

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application No: 4966/09

In the matter between:-

ELIZABETH ANTOINETTE ROHDE

Applicant

and

HELLMUTH ROBERT ROHDE

1st Respondent

HELLMUTH ROBERT ROHDE N.O.

2nd Respondent

ELIZABETH CATHARINA VAN DER LINDE N.O.

3rd Respondent

THE REGISTRAR OF DEEDS, BLOEMFONTEIN

4th Respondent

HEARD ON:

21 APRIL 2011

DELIVERED ON:

15 SEPTEMBER 2011

KUBUSHI, AJ

INTRODUCTION

[1] This is an application for the committal of the first respondent for contempt of court for failing to comply with the terms of a Deed of Settlement which was made an order of the Court. The applicant also sought certain orders compelling the first to third respondents (the respondents), the first respondent in his personal capacity and the others in their respective capacities as trustees of the Heardow Eiendoms Trust (the

Trust), to comply with certain terms of the court order.

[2] The respondents are opposing the application and have raised a plethora of defences and in particular three points *in limine* on the procedure and one point *in limine* on the substantive issues which I intend to deal with before I consider the application.

[3] It needs to be stated that the fourth respondent did not oppose the application and no order is to be made against it as an order was prayed for against it only if it opposed the matter.

FACTUAL BACKGROUND

[4] The facts of the case are that applicant and first respondent were married to each other until on the 27 March 2007 when the marriage was dissolved. A Deed of Settlement (the settlement) regulating amongst other things their proprietary aspects of the divorce was concluded between them. The settlement was made an order of the court. This is the order with which the applicant alleged the respondents failed to comply and sought to have first respondent committed to

prison for contempt and the other respondents ordered to comply with paragraph 5 of the settlement.

- [5] The salient terms of the settlement which it was alleged the respondents failed to comply with are:

- “1. Ad para 1: Verweerder betaal aan die eiseres die kapitale bedrag van R1 500 000 soos volg:
 - a. R600 000 nie later as 31 Julie 2008;
 - b. R400 000 nie later as 31 Julie 2009;
 - c. R250 000 nie later as 31 Julie 2010;
 - d. R250 000 nie later as 31 Julie 2011.
2. Ad para 4: Eiseres sal geregtig wees op 50% van die Verweerder se annuïteite vermeld in die bylaag hierby aangeheg, gemerk “A” soos op datum van egskeiding en Verweerder sal toesien dat die nodige aantekeninge in die betrokke maatskappye se boeke gemaak word.
3. Ad para 5: As sekuriteit vir die betaling van die kapitale bedrag vermeld in paragraaf 1 hierbo, sal ‘n tweede verband oor die plase tans geregistreer in naam van die HEARDOW EIENDOMS TRUST, uitgesluit die plaas HOPE wat reeds verkoop is, ten gunste van Eiseres geregistreer word nie later as op 31 Julie 2008 nie, met dien verstande dat die huidige verbande oor voormelde

twee plase gekonsolideer sal word in een eerste verband ten gunste van 'n finansiële instelling wat nie die bedrag van R2 600 000 sal oorskry nie.

4. Ad para 9: Indien die Verweerder sou versuim om enige van die betalings vermeld in paragraaf 1 hierbo stiptelik te maak, sal die volle kapitale bedrag of balans daarvan opeisbaar wees indien Verweerder nie binne dertig dae nadat skriftelike kennisgewing gerig is enige gebrekkige of nie-stiptelike betaling aansuiwer nie.
5. Ad para 11: Eiseres bedank hiermee as trustee van die DANKBAAR LANDGOED TRUST en die HEARDOW EIENDOMS TRUST en doen onherroeplik afstand van haar regte as trustbegunstigde in voormelde trusts en stem toe dat die Trustaktes dienooreenkomstig gewysig mag word en/of enige dokumente wat vereis mag word te onderteken.”

[6] At the time of the divorce the applicant and the respondents were trustees of the Heardow Eiendoms Trust, registration number IT1313/2001. The applicant withdrew as a trustee of this trust as per paragraph 11 of the settlement.

