IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not reportable

Case No: 2321/2016

In the matter between:

ES APPLICANT

and

RB RESPONDENT

Neutral citation: *ES v RB* (Case no. 2321/2016) (29 November 2024)
Heard: 16 August 2024

Delivered: 29 November 2024

Judgment

Phatshoane DJP

[1] The applicant, Ms ES, approached this Court for an order that the award issued on 30 July 2021 by Mr André Heyns, the receiver, concerning the determination

of the accrual in her and the respondent's estate be made an order of this Court (the main application). The respondent, Mr RB, opposes the main application on the basis that some calculations in Mr Heyns's award have their origin in the deed of settlement which to a certain extent is ostensibly unlawful. He therefore filed a counter-application in which he seeks relief in terms of rule 42(1)*(b) and (c)* to vary the terms of the decree of divorce substantially in the following way:

1.1 That para 2.1 of the deed of settlement incorporated into the decree of divorce on 01 March 2019 be amended by excising the following part thereof:

> "… and to the defendant's assets shall be included the assets and liabilities of R[…]Trust, number IT 1[…], and the assets and liabilities of the R[…] shall be deemed to be the assets and liabilities of the defendant".

1.2 That para 2.2.9 of the said deed be deleted in its entirety.

1.3 That the award of André Heyns be declared unlawful to the extent that the assets of R[…] Trust has been deemed to be the assets of the respondent's estate and included in such estate for the purposes of calculating the accrual in the respondent's estate during the subsistence of the parties' marriage.

1.4 That the parties be ordered to direct that Mr Heyns, within 30 days from the date of the order, excise R[…] Trust's assets from his award and to recalculate the accruals in the parties' estates without such assets.

[2] The respondent raised three preliminary points against the application whereas the applicant took issue with the late filing of the counter-application. The replying affidavit in the counter-application was also filed outside the time allowed in the Uniform Rules of this Court. Before turning to these issues, some background is necessary.

[3] The applicant and the respondent were married to each other on 17 December 1994 out of community of property in terms of an antenuptial contract which

incorporated the accrual system as contemplated in ss 2 and 3 of the Matrimonial Property Act 88 of 1984 (MPA). Two children were born of the marriage, a son, JB, and a daughter, MB. JB passed away on 17 July 2014. MB attained the age of majority on 15 January 2015.

[4] On 26 October 2016 the applicant issued summons against the respondent for a decree of divorce. She also filed a Rule 43 application for maintenance *pendente lite* on 14 December 2016. The marriage between the parties was dissolved on an unopposed basis before Coetzee AJ on 01 March 2019 by a decree of divorce which incorporated the deed of settlement. Prior to the dissolution, the parties were not *ad idem* with regard to their respective estate's accrual and therefore agreed to the following salient terms in the deed of settlement:

"2.1 That each party will under oath, within 14 (fourteen) days from date of the divorce, furnish the other party and the receiver with a statement setting out each party's assets and liabilities *and to the defendant's assets shall be included the assets and liabilities of R[…] Trust, number IT 1[…], and the assets and liabilities of the R[…] shall be deemed to be the assets and liabilities of the defendant*.

2.2 Mr André Heyns of the firm Enslins Auditors, Kimberely, is hereby appointed as the receiver to determine the accrual in the parties' respective estates with the following rights and powers:

2.2.9 The receiver shall also determine the assets and the liabilities of R[…]l Trust and such assets and liability shall be deemed to be the defendant's personal assets and liabilities.

2.4 That the receiver shall forward his award to the parties' respective attorneys and both the plaintiff and the defendant shall be entitled to lodge an objection against such an award within 14 (fourteen) days after the award had been dispatched. The receiver is to consider such objections and within 14 (fourteen) days following receipt of such objections issue the final award, which award shall be final and binding on the parties.

2.5 That each party is free to make the receiver's final award an order of court, with the understanding that the plaintiff shall solely be entitled to do so after she had complied with the provisions of clause 3 hereinunder.

3. That the plaintiff shall within 7 (seven) days after the receiver's final award, as provided for in clause 2.4, resign as a trustee of R[…] Trust, number IT 1[…], and shall sign all necessary documents to give effect to the resignation."

