

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Date heard: **23/02/2007**
Date delivered: **02/03/2007**

Case number: **705/2006**

In the matter between:

CHRISTIE, J A
Applicant

and

CHRISTIE, G D M
Respondent

Coram: **Lacock J**

JUDGMENT

LACOCK J:

- 1] The appellant in this matter was married to the respondent, which marriage was dissolved by an order of this Court on 27 November 1992.

It is common cause that the parties have concluded an agreement, headed “*Deed of Settlement*”, prior to the issuing and service of the summons in the divorce action,

in terms whereof provision was *inter alia* made for the custody and maintenance of the minor children, division of the assets in the estate and for the payment of maintenance by the respondent to the applicant. The relevant clauses in regard to the payment of alimony reads as follows:

- "7. *The Defendant will pay maintenance to the Plaintiff at the rate of R1700,00 per month until her death or remarriage, whichever event occurs first.*
8. *The maintenance payable by the Defendant in respect of his said children and in respect of Plaintiff shall be increased annually on the date upon which the Defendant receives his annual salary increase from his employers, such increase being equivalent to the same percentage whereby his salary is increased. It is further recorded that such salary increases are generally given at the 1st of June in each year. The provisions of this paragraph shall not bar the Plaintiff from applying in the appropriate court for an increase of maintenance at any time."*

- 2] The divorce action was enrolled as an unopposed matter in the motion court for 27 November 1992, and was disposed of as such. At the hearing of the matter counsel for the applicant (as plaintiff) handed up a "Draft Order" and moved for an order in terms of the said draft. The Court (**Wessels AJ**) thereupon made an order in exactly the same terms as those contained in the "Draft Order". This Order reads thus:

- "1. *That the bonds of marriage subsisting between plaintiff and defendant be and are hereby dissolved.*
2. *THAT the custody and control of the two minor children born out of the marriage namely TARYN-LEE and KYLE GORDON is awarded to the plaintiff.*
3. *THAT the defendant pay maintenance to the plaintiff in*

respect of the said children at the rate of R800.00 per month per child until each child respectively becomes self-supporting.

- 4. THAT the defendant is liable for and will pay all medical, dental, hospital, nursing, optometrical costs incurred in respect of the said children as well as all costs of medicines purchased for as long as he is legally liable to maintain them.*
- 5. THAT the defendant be liable and pay the costs of tertiary education which the said children may undergo provided such costs are within his means.*
- 6. THAT one half of defendant's pension interest in De Beers Pension Fund (Membership no 1164651) as at the date of divorce will accrue to the plaintiff and will be paid by the said fund to the plaintiff when the pension benefits accrue in respect of the defendant and the said pension fund will make an endorsement in its records in regard to the pension interest payable to the plaintiff in terms of this agreement.*
- 7. THAT the defendant pay the plaintiff's legal expenses pertaining to the divorce proceedings."*

Despite the contents of clauses 7 and 8 of the Deed of Settlement (quoted above), no provision was made in either the said draft order or the final order of divorce for the payment of alimony by the respondent to the applicant.

- 3] The applicant has now approached this Court in terms of Rule 42(1)(a) for the following relief:

- 1. That the final order of divorce in the above Honourable Court under case number 1409/1992 be amended as follows:*
 - 1.1. By the insertion after paragraph 6 thereof the following:*
 - 7. That the Defendant will pay maintenance to the Plaintiff at the rate of R1700.00 per month until her death or remarriage, whichever occurs first.*
 - 8. That the maintenance payable by the Defendant in respect of his said children and in respect of the Plaintiff shall be increased annually on the date upon which the Defendant receives his annual salary increase from his employers, such increase being equivalent to the same percentage whereby his salary is increased. It is further recorded that such*

salary increases are generally given as at the 1st June in each year. The provisions of this paragraph shall not bar the Plaintiff from applying in the appropriate court for an increase of maintenance at any time."

