

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Case nr: 3775/2015

In the matter between:

N. H. (PREVIOUSLY V.)

Applicant

[Identity number: [.....]]

and

V. D. V.

1st Respondent

[Identity number: [.....]]

**GOVERNMENT EMPLOYEE PENSION FUND
("GEPF")**

2nd Respondent

JUDGMENT BY: BOKWA, AJ

HEARD ON: 12 NOVEMBER 2015

DELIVERED ON: 10 DECEMBER 2015

A INTRODUCTION:

- [1] The applicant launched an application before this Court on the 12th of August 2015 seeking an order to amend the deed of settlement of the divorce action between the applicant and first respondent already granted by the Court on the 17th of December 2009 under case number 1303/2009.

- [2] The first respondent opposed the application on the 1st of September 2015 and proceeded to file its answering affidavit on the 21st of September 2015. The applicant filed its replying affidavit on the 6th of October 2015.

- [3] The first respondent launched an interlocutory application on the 3rd of November 2015 requesting, an order that certain paragraphs of the applicant's main application be struck out on the basis that the averments made therein, fell in the applicant's knowledge and further that such averments ought to have been raised in the founding affidavit of the main application. The first respondent contended therefore that the averments made by the applicant must be ruled to be scandalous, vexatious or irrelevant and as such to be struck off from the papers. The applicant conversely, denies that these allegations are irrelevant.

- [4] The applicant employs the Court to consider whether the passages to be expunged are therefore relevant to the issues and further whether such averments could be raised on the pleadings.

The applicant contends that the relevance of the passages to be expunged ought to be determined at the hand of the facts alleged, and if such facts are relevant to the issues, that they ought to stand.

B BACKGROUND FACTS:

Applicant's Case:

- [5] The applicant and the first respondent were married to each other out of community of property with an accrual on the 3rd of October 1992 in Lady Gray. One minor child was born of the marriage, a daughter R. V. and currently 12 years of age.
- [6] On the 17th of December 2009, the applicant and the first respondent were divorced by an order of this court and in terms of the divorce order, written settlement agreement entered into by the parties was made an order of the Court. In terms of the settlement agreement, custody of the minor child was awarded to the applicant subject to the first respondent's reasonable rights of access. In addition, the settlement agreement provided that the first respondent was to pay maintenance towards the minor child at R1 200.00 per month, as well as maintain the said child as a beneficiary on his medical aid.
- [7] The subject matter of the current application concerns clause 3.3 to 3.6 of the said deed of settlement which stated as follows:

“3.3 Ten opsigte van die verdeling van die aanwas tussen die partye bevestig die partye dat die Verweerder aan die Eiseres die bedrag van R100 000.00 (eenhonderd Duisend rand) verskuldig is.

3.4 Bogemelde bedrag sal deur Verweerder aan Eiseres uitbetaal word uit sy pensioenbelang, wanneer sodanige pensioenbelang uitbetaal by aftrede of diensverlating

3.5 Bogemelde bedrag sal rente dra en toeneem met R6 000.0 (ses Duisend rand) per kalender jaar, vanaf datum van ondertekening hiervan.

3.6 Die Eiseres bevestig dat sy by ontvangs van bogemelde bedrag `n trust ten behoeve van die minderjarige kind sal skep en die volle bedrag daarin sal betaal, waar die kind nog nie 25 jarige ouderdom bereik het nie. Hierdie trsfondse sal teen die hoogste moontlike rentekoers belê word en sodra die minderjarige kind die ouderdom van 25 jaar bereik, sal die trust tot `n einde kom en alle opgeloopte trust fondse aan die minderjarige kind uitbetaal. Sandard Bank sal as trustees optree.

5. Die partye erken en verklaar dat na ondertekening hiervan hulle geen verdere eise van welke aard ookal wedersyds teenoor mekaar sal hê nie en dat hierdie ooreenkoms hulle onderlinge geskille finaal skik en afhandel.”