[7] The first respondent did not pay the first instalment of R600 000 on the 31 July 2008 as per the settlement. The

applicant sent him the thirty days notice as required by paragraph 9 of the settlement on the 6 August 2008 and the first respondent paid this amount on the 12 September 2008. The first respondent was to pay a further amount of R400 000 on 31 July 2009 but he paid R250 000 instead. At the time the applicant lodged this application the first respondent was indebted to her in the amount of R650 000.

- [8] In May 2010 the trustees of the Hearrow Eiendoms Trust sold a portion, portion 9, of the farm Retreat 327 Ladybrand, which formed part of the property on which a mortgage bond was to be registered in terms of the settlement. This portion was sold with the consent of the applicant on condition that the applicant was to be paid the amount owing to her from the proceeds of the sale. The applicant was paid only R200 000 from the said proceeds. At the time of the hearing of this application an amount of R450 000 was still outstanding, being R200 000 which was payable on the 31 July 2010 and a further R250 000 which was payable on the 31 July 2011. These amounts were exclusive of the interest of the 15.5% per annum payable thereon. According to the applicant the first respondent was in contempt of court for failure to comply

with this term of the settlement.

[9] At the time of lodging this application the mortgage bond required to be registered in terms of paragraph 5 of the settlement had not been registered. The applicant alleged that the first respondent in his personal capacity was as a result in contempt of the court order and that the other respondents in their capacities as trustees of the Trust should be ordered to comply with this term of the settlement.

[10] On the 5 February 2009 the applicant was granted a further court order as *per* paragraph 4 wherein the insurance companies administering the annuity funds of the first respondent were ordered to immediately pay to the applicant the amount due to her from the proceeds of the annuity. The amount paid by the insurance companies was R63 018, 81. The applicant alleged that the first respondent failed to act promptly to inform the insurance companies to pay out the annuity and as a result the policy lost value from the date of the divorce to the date of payment, and that the first respondent was liable for the shortfall.

POINTS *IN LIMINE* ON PROCEDURE

[11] The respondents raised three points *in limine* that they left in the discretion of the court to decide. The points raised were the following: the manner in which the papers were paginated; the filing of the supplementary notice of motion and supplementary affidavit without leave of the court; and the failure to provide reasons for the condonation of the late filing of the answering affidavit.

PAGINATION OF THE PLEADINGS

[12] According to the respondents' counsel the papers were paginated in a peculiar fashion in that two indexes were filed. The opposing papers to the main application were collated under the supplementary index and this created an impression that the replying affidavits were the opposing papers to the main application. He contended that Rule 62 (4) of the Uniform Rules of Court, placed a burden on the Plaintiff to assist the court but in this case the papers were confusing and of no assistance to the court. He raised this point only to bring it to the attention of the court and was not requesting a postponement.

[13] The applicant's counsel in response submitted that it was not the applicant's intention to confuse the court but that the pleadings were paginated in that way because one set of the replying affidavits, there being two sets of replying affidavits, was misplaced and when it was found an extra bundle had to be prepared.

[14] Save for acknowledging that pagination of the pleadings was indeed confusing and that they were in general of no assistance to me, I found it not necessary to deal with this aspect any further.

SUPPLEMENTARY NOTICE OF MOTION AND

SUPPLEMENTARY AFFIDAVIT

[15] The respondents filed their replying affidavit on the 4 November 2009. And on the 20 July 2010, the applicant, instead of filing an answering affidavit, filed a 'supplementary notice of motion'. The supplementary notice of motion read as follows:

"GELIEWE KENNIS TE NEEM dat the Applikant van voorneme is om by die aanhoor van hierdie aansoek as verdere en/of

alternatiewe regshulp tot die aanvanklike Kennisgewing van Mosie, aansoek te doen tot die volgende aanvullende bevele:

11.1 Dat dit verklaar word die Dankbaar Landgoed Trust en die Heardow Eiendoms Trust *alter ego's* van Eerste Respondent is;

11.2 Dat dit verder verklaar word dat die Heardow Eiendoms Trust gevolglik n party was tot die Akte van Dading aangegaan tussen die Applikant en die Eerste Respondent in saak nr. 541/2006 welke Akte van Dading n bevel van hierdie hof gemaak is op 27 Maart 2008.

11.3 ...