- 1.2. That the present paragraph 7 be renumbered to paragraph 9.*
- 2. That the cost of this application be paid by the Respondent only in the event of the Respondent opposing this application."*

The sum total of the averments of the applicant in support of the relief sought are contained in the following two paragraphs of her 3 page founding affidavit:

"The provisions of paragraph 7 and 8 of the deed of settlement (annexure 'C2') were for some or other reason unknown to me never incorporated into the final order of divorce.

I respectfully submit that the order requested at the final order of divorce was erroneously sought and also erroneously granted in that the provisions of paragraphs 7 and 8 of the deed or settlement (annexure 'C2' to this affidavit), were not incorporated in the final order of divorce. Therefore I respectfully request that an order be granted in terms of the notice of motion."

- 4] Not any reason or explanation is advanced for the omission of the said provisions regarding the payment of alimony from the Court Order and/or draft order. One would at least have expected some explanation from either the attorney who acted for the applicant (and who still practises in Kimberley) or counsel who moved the order on her behalf, but no such explanations had been proffered.*

Again no factual evidence are presented in substantiation of the bald allegation that the order was erroneously

sought and granted.

Not surprisingly the respondent denied these allegations.

- 5] In her replying affidavit one finds the following averments:

"I am a lay person and do not understand the court procedure. I signed a deed of settlement in good faith and believed that the whole thereof would be incorporated in the final order of court.

I respectfully submit that it was the duty of my legal representative at the hearing to ensure that the deed of settlement (annexure 'C2'), be incorporated in the final order of divorce or at the very least paragraphs 6, 7 and 8 thereof. I respectfully submit that the failure by my legal representatives at the time to ask that these paragraphs be incorporated in the final order of divorce has the implication that the order was erroneously sought in that the whole deed of settlement and in particular clauses, 6, 7 and 8, were not included therein. Furthermore, the order was erroneously granted in that Annexure 'C2' or at the least, clauses 6, 7 and 8, were not included in the final order of divorce."

It is common cause that the applicant testified and was present in Court when the Order of Divorce was granted. Question is why did she not there and then realise that the deed of settlement was not made an order of court and raised this with her legal representatives. If one considers that the deed of settlement contains no less than 24 clauses and that only 6 of those clauses were incorporated in the Court Order, the necessity for a reasonable explanation for the alleged omission speaks for itself.

- 6] As submitted by Mr Roos SC for the defendant, it is not the function of this Court to speculate on possible explanations or reasons why the aforesaid clauses were not

incorporated in the final order of divorce. It is for the applicant to present the necessary evidence upon which this Court can find that the order was erroneously sought or erroneously granted. In the absence of any such evidence – as in this case – the application has to fail.

- 7] The further difficulty the applicant had to overcome is to be found in the very wording of Rule 42 (1) (a) itself. Not only was the applicant present in Court when the order was granted, but she was also represented by an attorney and counsel. The order she obtained was exactly the order requested by counsel. Without evidence to the contrary, it is difficult to conclude that the order was erroneously sought or erroneously granted. See **First National Bank of South Africa v Jurgens & Others, 1993 (1) SA 245 (WLD)**:

“The ordinary meaning of 'erroneous' is 'mistaken' or 'incorrect'. I do not consider that the judgment was 'mistakenly sought' or 'incorrectly sought'. The relief accorded to the plaintiff was precisely the relief that its counsel requested. The complaint now is that there is an omission of an accessory feature from the judgment. I am unable to perceive how an omission can be categorised as something erroneously sought or erroneously granted.”

(at 247 C to D).

This matter is to be distinguished from the case of **Ex parte Jooste & ‘n Ander, 1968 (4) SA 437 (O)** where it was held that although the order originally granted was exactly the order requested by counsel, such an order can

be varied under the sub-rule by reason of the failure of the applicants' legal representatives to follow their instructions. No similar situation presents itself in this matter. It is not the applicant's case that her legal representatives acted against her instructions.