[8] After the divorce, the parties seems to have had ongoing problems and disputes which in the main, related to the payment of maintenance and the sufficiency of such maintenance as well as the proper interpretation to be given to paragraph 3.6 of the

deed of settlement of their divorce. On the 12th of August 2015, the applicant launched an application seeking the following relief:

- “1. That the Deed of Settlement concluded between the Applicant and First Respondent be amended, by substitution of Clause 3.4 of the Deed of Settlement, with the following:

3.4 Bogemelde bedrag sal deur die Verweerder, Vincent David V., Id nr. [...], aan die Eiseres uitbetaal word uit sy pensioenbelang by die Government Employee Pension Fund, waar die Verweerder 'n lid is, met pensioennommer: [.....].
2. That the Deed of Settlement concluded between the Applicant and First Respondent be amended, by deleting Clause 3.6 from the Deed of Settlement.
3. That this order be served on the 2nd Respondent;
4. That the 2nd Respondent be authorized and requested to give effect to the stipulations of Clauses 3.4 and 3.5 of the Deed of Settlement, as amended;
5. That the Applicant bears the cost of this application if it is unopposed.
6. Further and/or alternative legal relief.”

- [9] The first respondent opposes this application and the relief sought, and has brought an interlocutory application in which it seeks relief in the following terms:

“4.

This interlocutory application is aimed at the striking out of certain paragraphs of the Respondent’s replying affidavit in the application under the above case number (the main application) on the grounds that it contains a number of allegations that:

4.1 Ought to have been encapsulated in the Respondent’s (Applicant’s) founding affidavit;

And

4.2 Are vexatious and/or irrelevant to the adjudication of the issues in the application.”

- [10] The applicant’s contention was that the proposed amendment would give effect to the intentions of the parties as it were agreed during 2009, and further would enable the second respondent to endorse it’s records with adequate information, which was not initially contained in annexure “B”, being the signed deed of settlement.

- [11] The applicant submits further as follows on page 11 of the paginated bundle:

“10.1 I am furthermore advised that the legal position has changed from what it initially was as reflected in Clause 3.4 of Annexure “B”.

- 10.2 I am advised that an amendment to the legislation, as found in the Government Employees Pension Law Amendment Act, No. 19 of 2011, coupled with an amendment to the Rules of the Second Respondent, will entitle me to receive the said money from the First Respondent on retirement, death or resignation.
- 10.3 I furthermore confirm that none of the parties will be unduly prejudiced by the amendment sought by myself, since the effect of the order sought is still in line with the stipulations of Annexure "B" as well as the current legal position as set out in the prevailing legislation and pension fund rules."

[12] The applicant submit further as follows on page 12 of the paginated bundles:

- "11.4 As primary caregiver of R., I am caring for her needs and maintenance with my own funds as well as the maintenance amount received from the First Respondent.
- 11.5 During the period leading up to the decree of divorce, I was assisted by an attorney from Bloemfontein, Mr. Paul Myburgh. He has since left Bloemfontein and is apparently working in the Western-Cape, although I could not trace him, despite my best efforts.
- 11.6 The relationship between myself and the First Respondent was an acrimonious one during the period leading up to the divorce and my attorney, Mr. Myburgh, advised me to settle the divorce as best I could, since it was the intention of the First Respondent to drag it out.

- 11.7 I am advised that I was entitled to the accrual from my marriage with the First Respondent, as his former spouse and that my entitlement to the accrual was to be paid by the Second Respondent.
- 11.12 As the primary caregiver of R., I have always had her best interests at heart and confirm that I will endeavour to sustain her to her best interests by all reasonable means.
- 11.14 It was the opinion of my present legal representatives that the amount with which the Trust will be benefitted annually, after the money is invested, will lose about 75 % of such accrual due to the costs associated with the creation, set-up and maintaining the business and yearly audit fees of the Trust.
- 11.15 If a Trust is to be created this Trust will be subjected to all the legal requirements of compliance, including, inter alia, the appointment of an accountant, drafting and submitting of financial statements, as well as keeping a separate bank account, all of which will incur costs for the Trust, thereby depleting the gains the Trust-capital might obtain.”