[5] Some 18 years prior to the breakdown of the marriage, the parties established R[….] Trust on 01 June 1998. The applicant and the respondent were appointed the trustees whereas JB and MB the capital and income beneficiaries of the Trust. The trustees were not the beneficiaries of the trust. The main purpose of the Trust was the acquisition of assets and income to be applied for the benefit of the beneficiaries and, as part of the parties' estate planning, to prevent their respective estates or that of their children from paying estate duty upon their deaths. Part B, Clause 5.1 of the trust deed[1] stipulates:

"5.1 RESTRICTIONS ON THE POWERS OF THE TRUSTEES

5.1.1. Unless the provisions of Part C provide otherwise, the board, a trustee and executive trustee may not:

5.1.1.1 merge the assets of the trust with their own assets.

5.1.1.2 directly or indirectly professes that any of the trust assets form part of his estate or personally belong to him or are due to him.

[1] As translated.

Part B, Clause 7.7.1 provides:

> "7.7.1 A trustee shall not be entitled to dispose of any trust funds, capital or income of the trust for his own benefit or for the benefit of his estate unless he is compensated in terms of the provisions of the trust deed or he is a beneficiary and the estate, assets, accounts and affairs of the trust shall as far as possible be controlled and administered separately from the trustee."

[6] On 30 July 2021 Mr Heyns, in accordance with the terms of the deed of settlement, made an award in terms of which he concluded that the respondent pays to the plaintiff R3 311 897. On 26 August 2021 the respondent objected to the award. However, on 01 September 2021, Mr Heyns notified the parties, in a comprehensively motivated letter, that he stood by the determination he made on 30 July 2021. Following this, the applicant's attorneys directed a letter to the respondent's attorneys dated 29 September 2021 to which was attached an e-mail from the applicant in which she resigned as trustee with immediate effect. In addition, the applicant's attorneys demanded payment of the award and notified the respondent's attorneys that in the event of non-compliance the plaintiff would approach the court in terms of clause 2.5 of the deed of settlement for the award to be made an order of this Court. The main application was served and filed on 17 November 2021. It was not met with any immediate response from the respondent. I now turn to consider the preliminary issues.

[7] First, is the respondent's application for condonation of the late filing of his replying affidavit in his counter-application, filed a month outside the time allowed in the Uniform Rules. He explained that his attorney was indisposed which occasioned the delay. The delay is negligible. There can be no prejudice for condonation to be granted and it is so ordered.

[8] More problematic for the respondent is the unexplained delay in the launching of his counter-application in which he seeks the variation of the deed of settlement

in terms of Rule 42(1)*(b)* and *(c)*. This rule is a procedural step designed to correct expeditiously an obviously wrong judgment or order.[2] Therefore, an application for rescission or variation in terms of either rule 42 or the common law must be made within a reasonable time after the applicant acquired knowledge of such judgment.[3]

[9] As alluded to, the deed of settlement sought to be varied was incorporated into the decree of divorce on 01 March 2019. Following Mr Heyns final award on 01 September 2021 the respondent did nothing to challenge the divorce order upon which the award is founded. It also bears repeating that the main application to have the award made an order of this Court was served on 17 November 2021. Once more, following receipt of the application, the respondent did nothing to challenge the decree of divorce. He served his answering affidavit to the main application in which he conveniently incorporated his counter-application on 16 October 2023. He did not seek condonation. Instead, he explained that he was ordered by this Court on 15 September 2023 to file his answering affidavit to the main application by 16 October 2023. He further explained that insofar as the counter-application forms part of the answering affidavit, it too had to be delivered by that date. He therefore contended that the counter-application was lodged timeously. In the alternative, he avers:

> "...(I)t is clear from paragraph 21 of my Founding Affidavit that the grounds for the Counter-application only became known to me when I consulted with my current attorney of record for the purposes of drawing my answering affidavit and that was in September this year [2023] and the Counter-application was brought within the next month which is hardly an unreasonable delay. The matter is in any event only scheduled for hearing on 16 August 2024."