GELIEWE KENNIS TE NEEM dat die Applikant, bykomstig tot die funderende verklaring reeds afgelewer, sal steun op die aanvullende funderende verklaring hierby aangeheg tesame met die aanhangsels daartoe.”

[16] Attached to the supplementary notice of motion was a ‘supplementary affidavit’. This supplementary affidavit purported, on the reading thereof, to be an affidavit in support of the supplementary notice of motion.

[17] On the 20 August 2010 the respondents filed a replying affidavit wherein they opposed the supplementary notice of motion. It is in this replying affidavit that the respondents raised some of the points *in limine* on procedure, namely, that the applicant had failed to follow the proper procedure set out in Rule 28 of the Uniform Rules of Court to amend the notice of motion and that the applicant filed a supplementary affidavit without the prior consent of the court. According to the respondents these pleadings, the supplementary notice of motion and the supplementary affidavit, were not properly before the court and must be regarded as *pro non scripto*.

[18] The other points *in limine*, namely, the one on the pagination of documents and the one on the failure to provide reasons for the condonation were raised in the respondents' heads of argument.

[19] Almost a year later after the filing of the main application, on the 26 January 2011, the applicant filed her answering affidavit. This was a reply to both the respondents' replying affidavits to the notice of motion and to the supplementary

notice of motion. In her response, the applicant undertook to address these points at the hearing of the application. On the 29 March 2011 the applicant filed an application for condonation for the late filing of her answering affidavit. This application was set down to be heard on the same day as the hearing of this application.

ARGUMENTS

[20] In their heads of argument respondents submitted that after filing their replying affidavit, applicant apparently realised that there were no merits in the notice of motion and filed a supplementary notice of motion in order to rectify the notice of motion. According to the respondents, a proper procedure dealing with amendments of this nature, which the applicant ought to have followed to amend the notice of motion, was in terms of rule 28 of the Uniform Rules of Court. The respondents contended that, the applicant was not entitled under the “further and/or alternative relief” prayer to circumvent the rules of court to obtain an order sought in paragraphs 11.1 and 11.2 of the supplementary notice of motion. In this respect I was referred to a decision in the **JOHANNESBURG CITY COUNCIL v BRUMA 32 (PTY)**

LTD 1984 (4) 87 TPD case at 92 – 93.

[21] In respect of the supplementary affidavit the respondents contended that the applicant did not follow the proper procedure as well. A proper procedure was provided for in sub-rule 6 (5) of the Uniform Rules of Court. They maintained that in terms of that sub-rule only the court has discretion to permit the filing of further affidavits and that *a fortiori* no litigant may take it upon himself or herself to simply file further affidavits without first having obtained leave of the court. Their counsel contended that no leave was sought or was being sought to have the supplementary notice of motion amended or the supplementary affidavit admitted by the court. They prayed that the supplementary notice of motion and the supplementary affidavit be regarded as *pro non scripto* and be scrapped from the record.

[22] The applicant's counsel contended that the amendment to the notice of motion was in order and that the court must grant it. He argued that the supplementary notice of motion was delivered to the respondents as long ago as June 2009 and that there was enough time for the respondents to

oppose it, but they chose not to. He referred me to paragraph 5 (the second paragraph 5 – there are two paragraph 5s) of the applicant's answering affidavit which stated as follows:

“In hierdie vooropstelling word die Agbare Hof eerbiediglik versoek om hierdie aanvullende Kennisgewing van Mosie en aanvullende funderende verklaring te aanvaar en sal ook vir n bevel ingevolge hiervan word.”

[23] This he pointed out was the paragraph which the applicant used to apply for the admission of the supplementary notice of motion and the supplementary affidavit by the court. He prayed that the evidence should not be excluded and that the court should deal with the notice in view of the merits of the case.

[24] Of concern to me at this stage was whether the supplementary notice of motion and the supplementary affidavit had been filed properly or not. I am of the view that referring to this pleading as a 'supplementary notice of motion and the supplementary' was an unfortunate choice of

words by the applicant. The rules do not provide for a supplementary notice of motion. My understanding of this notice was that the applicant wanted to amend paragraph 8 of the notice of motion. By filling the supplementary notice of motion, the intention was to seek an additional order that would then amend paragraph 8.