[13] At paragraph 12 the applicant states as follows:

“12.

I would not have agreed to the stipulations of Clause 3.6 of Annexure “B”, had I been advised of all the consequences related to the creation and administering of a Trust. I would furthermore not have agreed to this Clause, had I been advised that such accrual actually amasses to myself due to the marriage accrual system and that I was not obliged to set up a Trust with this money for the minor.”

First Respondent's Case:

- [14] The first respondent's contention was that the applicant could not vary a deed of settlement which had already been made an order of the Court. The first respondent assails the application on the basis that it was unclear firstly, if the applicant sought reliance in terms of Rule 42, Rule 31(2)(b) or common law grounds.
- [15] The first respondent submitted that the application was not within Rule 32(2)(b) or alternatively that the grounds provided for in Rule 42 were sufficiently established by the applicant. In the result, the deed of settlement was submitted to have been subsumed by the Court order and consequently that the applicant could not avail herself the grounds to vary the deed of settlement without the consent of the first respondent.
- [16] It was submitted that if the applicant sought to bring her application for rescission on the grounds of fraud or mistake, she ought to have done so within 1 year after she came to such knowledge of fraud or mistake. The application was attacked as defective since it was brought after 5 years and 9 months. It was submitted that the applicant could not simply alter the terms of her written agreement in the absence of a plea of rectification, fraud or simulation. In the circumstances the first respondent submitted that the applicant had not made any allegations in the founding

affidavit which satisfies the requisites of duress, undue influence or fraud.

- [17] The first respondent submitted further that the applicant ought to have foreseen these intractable dispute of facts before it launched it's application. It submitted that the intention of the parties was clearly expressed in the settlement agreement as result thereof it could not avail the applicant to introduce parole evidence to alter the terms of the settlement agreement in the absence of a plea of rectification, fraud or simulation.

C ISSUES FOR DETERMINATION

- [18] At the hearing of this matter, the following issues arose and were identified as relevant in determining the dispute between the parties.

18.1 Firstly whether the applicant has made out a case for amending the written settlement agreement of divorce which was made an order of the Court.

18.2 Secondly whether the first respondent made out a case in law, for the striking out of certain averments contained in the applicant's replying affidavit in terms of the uniform Rule 6(15) of the Court.

D THE LAW

The first respondent's notice to strike out:

- [19] As far as the notice to strike out is concerned, the applicant respectfully draw attention to the fact that all the material which the first respondent seeks to strike out, can properly be characterized as permissible response to matter raised in the replying affidavit deposed to by the applicant.
- [20] The new matter in reply, is the type of material that ought to have been included in the founding affidavit. Consequently the applicant contends that it thought that the first respondent would not oppose the application for amendment in the first place and for that reason only, it did not include the materials complained about being annexures “D” and “E” and which the first respondent seeks the Court to strike off. The applicant submits that in these circumstances, it is entitled to respond to matters raised by the first respondent in his answering affidavit to the extend that it is relevant to do so.
- [21] In paragraph 4 of the affidavit in support of the notice to strike out, the bold allegation is made that the material objected to, ought to have been encapsulated in the applicant’s founding affidavit and are therefore ***“irrelevant, vexatious and or scandalous”***.
- [22] The applicant disputes that this is the case and further dispute that there has and can be any prejudice to the first respondent by reason of the inclusion of the material objected to.

Legal principles: Motion Proceedings:

- [23] In motion proceedings the affidavits serve not only to place evidence before the Court, but also to refine the issues between the parties.¹
- [24] If the respondent fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit, the court should, for the purpose of the application, accept that the applicant's allegations are correct.²

Legal principles: Striking out:

- [25] Rule 6(15), in relevant part, provides that:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the Applicant will be prejudiced in his case if it be not granted.”

