

SOUTH AFRICA / JUDGMENT

## E.M.G.V v C.E.V and Others (KP121/2018) [2021] ZANWHC 65 (22 July 2021)

[2021] ZANWHC 65

COURT

North West High Court, Mafikeng

BEFORE

M Z Makoti

CASE / FILE NUMBER

KP121/2018

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

CASE NO: KP121/2018

In the matter of:

E[....] M[....] G[....] V[....]

Applicant

And

C[....] E[....]2 V[....]

First Respondent

THE SHERIFF OF THE HIGH COURT, KLDP

Second Respondent

RENETTE FABER

Third Respondent

COENRAAD FREDERICK KLAASENS

Fourth Respondent

DEON MARIUS BOTHA N.O

Fifth Respondent

GERT LOUWRENS STEYN DE WET N.O

Sixth Respondent

IN RE:

C[....] E[....]2 V[....]

Applicant

E[....] M[....] G[....] V[....]

First Respondent

V[....]'S DISTRIBUTORS CC

Second Respondent

## REASONS

MAKOTI AJ

## INTRODUCTION

[1] On 23 April 2021 the parties advanced their respective oral argument in this application. At the conclusion I granted an order in terms of which I dismissed the application with costs. I also made it known in my order that, should any of the parties require me to furnish reasons, I shall do so upon receipt of an application by such party. I am acutely aware that parties are legally entitled to be

provided by the court with the reasons for the orders that have been delivered.

[2] The applicant filed an application for leave to appeal my orders on 11 May 2021 and the matter was set down for hearing on 11 June 2021. On 02 June 2021, it having become apparent that the applicant was facing great difficulty in that he had not obtained reasons for my orders, he caused to be filed the notice requesting for the reasons. I became aware of this request for the reasons on 11 June 2021 when I attended court to hear the application and, logically, the application for leave to appeal could not proceed. It was then postponed to allow me to provide the reasons for my orders.

[3] I hereby provide my reasons for dismissing the application with costs against the applicant.

## NATURE OF APPLICATION

- [4] This application was brought stay and set aside the implementation of a writ of execution that was issued against property belonging to the applicant. The reason for issuing the writ appears to have been the applicant's failure or refusal to settle cost orders that were granted against him by the High Court under case numbers KPM121/2018. Aggrieved by the issuing of the writ of execution by the first respondent, the applicant instituted this application to prevent the intended execution against his property.
- [5] There is some acrimonious history to this matter in that the applicant and the first respondent, who were previously spouses married to each other in community of property, became hostile pugilists before courts of law. Their marital union came to an end during or about 18 March 2019 in proceeding before Regional Magistrate, HJ Boonzaaier. It is common cause that the divorce proceedings were finalised subject to a settlement agreement which provided for the appointment of a liquidator to help devolve their joint matrimonial estate. I shall deal with the role that was played by the liquidator at a later stage.
- [6] The writ of execution which the applicant wants set aside has its foundation in an order of the High Court (KPM121/2018), in which the Court set aside a deed of settlement that had been concluded between the parties, parts of which was incorporated as an order of the Court on 01 November 2018 ('the initial agreement') under High Court case numbers KPUM 27/2018. When setting aside the initial agreement, the Court awarded costs against the applicant which I shall also reflect on below.
- [7] It is worth mentioning at this point that the settlement agreement in terms of which a liquidator was appointed, and which was incorporated into the parties' divorce decree on 18 March 2019 was their second. I label it for convenience purposes as the second agreement, in terms of which attorney Ms Renette Farber ('Farber') was appointed to be the liquidator of the parties' joint matrimonial estate.
- [8] Through the liquidation processes led by Farber the parties were able to reach another settlement agreement on 31 October 2019, which I refer to as the final agreement. The matter before me concerned the appropriate interpretation of this agreement. The applicant contended that the settlement agreement settled all claims that existed between them, inclusive of the cost orders that were granted against him by the High Court on 31 May 2019. For obvious reasons, this application is vigorously opposed by the first respondent.
- [9] Apart from the applicant's contentions of the merits, he also raised a technical point relating to the first respondent's late filing of her answering affidavit. His argument was that the application should be entertained unopposed since the first respondent had filed her answering affidavit late, and had not applied for condonation for such late delivery. I deal with both questions below.