[25] In my view, the supplementary affidavit must not be dealt with separately from the supplementary notice of motion. Like I said earlier, the choice of words by the applicant was unfortunate. She should have referred to the affidavit as a supporting affidavit because it was filed in support of the supplementary notice of motion. Both my above views are supported by paragraph 5 of the applicant's supplementary affidavit quoted in paragraph 21 supra. This being so, I conclude therefore that there was no need for the applicant to approach the court before she could file this affidavit.

[26] As a result of this amendment paragraph 8 would read as follows:

- “1. that it be ordered that the Dankbaar Landgoed Trust and the Heardow Eiendoms Trust are alter ego’s of the First respondent.
2. that it further be ordered that the Heardow Eiendoms Trust is a party to the Deed of Settlement entered into between the applicant and the first respondent in case no 541/2006 which was made an order of the court on the 27 March 2008.”

[27] The general approach to an amendment of a notice of motion is the same as to a summons or pleadings in an action. The procedure for the amendment of pleadings is provided in rule 28 of the Uniform Rules of Court and it provides as follows:

- “(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his/her intention to amend and shall furnish particulars of the amendment.
- (2) the notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered

within 10 days of delivery of the notice, the amendment will be effected.

(3) an objection to the proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) ...”

THE APPLICATION OF THE LAW TO THE FACTS

[28] I agree with the conclusion reached by the court in the **JOHANNESBURG CITY COUNCIL** decision *supra*, the prayer for alternative relief has in modern practice become superfluous. In my view a party who seeks relief must set out clearly and precisely the order he or she seeks from the court in his or her pleadings for the other party to know what case he or she has to meet. Based on this reasoning my view is that the applicant, as argued by the respondents, ought to have followed the rule 28 procedure in order to have the notice of motion amended.

[29] The rule 28 procedure requires a party intending to amend a pleading to notify the other party of its intention to do so and where there is an objection he or she may then lodge an

application for leave to amend. In *casu* the applicant approached the court for an amendment without first notifying the respondents of her intention to do so and also to await their response. This, therefore, was an irregular step that was followed by the applicant and the normal route would have been for the respondents to proceed in terms of rule 30 of the Uniform Rules of Court to have this process declared irregular by the court. This was not done. Rule 30 (1) provides as follows:

“A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.”

[30] The respondents in this instance, did not follow this rule 30 (1) procedure and chose instead to respond to the notice by replying to the supplementary notice of motion and the supplementary affidavit. In taking a further step in the cause they abandoned their right to have the irregular procedure followed by the applicant set aside by this court. Sub-rule (2) of rule 30 provides that an application may be made if the applicant (respondents in this instance) has not himself or herself taken a further step in the cause with the knowledge

of the irregularity. The respondents in this instance knew of the irregularity. They referred to the irregularity in their replying affidavit. To my mind, since the respondent abandoned this process the issue whether the applicant followed a proper procedure or not has become moot. My conclusion is that the amendment to the notice of motion should be allowed.

CONDONATION FOR THE LATE FILING OF THE ANSWERING AFFIDAVIT

[31] On the 4 November 2009, more than a year later, the applicant filed her answering affidavit. And on the 29 March 2011, she filed an application whereby she sought condonation for the late filing of the answering affidavit. Attached to the application was a supporting affidavit deposed to by Thomas Walter Rothwell Hepple who appeared from the record to be the attorney for the applicant. The affidavit did not set out the reasons why the applicant was filing her answering affidavit out of time. It only stated that the respondents had been notified of the applicant's intention to file the application and that the respondents had no objection if she did so. Correspondence was attached to

the affidavit as proof of this interaction between the respective attorneys. The respondents did not oppose the application but their counsel at the hearing of the matter, argued that condonation was an indulgence and that the application thereto must fully set out the reasons, step by step, why the answering affidavit was not filed in time.

THE APPLICABLE LAW

[32] The procedure for the application for condonation is set out in rule 27 (1) of the Uniform Rules of Court and it provides that:

“In the absence of agreement between the parties, the court may on application and on good cause shown, make an order extending or abridging any time prescribed by these rule...”