¹ Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 323F – 324C. Cf: Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 469C-E cited with approval in Minister of Land Affairs and Agriculture v D&F Wevell Trust 2008 (2) SA 184 (SCA) at 200D; MEC for Health, Gauteng v 3P Consulting (Pty) Ltd 2012 (2) SA 542 (SCA) at 550G-551C;

² Moosa v Knox 1949 (3) SA 327 (N) at 331. United Methodist Church of South Africa v Sokufundumala 1989 (4) SA 1055 (O) at 1059A; Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 et seq Ebrahim v Georgoulas 1992 (2) SA 151 (B) at 153D

[26] Two requirements must be satisfied before a striking out application can succeed, viz³:

26.1 The matter sought to be struck out must indeed be scandalous, vexatious or irrelevant; and

26.2 The court must be satisfied that if such matter is not struck out the parties seeking such relief would be prejudiced.

[27] The meaning of the terms used in the rule was stated as follows:⁴

“Scandalous matter – allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.

Vexatious matter – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

Irrelevant matter – allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter”.

[28] **“Irrelevant”**, for the purposes of the Rule, means irrelevant to an issue or issues in the action:⁵

“(T)he correct test to apply is whether the matter objected to is relevant to an issue in the action. And no particular section can be

³ Beinash v Wixley 1997 (3) SA 721 (SCA) at 733B; Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd [2001] 3 All SA 15(T); Tshabalala-Msimang v Makhanya [2008] 1 All SA 509 (W) at 516 g-h; National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at 308B

⁴ Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) at 566C-E; Cf.: Tshabalala-Msimang v Makhanya [2008] 1 All SA 509 (W) at 516e-f; Breedenkamp v Standard Bank of South Africa Ltd 2009 (5) SA 304 (GSJ) at 321C-E

⁵ Stephens v De Wet 1920 AD 279 at 282; Meintjes v Wallachs Ltd 1913 TPD 278 at 285; Rail Commuters' Action Group v Transnet Ltd 2006 (6) SA 68 (C) at 83E.

irrelevant within the meaning of the Rule if it is relevant to the issue raised by the plea of which it forms a part. That plea may eventually be held to be bad, but, until it is excepted to and set aside, it embodies an issue by reference to which the relevancy of the matter which it contains must be judged.”

[29] In Golding v Torch Printing and Publishing Co (Pty) Ltd and Others⁶ Ogilvie Thompson AJ, as he then was, said:

“A decisive test is whether evidence could at the trial be led on the allegations now challenged in the plea. If evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded.”

[30] Historical background, even if strictly not relevant, should not be struck out⁷:

“For the sake of clarity the history of a case is often permissible as an introduction to allegations founding the cause of action.”

[31] The first respondent seeks relief that the applicant’s replying affidavit especially paragraph 2.6, 2.8, 6, 7, 15.1, 15.2, 19.2, 20.2, 21.2, 23.4, 26.1 and 26.2 be struck off.

[32] The applicant states as follows in it’s replying affidavit on page 67 of the paginated bundle:

⁶ 1948 (3) SA 1067 (C) at 1090. Cf.: Habib v Patel 1917 TPD 230 at 232; Geyser v Geyser 1926 TPD 590 at 594; Weichardt v Argus Printing & Publishing Co Ltd 1941 CPD 133 at 145; Golding v Torch Printing & Publishing Co (Pty) Ltd 1948 (3) SA 1067 (C) at 1090; Rail Commuters’ Action Group v Transnet Ltd 2006 (6) SA 68 (C) (supra) at 83H.

⁷ Richter v Town Council of Bloemfontein 1920 OPD 172 at 173/4; Ahlers NO v Snoeck 1946 TPD 590 at 594.

