence, waiver or abandonment in terms of the agreement shall operate as a waiver or novation of any of the parties rights in terms of the agreement. In my view, when applicant continued paying the monthly instalment on the Mercedes Benz despite the agreement to the contrary, and the respondent agreeing that the Mercedes Benz be sold and replaced with a more affordable vehicle, the parties were giving or allowing each other indulgences which did not affect any of the parties rights in terms of the agreement. Clause 9 specifically states that a party is not precluded from enforcing at any time and without any notice strict and punctual compliance with each and every provision of the agreement.

[10] Counsel for the applicant submitted that applicant is not under any obligation in terms of agreement to provide respondent with a car. He argued that the car must be seen as the property of the applicant as he was paying the monthly instalments on the Mercedes Benz and furnished respondent with a new Toyota that he paid for in cash after selling the Mercedes.

[11] I incline to the view that, on proper construction of clause 4 and 5 of the agreement between the parties, respondent was entitled to retain a motor vehicle and be paid the amount of R500 000.00. Accordingly the amount of R159 000.00 cannot be set off against R500 000.00 owed to the respondent.

[12] In the circumstances, I make the following order:-

1. The applicant's application is dismissed with costs.
2. Applicant is ordered to pay respondent the amount of R500 000.00 within 30 (thirty) days of this order.
3. Applicant is ordered to pay respondent interest, at the rate of 15.5% per annum, on the amount of R500 000.00 calculated from 16 March 2008 up to date of final payment.

MATOJANE, J