THE APPLICATION OF THE LAW TO THE FACTS

[33] In this instance the parties have, in my opinion, reached an agreement. My understanding of this sub-rule is that where the parties have reached an agreement it is not necessary for the party seeking to file an affidavit out of time to approach the court for condonation. My view is that

because the parties, in this instance, had reached an agreement it was not necessary for the applicant to apply for condonation.

POINTS IN LIMINE ON THE SUBSTANTIVE ISSUES

[34] I now turn to determine a further point that was raised by the respondents *in limine* on the substantive issues, namely, that the order was *ad pecuniam solvendam* and can therefore not be enforced by a committal for contempt of court.

ARGUMENTS

[35] The contempt that the applicant was complaining about emanated from the respondent's failure to comply with the terms of settlement as stated in paragraph 5 of this judgment, in that:

1. the first respondent did not comply with paragraph 1 read with paragraph of the settlement in that he did not pay the amounts due on the date set out in the settlement and that with the advise of his new attorney he will not be paying the outstanding amount of R450 000.
2. the respondents are in contempt for failing to register a mortgage bond over the Heardow Eiendoms Trust as

required by paragraph 5 of the settlement.

[36] The respondents contended that for an order to be enforced by a committal for contempt of court it must be *ad factum praestandum*. The respondents must not be in contempt for payment of money but the order must be to do or not to do a specific thing.

[37] In counter argument the applicant's counsel stated that the contempt in this instance, was because of the conduct of the first respondent and not because the first respondent had not paid. The conduct the applicant was complaining about was that the first respondent had twice tendered to pay but failed to do so. This was an order *ad factum praestandum*, he said. He argued that the first respondent was in fact in a position to pay as ordered by the court, and that his failure to do so was deliberate. He was able to pay through the Trust and in fact he had done so before, he stopped paying only because his attorney advised him not to pay. He prayed for an order for committal of the first respondent to prison based on his contempt of an order *ad factum praestandum*.

THE APPLICABLE LAW

[38] It is now established law that an order must be one *ad factum praestandum* before it can be enforced by committal for contempt. When an order is for payment of money *simpliciter* (*ad pecuniam solvendam*) it cannot be enforced by committal for contempt of court and the remedy is execution. It is also trite that the issues relating to the division of assets in a divorce action, the settlement of the parties' property rights and incidental matters arising from the dissolution of a marriage do not constitute an order *ad factum praestandum*. **HOFMEYER v FOURIE, B.J.B.S CONTRACTORS (PTY) LTD v LATEGAN** 1975 (2) SA 590 (CPD) at 599E; **JYIAYA v MEC FOR WELFARE, EASTERN CAPE** 2004 (2) SA 611 (SCA).

APPLICATION OF THE LAW TO THE FACTS

[39] My view is that at the time the deed of settlement was made an order of court, some of the orders were *ad factum praestandum* and others were *ad pecuniam solvendam*. Following the rationale used in the **THUTA v THUTA** 2008 (3) SA 494 (TKH) judgment I first had to determine which of the terms of the court order as incorporated in the

settlement, could be enforced as prayed for by the applicant.

[40] I dealt with each salient term of the settlement as set out in paragraph 5 *supra*:

40.1 My view is that paragraph 1 read with paragraph 9, was an order *ad pecuniam solvendam*. This was an order for payment of money *simpliciter*. The fact that the settlement was for payment in instalments and that it was made an order of the court did not convert it to an order *ad factum praestandum*. This was an order in respect of the issues relating to the division of assets in a divorce action and/or the settlement of the parties' property rights and could therefore not be regarded as an order *ad factum praestandum*.

The issue in this instance was similar to the one raised in the **HOFMEYER v FOURIE, B.J.B.S CONTRACTORS (PTY) LTD v LATEGAN** 1975 (2) SA 590 (CPD) judgment. And at 591D thereof the court stated as follows:

“The issue raised on the papers in this case is whether the court has the power to imprison a judgment debtor for contempt of Court by reason of a failure, when able to do so, to pay a judgment debt of a commercial nature which the court has ordered him to pay in specified instalments, on specified dates, at a specified place, to a specified person.”

The court held in that judgment that the Supreme Court had no such power. The court concluded also that the issues relating to the division of assets in a divorce action, the settlement of the parties’ property rights and incidental matters arising from the dissolution of a marriage do not constitute an order *ad factum praestandum* even if they are made an order of the court.