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[2] *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417C.
[3] *Gcasamba v Mercedes-Benz Financial Services SA (Pty) Ltd* 2023 (1) SA 141 (FB) para 29; *Roopnarain v Kamalapathy and Another* 1971 (3) SA 387 (D) at 391F-G.

[10] The counter-application was served and filed approximately four years after the decree of divorce had issued and almost two years after the respondent had been served with the main application. The delay is quite egregious and the explanation thereof wholly inadequate and unconvincing. The Court's backlog and its turnaround time cannot serve as an excuse for the parties' non-compliance with the rules of this Court. This is impermissible and deserving of censure. This would have been the end of the matter in relation to the counter-application. However, based on the caution sounded in various decisions of our courts, that a court in exercising its inherent power in application proceedings to separate issues in limine must do so with circumspection,[4] something must be said concerning the respondent's counter-application which in any event is so inextricably linked to the main application that any severance thereof would serve no worthwhile purpose.

[11] The striking feature of this case is that the applicant, in her answering affidavit to the respondent counter-application, states that before the hearing of the main application the respondent convinced their daughter, MB, to bring an urgent application on 26 November 2021 where the respondent was cited as the first respondent whereas the applicant the second respondent. In that application, MB sought an order to stay the present main application pending the determination of Part B of her application; that she be granted leave to intervene as the second respondent in the main application; that she be afforded leave to intervene in the divorce proceedings and an order interdicting her parents from alienating the trust's assets pending the determination of the relief in Part B. In part B, MB sought an order that the impugned clause 2.1 of the deed of settlement be amended by deleting the words: "… and to the defendant's assets shall be included

[4] See *Louis Pasteur Holdings (Pty) Ltd and Others v ABSA Bank Ltd and Others* 2019 (3) SA 97 (SCA) para 33; *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA); ([2012] 2 All SA 345; 2012 (6) BCLR 613; [2012] ZASCA 15) para 49.

the assets and liabilities of R[…] Trust, number IT 1[…], and the assets and liabilities of the R[…] shall be deemed to be the assets and liabilities of the defendant" and that clause 2.2.9 be deleted in its entirety. Nxumalo J dismissed that application with costs including the subsequent application for leave to appeal. What is remarkable is that the respondent currently seeks almost the identical relief in the present counter-application.

[12] As I see it, the three preliminary points raised by the respondent are decisive of both the principal and the counter-application. With regard to the first point in limine, it was argued for him that to the extent that the deed of settlement provides in clauses 2.1 and 2.2.9 that the trust's assets be considered as part of the respondent's assets for the purposes of determining the accrual, it is unlawful in that it offends against s 12 of the Trust Property Control Act 57 of 1988 (TPCA) which provides that:

"Trust property shall not form part of the personal estate of the trustee except in so far as he as the trust beneficiary is entitled to the trust property."

[13] It was further argued for the respondent that the deed of settlement also offends clauses 5.1.1.1, 5.1.1.2 and 7.7.1 of the trust deed which prohibits trustees from merging any of the assets of the trust with their own or holding out that any trust assets belong to them personally or appropriating any of the trust capital or income for their own benefit. It was further contended that both parties, when they agreed to the terms of the deed of settlement, acted unlawfully under a material error of law, beyond their powers as trustees, and in breach of the trust deed which renders the deed of settlement unenforceable. That insofar as Mr Heyns's award is founded in the deed of settlement, it is unenforceable and neither competent nor proper to be made an order of the Court.

[14] Rule 42(1)*(c)* provides that the Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary an order or judgment granted as the result of a mistake common to the parties. In

Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, *Corruption and Fraud in the Public Sector Including Organs of State and others*[5], the Constitutional Court underscored that the rule operates only in specific and limited circumstances and that the interest of justice requires the grounds available for rescission, and by extension variation, to remain carefully defined. The guiding principle of the common law being the certainty of judgments.