## THE MERITS OF THE APPLICATION

[10] As I have already indicated, this matter concerns the correct interpretation of a final settlement agreement that was concluded between the parties.[1] It is worth reiteration that in the applicant's view the settlement agreement settled all disputes which were at that point

existing between them. This, according to him, included all or any cost orders that had been granted against him and in favour of the first respondent.

[11] Due to the fact that it was completely set aside on 31 May 2019, the initial agreement[2] is of no consequence to the determination of this matter. However, the order that was granted by the High Court setting aside the initial agreement remains relevant as it was on its terms that the applicant was ordered to pay some of the costs of the case under KPM121/2018. The cost order became due and payable to the first upon taxation, or upon the parties reaching an agreement as to the amount. The first respondent attended to preparation of the bill of costs, which was served on the applicant prior to being subjected to taxation.

[12] That said, I find it apposite to record some of the important paragraphs of the court order that was granted on 31 May 2019, which read inter alia as follows:

*"4. That the costs relevant to paragraph 1 above be paid by the first respondent[3] on party and party scale. Such costs will not form party of the liabilities of the joint estate of the applicant as plaintiff and the first respondent as defendant, consequent to the divorce order;*

5. That all costs occasioned by the filing of further supplementary affidavit by the first respondent, opposition thereto and further heads of argument by the applicant, be paid by the first respondent on the exact terms of paragraph 4 above, which is hereby incorporated;" (Emphasis added)

[13] On my pondering, the applicant's Counsel could not proffer any plausible answer to counter the suggestion that these costs had nothing to do with the parties' joint matrimonial estate. Once the costs awarded were taxed and the applicant became obligated to pay them. When he failed to pay the costs the first respondent caused the impugned writ to be issued, to execute against his property. It is these cost orders that the applicant contends form part of the final settlement agreement that was concluded between them on 31 October 2019.

[14] It is important that the final settlement agreement was reached with the assistance of Farber, who was also appointed by agreement between the parties on 18 March 2019 as the receiver and liquidator of their joint estate. Her appointment was specifically for purposes of helping the parties to share their joint matrimonial property or estate. I placed emphasis on the fact that the joint estate did not include the cost orders mentioned above. The provisions of paragraph 4 of the second agreement are most telling as to the defined role of Farber, and it reads thus:

*"4. The parties place on record that by signing hereof they will have no further claims against each other in respect of the abovementioned case save for the High Court case with ... KPUM27/18."*

- [15] There can be no better conclusion other than that what was to become of the High Court case, quoted above, was to be excluded from the processes led by Farber. This should be read in conjunction with paragraph 1 of the same second agreement which also made it plain that Farber's role was to be 'liquidator of the joint estate', with powers that were conferred in Annexure A to that agreement. The terms of the said Annexure A do not take the matter further and I do not entertain them.
- [16] In support of the orders that he sought from this Court, the applicant placed reliance on the provisions of paragraphs 9 and 10 of the final settlement agreement for his proposition that the cost orders formed part of the joint estate. Paragraph 9 records that the agreement constitutes an entire agreement between the parties while paragraph 10 stipulates an intention to settle all claims existing between them. These paragraphs, according to the applicant, encompassed the cost orders against him.
- [17] There could be no gainsaying to the proposition that the final settlement agreement had to be considered in the context of the prevailing provisions of the second agreement, inclusive of paragraph 4 above, the preamble of which records the purpose as to settle disputes relating to the distribution of parties' joint matrimonial property. It is important, when interpreting the settlement agreement as a legal instrument, to also take into consideration the purpose set out in the preamble. This is because, as explained by the Court in *Novartis v Maphil*[4] words have to be used and interpreted in the context within which they were used. For proper understanding, the court held that:

*"[28] ... A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing."*

- [18] Our laws or principles of interpretation were shaped to a great deal by English law. Amongst the English authorities is the case of *Society of Lloyd's v Robinson*[5] in which some useful words were expressed as follows:

*"Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a*

commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language." (Emphasis added)

- [19] The approach adopted by the applicant is problematic and an unhelpful interpretation of paragraphs 9 and 10 of the second settlement. These paragraphs have to be interpreted within the context that the agreement was concluded to settle the devolution of the parties' joint matrimonial estate,[6] which, in terms of the court's order of 31 May 2019, specifically

excluded the costs that were awarded on that date. Such interpretation is consonant with what was held by Schreiner JA in *Jaga v Dönges* NO and another,[7] namely that from the outset one has to consider the context and the language together, with neither predominating over the other.

- [20] From context point of view, the interpretation which the applicant ascribes to the agreement cannot hold. It stands to be rejected, especially in light of the fact that the court excluded the costs that were awarded in favour of the first respondent on 31 May 2019 from the joint matrimonial estate of the parties. Moreover, Farber, the liquidator made it clear that she was dealing only with the joint estate of the parties, which excluded the costs that led to the issuing of the impugned writ of execution.
- [21] If anyone ever wondered what frivolous litigation looked like, this is a classic example. I find no logic in an attempt to stretch the ambit of the second settlement beyond what was intended. And what was intended was to devolve the assets and liabilities of the parties' joint estate. The contention that the parties intended to settle more than their joint estate is disingenuous and undermines the binding effect of an order of the court.

#### WHETHER APPLICATION SHOULD BE TREATED AS UNOPPOSED

- [22] In this regard the applicant contended that the first respondent, being the only one who filed a notice of opposition, failed to deliver her answering affidavit within the applicable time frames. The result of this, he contended, is that there is no answering affidavit before the court. This contention was fortified on the contention that the first respondent had failed to apply for condonation of the late delivery of the affidavit.
- [23] The first respondents' answering papers complained of were delivered on 17 March 2021, whereas the notice of motion which commenced the proceedings was issued on 29 October 2020. The first respondent received service of the application when it was served on her attorneys of record on 03 November 2020. The notice of opposition was filed on her behalf on 18 November 2020. Then, the applicant delivered his replying affidavit on 31 March 2021, raising inter alia that technical point that the answering affidavit was filed late and should be overlooked.
- [24] The applicant did not delve too long on the technical point, apart from the tersely worded paragraphs in which he contended that the answering affidavit should not be accepted without an application for condonation. Thus, he contended, the answering affidavit should be overlooked by the court. It is not important to decide this question as I have already indicated that the application was destined to fail even if I had found that the first respondent's answering affidavit was improperly before court.

#### ORDER

- [25] After listening to the submissions I granted the following order:
- [1] The application is dismissed.

[2] The applicant is to pay the costs of the application.

M. Z. MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

FOR APPLICANT:

ADV AJ LE GRANGE

THERON JORDAN & SMIT ATTORNEYS

C/O CJP OELOFSE ATTORNEYS

MAHIKENG

FOR RESPONDENT:

ADV M LOUW

CLAASEN VAN NIEKERK ATTORNEYS

C/O VAN ROOYEN TLHAPI WESSELS

## REASONS

REQUESTED: 06 JUNE 2021

## REASONS

DELIVERED: 22 JULY 2021

[1] Dated 31 October 2019.

[2] KPUM 27/2018, dated 01 November 2018.

[3] The applicant in this matter.

[4] Novartis v Maphil (20229/2014) [2015] ZASCA 111; 2016 (1) SA 518 (SCA);

[2015] 4 All SA 417 (SCA) (3 September 2015).

[5] [1999] 1 All ER (Comm) at 545, 551.

[6] See, second settlement agreement, paras 8.1 and 8.2.

[7] Jaga v Dönges NO & another, Bhana v Dönges NO & another 1950

(4) SA 653 (A) at 662G-663A.

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZANWHC/2021/65.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/emgy-v-cev-and-others-unknown-topic-anwhc-2021>

Prepared on 11 October 2026 · Esheria