40.2 Paragraph 5 of the settlement, in my view, is an order *ad factum praestandum*. This was an order directing the first respondent to register a mortgage bond over the Heardow Eiendom Trust. In an order *ad factum praestandum* a

person is ordered to do or not to do something.

40.3 As regards paragraph 4, the applicant was granted another order of court on the 5 February 2010. The said order read as follows:

“Na oorweging van die Kennisgewing van Mosie en die ander dokumente wat ingedien is en na aanhoor van die Advokaat vir Applikant

WORD DIT GELAS DAT:

1. Die Addendum tot die Akte van Dading, onderskeidelik gedateer 23 en 24 Januarie 2009 en wat as aanhangsel “A” tot aansoekstukke aangeheg is word ‘n bevel van die hof gemaak.
2. Die Sentrale Uitredingsannuïteitsfonds en Sanlam as administrateur van die Fonds soos vervat in klousule 4.1 tot 4.3 van aanhangsel “A” en Lifestyle Uitredingsannuïteitsfonds en

Liberty Life as administrateur
 van die Fonds soos vervat in
 klousule 4.4 tot 4.6 van
 aanhangsel “A”, hiermee die
 uitbetaling so gou doenlik te
 maak aan die applikante te
 rekening: Heppie Attorneys Inc,
 Eerste Nasionale Bank, Trust
 Rekening: 62056116778,
 Takkode: 261550. tak
 Centurion.

OP LAS VAN DIE HOF”

[41] My view is that when a new court order was granted it amended paragraph 4 of the settlement and the result was that nothing was now expected of the first respondent. The order was now directed at Sanlam and Liberty Life, the insurance companies which administered the annuity funds. The first respondent can therefore not be held in contempt for failure to comply with this order. The amount that applicant alleged to be outstanding, if at all, was an order for payment of money *simpliciter* (*ad pecuniam solvendam*) and it cannot be enforced by committal for contempt. The

remedy is through execution.

THE TRUST IS NOT A PARTY TO THE DIVORCE PROCEEDINGS

[42] The only terms of settlement that I can deal with in this judgment is the one contained in paragraph 5 of the settlement because it is an order *ad factum* praestandum. The applicant prayed for an order compelling the respondents, in their respective capacities, to immediately upon service of the notice on them to take reasonable steps to comply with the terms of this paragraph, which shall include the signing of all the documentation attached to the notice of motion as Annexure “EAR13”, required for the registration of the mortgage bond.

THE ARGUMENT

[43] The applicant’s counsel contended that the first respondent failed to register the bond as *per* the settlement and that at the time of the hearing of this application he was eight months in breach of this term of the settlement. He argued that the second and third respondents as trustees of the Trust not only knew of the deal but were prepared to proceed

with it. He further contended that the first respondent had at all material times acted as the *alter ego* of the Trust and had in the past not required the approval of the other trustees to conclude business transactions for the Trust. The issue of the *alter ego* was raised during the divorce proceedings but was not adjudicated on because there was settlement. The first respondent bound the other trustees when he entered into the settlement and promised to register a bond over the Trust, he argued. He referred me in this respect to the **BADENHORST v BADENHORST** 2006 (2) SA 255 (SCA) judgment.

- [44] The respondents on the other hand contended that the Trust did not form part of the divorce proceedings. Their counsel conceded that the first respondent did not dispute the amounts outstanding or the court order against him. He also conceded that the other trustees were initially not against the said registration but were advised by their new attorneys that the agreement by the first respondent was in contravention of the provisions of the Deed of Trust of the Trust. He argued that for the Trust to have been part of the settlement all the trustees should have signed on its behalf. And

because they did not sign, the Trust was not bound. He contended that a trust can only be bound if all the trustees consented in writing. He went further to say that a court has already decided on these issues and that this court cannot adjudicate the issues afresh. The settlement was final and there can be no further claims and the applicant can also not at this late stage raise the issue of the *alter ego*. If the applicant wanted the Trust to be part of the divorce proceedings, she should have joined the trustees (or the Trust) as parties to those proceedings. He opined that the issue of the *alter ego* was indeed canvassed at the divorce proceedings but was never decided and it cannot now be decided by this court. He referred me in this respect to the **LAND AND AGRICULTURAL BANK OF SOUTH AFRICA v PARKER AND OTHERS** 2005 (2) SA 77 (SCA) at 92 -93 and an unreported case of the Eastern Cape, Grahamstown, **M J FRONEMAN v A FRONEMAN AND OTHERS** (3074/2009) (delivered on 10 December 2009) decisions.