[15] Two broad requirements must be satisfied where a party relies on common mistake. First, there must be a common mistake which occurs where both parties are of one mind and share the same mistake. Secondly, there must be a causal link between the mistake and the grant of the order or judgment. In other words, the judgment or order must be as a result of a mistake.[6] A common mistake would cover the case of a judgment entered by consent where the parties consented in *justus error*. It is not sufficient, however, if the error is that of one of the parties only, for instance, if a litigant by mistake of himself or his legal advisers abandons relief to which he is or may be entitled, the court has no power to recall or amend the order it has in consequence deliberately made, in the absence of fraud of the other party in the course of the proceedings.[7]

[16] To demonstrate that the deed of settlement was not conceived as a result of a mistake common to the parties the applicant, in her answering affidavit to the counter-application, states that following the settlement negotiations between the parties on 14 November 2018 her attorneys directed a letter to the respondent's attorneys to which was attached a draft deed of settlement. On 25 January 2019 her attorneys provided the respondent's attorneys with an amended deed of settlement. On 08 February 2019 she says that the respondent's senior counsel

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[5] 2021 (11) BCLR 1263 (CC) para 98.
[6] *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 863A-C.
[7] DE van Loggerenberg *Erasmus: Superior Court Practice* - (Jutastat e-publications: Commentary under rule 42)- RS 23, 2024, D1 Rule 42-30.

recommended that certain amendments be made on the deed of settlement and further intimated that the respondent would sign the deed if the applicant was not averse to the amendments. The applicant further says that her attorney amended the deed as suggested by the respondent's counsel. Following which she signed the deed on 13 February 2019 whereas the respondent did so on 26 February 2019 and the divorce was finalised on an unopposed basis on 01 March 2019.

[17] The respondent was ably represented by senior counsel and an attorney during the settlement negotiations. In his replication he did not admit or deny the history and progress with regard to the settlement negotiations as sketched by the applicant. He simply contended that the settlement negotiations were conducted on a without prejudice basis and that it was inappropriate for the applicant to rehearse the contents and the progress or history of the negotiations without his consent.

[18] It is trite that a statement made by a party involved in a dispute which is genuinely aimed at achieving a compromise is protected from disclosure. These statements are usually marked 'without prejudice' and can only be accepted into evidence with the consent of both parties. However, 'without prejudice' privilege is not a blanket privilege. It is subject to certain exceptions. In the context of this case the views expressed by James JP in *Gcabashe v Nene*[8], which I adopt, are apposite:

"Negotiations conducted without prejudice are, of course, designed to resolve disputes between the parties and if the negotiations result in a settlement then logically evidence about the settlement and the negotiations leading up to it should be available to the trial Court because the whole basis of non-disclosure has fallen away."

[19] I strain to find that the history of the negotiations leading up to and giving rise to a settlement agreement is inadmissible in the circumstances where this serves to

[8] 1975 (3) SA 912(D)

establish whether there had been a common mistake between the parties. I accept that the applicant fully substantiated, by setting out the background to the negotiations which had been confirmed by her attorney in his supporting affidavit, that she did not labour under any mistake let alone one common to the parties. It seems to me that the error, if any, was that of the respondent alone. However, it does not end here because core to the respondent's argument is that the parties acted under a material error of law and beyond their powers as trustees which renders the deed of settlement unenforceable. I now turn to consider whether clause 2.1 and 2.2.9 of the deed of settlement violates s 12 of the TPCA and clause 5.1.1.1, 5.1.1.2 and 7.7.1 of the trust deed.

[20] In *Badenhorst v Badenhorst*[9], the appellant sought that the court, in awarding a redistribution of assets order in terms of s 7 of the Divorce Act 70 of 1979 (the Divorce Act) considers the assets of an *inter vivos* trust in addition to the respondent's personal estate on the basis that the trust was the respondent's (trustee's) alter ego. The crisp question there arising was whether, when making a redistribution order in terms of s 7(3) of the Divorce Act, the assets of an *inter vivos* discretionary trust created during the marriage must be taken into account. The court held:

"[9] 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 account when making a redistribution order. A trust is administered and controlled by trustees, much as the affairs of a close corporation are controlled by its members and a company by its shareholders. 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*. A nominee of a sole shareholder may have *de iure* control of the affairs of the company but the *de facto* control rests with the shareholder. *De iure* control

[9] 2006 (2) SA 255 (SCA).

of a trust is in the hands of the trustees but very often the founder in business or family trusts appoints close relatives or friends who are either supine or do the bidding of their appointer. *De facto* the founder controls the trust. To determine whether a party has such control it is necessary to first have regard to the terms of the trust deed, and secondly to consider the evidence of how the affairs of the trust were conducted during the marriage."