- 2.1 I was quite surprised with the first respondent's opposition of the application.
- 2.2 It was necessary to bring the application in order to comply with the 2nd Respondent's requirements for endorsing their records with my claim against the 1st Respondent's pension fund.
- 2.3 Whilst considering the bringing of this application and obtaining legal advice, I thought it apposite to request relief in the sense that the 2nd Respondent pays out the portion of my accrual from the 1st Respondent's pension fund in accordance with the clean-break principle.
- 2.4 The 1st Respondent actually insisted that I obtain the portion of his pension fund already during 2013, despite the wording of clause 3.4 of the Deed of Settlement. The 1st Respondent said that he wanted to have my portion of the accrual paid from his pension fund as soon as possible since he did not want to pay the 6 % interest on the amount of R100 000.00, as the Deed of Settlement stipulate.
- 2.5 The 1st Respondent even provided me with all the required forms to be completed and to submit to the 2nd Respondent and the 1st Respondent even committed to submit these forms to the regional office of the 2nd Respondent so as to expedite matters.

2.6 The 1st Respondent's attorneys at that stage, Messrs. Goodrick & Franklin attorneys addressed the letter attached hereto as Annexure "D", dated 18 January 2013 to me in which they reminded me to submit the claim forms for the pension fund to them "*so spoedig moontlik*". It was also confirmed that the pension will then be paid out and the Trust can then be created.

2.7 The 1st Respondent's apparent denial of the knowledge of this request, initiated by him, is typical of the manner in which the 1st Respondent had treated me during the divorce process as well.

2.8 On 13 February 2014 Goodrick & Franklin Attorneys again corresponded with my attorneys and confirmed that the 2nd Respondent is prepared to pay out my accrual and that certain information was required from me. The 1st Respondent's attorneys even confirmed that the pay-out of the accrual to me "*...net tot voordeel van die kind kan wees ...*". This letter is attached hereto as Annexure "E".

2.9 On 7 April 2014, the 2nd Respondent's Legal Unit wrote to me and confirmed that the no endorsement had been made against the Funds and that I had to follow certain steps to have the records endorsed. This letter is attached as Annexure "F".

[33] The applicant submit further as follows on page 70 – 73 of the paginated bundles:

“5.

I was under the impression on the date of signing the Deed of Settlement that my claim against the Second Respondent would be endorsed on their records and that this claim would pay out ultimately when the First Respondent retires or terminates his services with the State.

6.

The First Respondent, however provided me with forms during January 2013 and requested me to claim my R100 000 from the 2nd Respondent as soon as possible.

7.

I completed all the documents and submitted those to the Second Respondent but was then advised during April 2014 that the Second Respondent has not endorsement against their records and that they were actually not obliged to endorse their records with my claim as they were not mentioned in the Deed of Settlement.

8.

The 2nd Respondent thus changed its Rules after the Deed of Settlement was signed so that spouses in the position I was in, could claim from the 2nd Respondent already at that stage, although their member had not yet resigned or retired.

9.

In the consultations with Me Milton I was furthermore advised that I had allowed my accrual to be made subject to the formation of a Trust for my minor child.

10.

I confirm again that I am the primary care giver of my child and that she does not suffer any loss or lack of support or maintenance and that I provide in all her needs as best I can.

11.

The accrual, however, should have befallen me and I can use such accrual money as I choose but this would necessarily mean that I continue to maintain and give care to my daughter also with this money.

12.

I was, however, advised that the Law regarding accrual and the division of benefits in a marriage confirmed such accrual as owing to me and not to our minor child.

14.

During June/July 2013 R. had to go on a netball tour to Kroonstad and I requested the First Respondent to pay the half of this tour. The First Respondent refused to make any contribution and said that the pay-out of my portion of the accrual from the Second Respondent should be used on behalf of our child. I confirmed to him at that stage that I had not yet received it.

16.

I therefore request a variation of the Deed of Settlement on the common law grounds that I was brought under impression by the 1st Respondent's claims during the divorce process and the advice received from my legal representative at that time that I had no other options than to accept the Deed of Settlement's proposals if I wanted to get divorced.

17.

I refer specifically to the investment of the accrual money in a Trust to be set up for our minor child and the fact that the Rules of the 2nd Respondent as amended after signing the Deed of Settlement to bring the clean break principle into their rules, now provides me with an opportunity to lay a claim thereto, which I also do now with this application."