- [45] The following issues are common cause between the parties or are not in dispute: that this application originated from divorce proceedings between the applicant (the plaintiff in

the divorce proceedings) and the first respondent (the defendant in the divorce proceedings); that the Trust was not a party to the divorce proceedings nor was it joined as a party prior to the settlement being made an order of court; that the settlement was signed by the applicant and the first respondent in their capacities as such; the applicant desired to include the second and third respondents in complying with the settlement; that the issue of the *alter ego* was canvassed at the divorce proceedings but was never decided; that the settlement envisaged the Trust to be a party to the settlement, this was indicated by the following terms of the settlement:

- 45.1 that the applicant was to withdraw as a trustee of the Trust;
- 45.2 that as security for the amount owed by the first respondent to the applicant, a mortgage bond be registered over the Trust.

ISSUE TO BE DECIDED

[46] I now have to decide whether or not the Trust and/or the trustees can be bound by a court order granted against the first respondent in his personal capacity and in a matter in

which the Trust and/or the trustees were not cited as parties to that action.

APPLICABLE LAW

[47] It is a fundamental rule of trust law, that in the absence of a contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts. A court dealing with a divorce action is entitled, in its discretion, to incorporate the terms of the settlement in a court order, it cannot, however, thereby bind a party who was not a party to the action before it in terms of such an order. See **NIEUWOUDT AND ANOTHER NNO v VRYSTAAT MIELIES (EDMS) BPK**, 2004 (3) SA 486 (SCA).

[48] The applicant contended that the two respondents can be bound since they were aware of the agreement between the parties and they had the desired intention to bind the Trust. He further argued that the first respondent acted as the *alter ego* of the Trust in that during the whole existence of the marriage between the applicant and the first respondent both the Trust's property and business were conducted by the first respondent for his personal benefit – without the decision

and handling by the other trustees. Her counsel referred me to two experts reports compiled during the divorce proceedings. He alleged that the findings of those reports confirmed that the Trust was indeed the *alter ego* of the first respondent. It was on the basis of these findings that the settlement was entered into, he contended.

THE APPLICATION OF THE LAW TO THE FACTS

[49] I do not agree with the applicant's argument. The court order issued in terms of the divorce proceedings could not bind the Trust. The Trust was not cited as a party to the proceedings nor was it joined as such. My view is that it could not have been the courts intentions that by incorporating the settlement into the order of the court to bind parties who were not parties to the action before it. The terms the applicant relied on were not captured in the settlement. The applicant's counsel relied in his argument on the Badenhorst judgment *supra* to which he had referred me to. This decision, in my opinion, was of no assistance to the applicant in the present circumstances. In that judgment, the appellant sought, by way of a counterclaim instituted during the course of divorce proceedings initiated by the

respondent, a redistribution order in terms of section 7 (3) of the Divorce Act 70 of 1979 directing the respondent to transfer half his estate to her. Incorporated in the appellant's prayer was a claim that the assets of the Jubilee Trust and the farm 'Jubileeskraal' be regarded as assets in the respondent's estate. The court at 260I – J and 261A held that:

"The mere fact that the assets vested in the trustees and did not form part of the respondent's estate does not *per se* exclude them from consideration when determining what must be taken into consideration when determining what must be taken into account when making a redistribution order... To succeed in a claim that trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that such party controlled the trust and but for the trust would have acquired and owned the assets in his own name. Control must be *de facto* and not necessarily *de iure*."

[50] I do agree with the Badenhorst judgment. But the facts of that case are distinguishable from the case I am dealing with presently in that in this instance, the matter had already been dealt with and finalised whereas in the Badenhorst judgment

the case had not been finalised. The issue of the *alter ego*, as submitted by both parties was canvassed during the divorce proceedings but was never decided on. The applicant argued that it was because the parties signed the settlement. It however remains that this issue was never decided by the court at the divorce proceedings and that court granted an order without having decided on the issue.