[21] In *Badenhorst* the SCA concluded that the value of the trust assets should have been added to the value of the respondent's estate. It also referred to some decisions of the High Court where the question of whether the trust assets can be taken into account in redistribution orders had received attention and was answered affirmatively. In *WT And Others v KT,*[10] the SCA did not extend the principles laid down in *Badenhorst* to the division of joint estate in marriages concluded in community of property. It distinguished *Badenhorst* on the basis that the latter case related to the determination of a redistribution of assets in terms of s 7(3) of the Divorce Act for a marriage out of community of property. In its later decision in *REM v VM,* [11] the SCA said:

". . .A claim lies against the trust, or the errant trustee, on the basis that the unconscionable abuse of the trust form by the trustee, in his or her administration of the trust, through fraud, dishonesty or an improper purpose prejudices the enforcement of the obligation owed to the third party, or a spouse. The respondent had to prove that the appellant transferred personal assets to these trusts and dealt with them as if they were assets of these trusts with the fraudulent or dishonest purpose of avoiding his obligation to properly account to the respondent for the accrual of his estate and thereby evade payment of what was due to the respondent, in accordance with her accrual claim. If established, a declaration could be made that the trust assets in question are to be used to calculate the accrual of the appellant's estate, as well as satisfy any personal liability of the appellant to make payment to the respondent."

[10] 2015 (3) SA 574 (SCA)
[11] 2017 (3) SA 371 (SCA) para 20.

[22] With regard to s 12 of the TPCA, it was held in *REM v VM* (supra) that where the trust form is 'debased' justice dictates 'that the veneer of the trust be pierced in the interests of creditors' and by parity of reasoning, 'unconscionable abuse of the trust form through fraud, dishonesty or an improper purpose will justify looking behind the trust form'. The ambit of a claim of this nature must be considered with due cognisance of the provisions of the Trust Property Control Act 57 of 1988 including s 12.[12] This entails ignoring the trust's separate existence momentarily and for the limited purpose of providing an equitable remedy to the victim of trust abuse. More importantly, the Court's power to pierce the trust form is not based on the authority of the MPA or in the exercise of a statutory discretion, but on the basis that a factual enquiry has revealed trust-form abuse, upon which the piercing of the trust veneer follows.[13]

[23] What the above authorities illustrate is that clauses 2.1 and 2.2.9 of the deed of settlement cannot be said to be offending s 12 of the TPCA to the extent that they provide that the trust's assets be considered as part of the respondent's assets for the purposes of determining the accrual. Neither does the deed of settlement offends against clause 5.1.1.1, 5.1.1.2 and 7.7.1 of the trust deed. What must be established casuistically is whether the trustees acted in an unconscionable manner in handling the affairs of the trust in order for the Court to give an equitable remedy to the victim of trust abuse.

[24] In the main application the applicant barely touched on the subject that the respondent abused the trust form understandably because the nature of the application did not require that exposition. However, the allegation that the respondent abused the trust form surfaced slightly in the papers. In her answering affidavit in the counter-application the applicant states that the respondent treated the trust as his *alter ego* throughout their marriage contrary to

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[12] *Ibid* para 19.
[13] *PAF v SCF* 2022 (6) SA 162 (SCA) at para 36.

the provisions of the trust deed. In the Rule 43 application, attached to her answering affidavit, she intimated that the respondent did not involve her in any decision concerning the trust. To this end, she referenced some examples.