[34] It is clear from the papers that the paragraphs alleged to be offending by the first respondent amounts to evidence. However, that is insufficient reason in itself to justify it's being struck out. The first respondent has not in my view demonstrated any real prejudice which this Court could apprehend, if the alleged objectionable paragraphs were not struck out. It would appear that annexures "D" and "E" specifically, seems to show the state of mind and knowledge on the part of the first respondent of the history of this matter.

[35] In the circumstances, I am not persuaded that any of the matters under attack are irrelevant to the issues in this case, and therefore in my view, no other proper basis has been advanced for their exclusion from the pleadings. In the exercise of my

discretion, I conclude that the application to strike out must be refused.

- [36] As I see it, the applicant has not merely annexed documentation in the form of annexures “D” and “E” and requested the Court to have regard to it. On the contrary, and in my view annexures “D” and “E” identifies the proper context within which this matter has to be determined. Annexure “D” is on page 82 of the paginated bundle, being a letter written by the erstwhile legal representatives of the first respondent which letter was addressed to the applicant dated the 18th of January 2013. It is worth placing the terms of this letter for proper consideration herein under.

“AKTE VAN DADING: N / VD V.

Ons verwys na bogemelde aangeleentheid en rig die skrywe aan u in opdrag van ons kliënt Mr V..

Na aanleiding van u Akte van Dading met u Egskeiding is daar ooreengekom dat `n Trust gestig sal word en die pensioengelde aan u verskuldig daarin betaal word tot voordeel van die minderjarige dogter.

Ons verneem van u vanaf Mr V. dat hy reeds dokumentasie aan u oorhandig het vir voltooiing en ondertekening. Ons ontvang hierdie dokumente so spoedig moontlik. Die pensioen sal dan kan uitbetaal en die trust kan geskep word.

Ons vertrou op u samewerking en verneem dringend vanaf u.

Die uwe ”

[37] The attorneys of the first respondent wrote to the applicant's attorneys on the 13th of February 2014. Paragraph 5 of the said letter states as follows:

“Ons heg verder hierby aan korrespondensie aan Me V. in sake die oprigting van `n trust ten gunste van die minderjarige dogter ooreenkomstig die akte van dading. Mr V. se pensioenfonds is bereid om die bedrag uit te betaal en het dus die nodige inligting nodig. Ons is ook van mening dat hierdie net tot voordeel van die kind kan wees gesien in die lig van onderhoudsverligting.”

[38] Annexure “F” on page 84 is a letter of the pension fund addressed to the applicant informing her that her decree of divorce does not reflect an order in terms of Section 7(8)(a)(i) and (ii) of the Divorce Act, 1979, as amended and therefore that no endorsement was effected. In order for the GEPPF to comply with the Divorce Act 70 of 1979 it needed adherence with all the requirements namely:

- Identify the Fund;
- Direct the Fund to record an endorsement on the member's pension Fund; and
- Direct the Fund to pay the plaintiff pension interest.

C ANALYSIS

- [39] The applicant submits that it has shown sufficient cause why the deed of settlement which was encapsulated in the decree of divorce should be amended. It further submits that if regard is had to annexures “D” and “E”, it is clear that the first respondent set the process in motion to have the R100 000.00 paid out to the applicant soon after the conclusion of the divorce.
- [40] It was submitted on behalf of the applicant that the logical way to interpret annexures “D”, “E”, “F” and “G” collectively, would inevitably lead to the conclusion that the parties intended to amend the deed of settlement and further that they reached “consensus” that it be so amended.
- [41] The question is whether a variation of the divorce order is possible under these circumstances. In my view public policy dictates that the Court as an upper guardian of minor children must assist the parties to comply with the settlement agreement of the divorce by properly interpreting the agreement, regard being had to annexures “D”, “E”, “F” and “G” herein above. In the dictum of Kollapen AJ in GF SH 2011 (3) SA 25⁸, at page 29 paragraph B the Judge held as follows:

“The court went on to affirm that public policy is firmly rooted in our Constitution and the fundamental values it enshrines, which include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racism and non-sexism. In the judgment of His Lordship Mr Justice Cameron he also expressed the position with regard to the Shifren principle as follows in para 95:

⁸ Kollapen AJ in GF SH 2011 (3) SA 25.