- [51] The **BRUNETTE v BRUNETTE AND ANOTHER NO** 2009 (5) SA 81 (SE) judgment was another case that was decided along the same reasoning. In that case, in a divorce action, the applicant intended to amend her particulars of claim so as to include a prayer that the assets of two *inter vivos* trusts be regarded as the assets of two businesses conducted in partnership by the parties. It was alleged by the applicant, in that case, that during the conduct of the businesses no distinction was made between the partnership assets and those belonging to the trusts, and that it would be proper for the partnership assets and those belonging to the trusts to be dealt with as partnership assets in any redistribution order which the trial court might make. The applicant then sought the joinder of the first respondent in his representative

capacity as trustee of the trusts (she being the other) as a party to the divorce action. And on appeal the court at 84A – B held that:

“If the applicant’s contentions were correct then the manner in which the trusts had been administered in the past became highly relevant in determining whether or not they should be regarded as constituting partnership assets to be taken into account in any distribution order in terms of section 7 (3) of the Divorce Act. Any decision thereanent can only properly be made by the trial court. At this juncture it is entirely permissible for the applicant to rely on the allegations which, if proved at the trial, would entitle her to succeed.”

[52] And in **M J FRONEMAN v A FRONEMAN AND OTHERS** decision *supra*, the applicant applied for an order for the committal of the first and second respondents for contempt of court for failing to obey the terms of a divorce settlement agreement which was made an order of court and also sought certain directory orders against the respondents. The court held that in such circumstances enforcement by way of committal for contempt whether or not including a further order to comply was not possible

[53] It is evidently clear from the above quoted judgments which I was referred to by both counsel that for the applicant to succeed in this instance, the issue must have been canvassed and proved during the divorce proceedings and/or the respondents must have been cited or joined as parties to that action. This was not done and I hold the same view that they cannot now be expected to comply with the settlement.

[54] As the court order was granted against the first respondent in his personal capacity, he is in contempt for failure to comply with this term of the settlement. However, can it be said that he deliberately failed to comply?

[55] The requisites to establish a contempt of court are: the order, the service or notice, non-compliance and wilfulness and *mala fide*. The test is whether or not the non-compliance was committed 'deliberately (wilfully) and *mala fide*'. The enforcer has to prove the three requisites beyond reasonable doubt and the non-enforcer is to bear the evidential burden in relation to wilfulness and *mala fides*. The non-complier is

expected to furnish evidence raising a reasonable doubt whether non-compliance was wilful and *mala fide*, if he or she fails to do so the contempt will be established beyond reasonable doubt. See **CONSOLIDATED FISH (PTY) LTD v ZIVE AND OTHERS** 1968 (2) SA 517 (CPD) at 522B – C; **FAKIE NO NO v CCII SYSTEMS (PTY) LTD** 2006 (4) SA 326 (SCA) at 344H – J and 345A and **UNCEDO TAXI SERVICE ASSOCIATION v MANINJWA** 1998 (3) SA 417 (E) 425G-426C.

- [56] Based on the above summations, my opinion is that it cannot be said that the first respondent deliberately failed to comply with paragraph 5 of the settlement. The settlement was doomed for failure from the beginning there was no way in which the first respondent was going to be able to comply with this term of the settlement without the Trust and/or the trustees being party to the settlement.

COSTS

- [57] The applicant prayed for a cost order on an attorney and client scale against the respondents because of the contemptuous manner in which they failed to comply with the

court order. The respondents on the other hand prayed for a special order against the applicant, particularly in favour of the Trust as the applicant was aware that the Trust was not a party to the divorce proceedings.

[58] My view is that because of the *laissez faire* attitude by both parties in the handling of this matter I am not persuaded that any of them deserves a special cost order. My view is that the costs must follow the event. There is also no cost order against the fourth respondent.

THE ORDER

[59] Accordingly, the following order is granted:

- 59.1 the points *in limine* raised by the respondents on procedure are dismissed.
- 59.2 the point *in limine* raised by the respondents on the substantive issues is upheld.
- 59.3 the application is dismissed with costs.

E. M. KUBUSHI, AJ

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