[25] The respondent countered that the allegation that he treated the trust as his alter ego was not averred in the Particulars of Claim and no finding in this regard had been made by Coetzee AJ when he dissolved the marriage between the parties and incorporating the deed of settlement to the decree of divorce. It was argued that Coetzee AJ therefore erred to the extent that he made the settlement agreement an order of the Court which provided that the trust's assets be considered for the purposes of determining his accrual. The respondent further maintained that the rule 43 application is not part of the pleadings but a discreet proceedings ancillary to and distinct from the main action and that the affidavits filed in that application are not normally read into the record in the main proceedings. He did not reply to the allegation contained in the rule 43 application because the matter became settled.

[26] In my view, it is not necessary to determine whether there had been in this case unconscionable abuse of the trust form. This is so because all the disputes between the parties were settled. On the respondent's own version "during the settlement negotiation", prior to the dissolution of the marriage, the applicant and her legal representatives for the first time demanded that the trust assets be deemed to be the assets in his estate for purposes of determining the accrual during the subsistence of the marriage "claiming" that the trust was the respondent's "*alter ego*". He then stated in para 18:

"At the time the animosity generated by the litigation which was dragging on forever and was then in its third year had exhausted me mentally and physically and I believe there was similarly an urgency on the part of the applicant to settle as she wanted to move on with her life and remarry and we settled on this basis- namely that the trust assets would be deemed to be part of my estate for the purposes of the determination of the accrual thereof during the subsistence of the marriage."

At para 19 he further states:

"This is captured in the Deed of Settlement which was made an order of Court as part of the order dissolving the marriage between myself and the applicant on 1 March 2019."

[27] This unequivocally shows that the parties have freely, voluntarily and in full knowledge of their rights agreed to settle the divorce on the basis, inter alia, that the trust's assets would be deemed to be part of the respondent estate for the purposes of the determination of the accrual. I have already determined that there was nothing unlawful in the parties reaching such a compromise, particularly in the context of some discussions between them suggestive that one of the trustees abused the trust form. The deed of settlement has a non-variation clause. As a matter of policy, such a clause should in principle be recognised as enforceable.[14]

[28] To borrow from Innes CJ in *Burger v Central South African Railways*[15]: "It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There are, of course, grounds upon which he may repudiate a document to which he had put his hand." No such grounds were established by the respondent, either on account of *justus error* or common mistake, or a patent error as contemplated in terms of Rule 42(1)*(b) and (c)*. It follows that the point taken must fail.

[29] The second point in limine is to the effect that there is no allegation in the Particulars of Claim that the trust's assets had to be considered for purposes of

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[14] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A).

[15] *Burger v Central South African Railways*, 1903 T.S. 571 at 578 approved in *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (SCA) at 470B – E.

determining the accrual in the parties' respective estates or that they be deemed to be part of the respondent's estate nor is there any reference in the pleadings to the trust or its assets or the ownership thereof. Put otherwise, it was argued that the applicant never prayed in her pleadings for the Court to pierce the trust form and order that the value of its assets be taken into account in the calculation of the accrual in his estate. Accordingly, so it was argued, no evidence was placed before Coetzee AJ to make such a determination and consequently the decree of divorce incorporating the deed of settlement was incompetent. It was argued that the deed of settlement, insofar as it travelled beyond the pleadings, is incompetent to be made an order of the court and ought not to have been incorporated into the decree of divorce.

[30] The second preliminary point ought not to be discussed at any great length as decisions of the Constitutional Court in *Eke v Parsons*[16] and that of the SCA in *Road Accident Fund v Taylor and related matters*[17] are dispositive of it. In *Taylor,*[18] the SCA held:

> "Importantly, however, the judgment [*Eke v Parsons*] makes clear. . . that the power to make a compromise an order of court is derived from a long-standing practice aimed at assisting the parties to give effect to their compromise. The clear import of *Eke v Parsons* therefore is that this power is not derived from the jurisdiction of the court over the issues that had been raised before it but were subsequently settled. In making a compromise an order of court, the court plainly does not determine the issues that the compromise settled. Unless a compromise is conditional upon it being made an order of court, the fact that a court declines to do so, in itself, has no effect on the enforceability of the compromise inter partes."