“The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual “freedom”, and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity. The issues in the present appeal do not imperil that balance.”

[42] The Court went on to consider matters that relates to rights and obligations in the context of family law and listed those considerations as follows on page 30 para D(19.1 – 19.3):

“Those considerations include:

[19.1] The constitutional imperative that in all matters concerning children the principle of the best interests of the child must apply as a guiding and paramount principle.

[19.2] The obligation of parents to maintain their children in accordance with their ability, as well as the needs of the minor children. It should follow that it is indeed a matter of public policy to ensure that those guiding principles, insofar as they relate to the reciprocal and mutual reinforcing obligations of parents, are maintained and are not sacrificed, as it were, at the altar of ensuring certainty at all times.

[19.3] The fact that in the real world parents, entrusted with the responsibility of ensuring that the best interests of their minor children are advanced, must invariably make decisions that may warrant a departure from, or a variation of, the express terms of a settlement

agreement. It would be impractical and inconvenient to suggest that, in all such instances, and in the face of a non-variation-except-in-writing clause, parents should then be constrained in their ability to take decisions and to do things, even by mutual agreement, that would advance the interests and the wellbeing of such minor children.”

[43] The applicant annexed the annexures “D”, “E”, “F” and “G” in reply to give the matter a proper perspective. The first respondent submitted that in so doing, the applicant made out a case in reply when it ought to have done so in its founding affidavit. I have already made a finding that the application to strike out ought to be refused. In motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. If the respondent fails to admit or deny, or confess and avoid, allegations in the applicant’s affidavit, the Court should, for the purpose of the application, accept that the applicant’s allegations are correct.

[44] As I see it, there are no intractable dispute of facts which the applicant ought to have foreseen before launching this application. Neither is this case about an applicant who essentially changes horses in mid-case. This is not the scenario in the matter of Administrator of Transvaal and Others v Theletsane 1991 (2) SA 192 (A)⁹. If a literal and contextual interpretation is given to annexures “D”, “E”, “F” and “G”, then the conclusion is inevitable that the parties intended to amend the deed of settlement of their divorce.

⁹ Administrator of Transvaal and Others v Theletsane 1991 (2) SA 192 (A)

[45] I concluded that the applicant made out a case for the relief it seeks in the notice of motion.

[46] In the premise, I make the following order:

1. That the application to strike out be dismissed with costs;
2. That the Deed of Settlement concluded between the Applicant and First Respondent be amended, by substitution of Clause 3.4 of the Deed of Settlement, with the following:

“3.4 Bogemelde bedrag sal deur die Verweerder, **Vincent David V., Id nr. [.....]**, aan die Eiseres uitbetaal word uit sy pensioenbelang by die **Government Employee Pension Fund**, waar Verweerder `n lid is, met pensioennommer: [.....].”

3. That the Deed of Settlement concluded between the Applicant and First Respondent be amended, by deleting Clause 3.6 from the Deed of Settlement.
4. That this order be served on the 2nd Respondent;
5. That the 2nd Respondent be authorized and requested to give effect to the stipulations of Clauses 3.4 and 3.5 of the Deed of Settlement, as amended;
6. The First Respondent to pay the cost of suit to the applicant on a party and party scale.

I R O BOKWA, AJ

On behalf of applicant: Adv. J.S. Rautenbach
Instructed by:
Bezuidenhouts Inc
Bloemfontein

On behalf of 1st & 2nd respondent: Adv. W.A. Van Aswegen
Instructed by:
McIntyre & Van der Post
Bloemfontein

/PC