- 8] Since it occurred to me that a possible explanation for the submission of a draft order by counsel (and which draft order was made an order of Court), could be attributed to the judgment of this Court in **Cherry v Cherry (Case no. 301/1990)**, where it was held by the late **Kriek JP** that,

"Die eiser en die verweerderes het op 23 April 1990 'n skikkingsooreenkoms aangegaan en ek word nou, na aanhoor van die eiser se getuienis, gevra om 'n egskeidingsbevel te maak en om te beveel dat die skikkingsakte 'n bevel van die Hof gemaak word. Hierdie uitspraak gaan oor laasgenoemde bede.

In die verlede is hierdie soort bevel gereeld gemaak in egskeidingsake in hierdie Afdeling, maar dit is 'n praktyk wat uiters slordig is en wat nou beeindig moet word.

Skikkingsooreenkomste in hierdie soort sake bevat gewoonlik bepalinge wat glad nie tuishoort in 'n hofbevel nie.

'n Ander beswaar teen die huidige praktyk is dat in die meeste gevalle die bepalinge van die ooreenkoms in verhalende taal geskryf is en nie in die soort taal wat in 'n hofbevel behoort gebruik te word nie.

Nog 'n beswaar is dat die ooreenkoms gewoonlik bepalinge bevat met betrekking tot die verdeling van die bates. Indien die partye ooreenkom hieroor is daar geen geskil tussen hulle nie en is dit nie nodig dat hulle ooreenkoms omskep word in 'n hofbevel nie. Indien daar wel geskille is, dan moet 'n ontvanger aangestel word om die boedel te verdeel. Laastens bevat skikkingsooreenkomste gewoonlik bepalinge wat oorbodig is in 'n hofbevel.

Daar kan geen wesenlike beswaar daarteen wees dat sekere paragrawe van 'n ooreenkoms, indien in gepaste taal gegiet, bevels van die Hof gemaak word nie. Die verkieslikste praktyk, en die een wat na vandag gevolg sal word, is dat 'n gewysigde bede in die vorm van 'n konsep-bevel wat uiting gee aan die ooreenkoms tussen die partye, opgestel word en

van die Balie opgehandig word by die verhoor.”

and since not any one of the parties revealed in their affidavits what – if any – their agreement was in regard to whether the deed of settlement or at least that portion in respect of the payment of alimony, should or should not have been made an order of Court, I exercised my discretion under Rule 6 (5) (g) and directed that both parties testify before me and to be examined and cross-examined. This exercise however, proved to be a futile one, since not any one of the parties were able to shed any light on these issues.

- 9] Clutching at his last straw, Mr Haddad for the applicant requested me to exercise my discretion under sec. 173 of the Constitution to correct, what he labelled a patent error. Suffice it to say that the absence of evidence precludes me from finding that an error had in fact occurred, and there are therefore no grounds for interfering with the Court order granted by **Wessels AJ**. The evidence produced in this matter does not warrant a finding that a procedural error had been committed. In the absence of supporting evidence it cannot be said that this is a matter of adjective law. The principles laid down in **Zondi v MEC, Traditional and Local Government Affairs 2006 (3) SA 1 (CC) at 12 to 15** are therefore not applicable to this matter.

- 10] In view of the conclusion to which I have come in this

matter, it is not necessary to deal with Mr Roos's argument viz. that, since no order in regard to alimony had been made by the Court granting the divorce order, this Court is precluded from now granting such an order. (**Schutte v Schutte, 1986 (1) SA 872 (A)**).

- 11] The parties were *ad idem* that costs should follow the result of the application.

I therefore make the following order:

The application is dismissed with costs.

HJ Lacock
JUDGE

<u>For the applicant:</u> Mr VW Haddad (instructed by, Elliot, Maris, Wilmans & Hay, Kimberley)
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For the respondent: Adv JF Roos SC (instructed by Fletcher's, Kimberley)