And further at para 51:

[16] 2016 (3) SA 37 (CC); (2015 (11) BCLR 1319; [2015] ZACC 30).
[17] 2023 (5) SA 147 (SCA).
[18] Ibid para 42.

> "To sum up, when the parties to litigation confirm that they have reached a compromise, *a court has no power or jurisdiction to embark upon an enquiry as to whether the compromise was justified on the merits of the matter or was validly concluded*. When a court is asked to make a settlement agreement an order of court, it has the power to do so. The exercise of this power essentially requires a determination of whether it would be appropriate to incorporate the terms of the compromise into an order of court." (My emphasis)

[31] The applicant stated that, during the settlement negotiation on 19 October 2018, her attorney notified the respondent's legal team that he held instructions to amend the Particulars of Claim by including an averment to the effect that the trust assets be considered as part of the respondent's assets for purposes of determining the accrual in his estate. To avoid further litigation and concomitant costs the divorce was settled. The respondent does not recall whether such discussion ever took place and persist that an amendment was never applied for. That the Particulars of Claim were silent with regard to the trust's assets is of no moment in light of the decision in *Taylor*. Accordingly, the point taken must falter.

[32] With regard to the third preliminary point, it was argued that the main application is premature because, in terms of clause 2.5 of the deed of settlement, the applicant was not entitled to bring the application to have the award made an order of the court until she had resigned as a trustee. It was contended that resignation as a trustee must comply with clause 7.3.1.1. of the trust deed which is to the effect that a written notice of resignation be forwarded to the board of trustees, which the applicant did not do. The applicant's resignation was in the form of an e-mail sent to her attorney who in turn sent a letter to the respondent's attorney pointing to her resignation. It was argued that to the extent that the e-mail was not addressed to the board nor signed by the applicant, the resignation is defective for lack of compliance with the requirement of the trust deed.

[33] The trust deed does not provide that a written resignation be signed albeit it would be preferable that it be signed. At no stage, following receipt of the resignation did the respondent protest that the resignation was invalid. It took the respondent almost two years to record his remonstrations when he filed his opposing papers to the main application. There is no allegation that the applicant took part in the administration of the trust following her resignation. Form cannot be allowed to trump substance. I am satisfied that the resignation conforms with the provisions of clause 7.3.1.1 of the deed of trust. The point taken is devoid of any merit.

[34] On the aforegoing analysis, the applicant made out a case for the Award by Mr Heyns to be made an order of this Court.

[35] Finally, with regard to his counter-application, the respondent similarly contended that clauses 2.1 and 2.2.9 of the deed of settlement and their incorporation into the decree of divorce constituted a patent error as contemplated in rule 42(1)*(b)* and a mistake common to the parties as envisaged in rule 42(1)*(c)* which would entitle this Court to vary the decree of divorce by excising the said offending clauses or part thereof from the deed of settlement and the calculations as contained in Mr Heyns's award which are based on them. The argument in the counter-application attracts similar reasoning as in the principal application. It follows that the counter-application must be dismissed. Costs shall follow the result in both applications. An order is therefore made.

Order:

1. The final award of Mr André Heyns, dated 30 July 2021, in respect of the determination of the accrual in the applicant and respondent's respective estates and attached to the applicant's founding affidavit as Annexure "C", is made an order of this Court.

2. The respondent is ordered to pay R3 311 897.00 to the applicant in respect of the applicant's accrual claim against the respondent in terms of the provisions of Chapter 1 of the Matrimonial Property Act 88 of 1984.

3. The respondent is to pay the cost of the main application on party and party High Court scale, which costs shall include the fees of a senior-junior counsel on scale B in terms of Rule 67A of the Uniform Rules of this Court.

4. The respondent's counter application is dismissed with costs, such costs to be on party and party High Court scale and shall include the fees of senior-junior counsel on scale B in terms of Rule 67A of the Uniform Rules of this Court.

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PHATSHOANE DJP

For the applicant:	Adv AS Sieberhagen
Instructed by:	PGMO Attorneys, Kimberley.
For the respondent:	Adv A Eillert
Instructed by:	Adrian B Horwitz & Associates, Kimberley.