

SOUTH AFRICA / JUDGMENT

M M v M M and Another (3019/2014) [2018] ZAFSHC 192 (6 December 2018)

[2018] ZAFSHC 192

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

3019/2014

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 3019/2014

In the matter between:

M M Plaintiff

and

M M 1st Respondent

SHERIFF BLOEMFONTEIN EAST 2nd Respondent

JUDGMENT BY: MHLAMBI J,

HEARD ON: 01 NOVEMBER 2018

DELIVERED ON: 06 DECEMBER 2018

MHLAMBI, J

- [1] The cardinal question to be decided in this matter is whether a deed of settlement which was incorporated in a final decree of divorce constitutes a court order which gives rise to the authorisation of a writ without further ado.
- [2] The applicant brought an application on 22 May 2018 in terms of which she sought relief in two parts: Part A and B. Part A was brought on a semi- urgent basis for interim relief in terms of which the sheriff of Bloemfontein East, the second respondent, was ordered to

suspend the selling in execution of the applicant's movable property which was attached and removed from her home by the sheriff on 04 May 2018 pursuant to a warrant of execution which was granted by the registrar of this court on 20 March 2018 under case number 3019/2014. Part A was struck from the roll on 24 May 2018 for lack of urgency.

- [3] Under Part B, the applicant sought an order setting aside, alternatively rescinding the warrant of execution granted by the

registrar of the above court on 20 March 2018 under case number 3019/2014 and directing and ordering the second respondent to rescind

the notice of attachment in execution dated 4 May 2018. The court is called upon to adjudicate only Part B of the Notice of Motion.

- [4] The parties were married to each other in community of property and the bonds of marriage were dissolved on 16 February 2016 when the court granted a decree of divorce which incorporated the deed of settlement. Clause 2.3 of the said deed of settlement stipulated that both parties would be liable for fifty per cent (50%) of the two children's tertiary education and or post-schooling training. On 20 March 2018, the first respondent caused a warrant of execution to be issued by the registrar under case number 3019/2014 for the payment to him by the applicant of the amount of R 16 152.50. This amount was set out in the accompanying affidavit. as payment that the applicant failed to pay to either the first respondent or to Motheo TVET College in respect of the tertiary education of the major son, KT M, for both registration and class fees for the years 2016, 2017 and 2018. The present application arose as a result of the execution steps taken against the applicant.

- [5] The grounds for the relief sought under Part B of the notice of motion are stated as follows:

5.1 The first respondent lacked the necessary locus standi to claim payment of the amount claimed and allegedly owed to him. He had not incurred the expense of the tuition fees claimed from the applicant as at the time the warrant of execution was issued. The amount sought to be recovered was owed to Motheo TVET College and not to him.

5.2 The warrant of execution was irregularly obtained as it did not comply with sub-Rule 45 (1) of the Uniform Rules of Court. No judgment was granted in favour of the first respondent which authorised the issuing of such writ. The amount sought to be recovered was neither a liquidated amount of money nor a liquidated debt. The writ was therefore ill-gotten as the settlement agreement was enforced in a manner that precluded the applicant from exercising his right to be heard.

5.3 On a proper construction of clause 2.3 of the settlement agreement, the applicant's liability under clause 2.3 of the agreement had not arisen at the time legal steps were initiated against her. The tuition provided to the child at Motheo TVET College at the relevant time did not qualify as "tertiary education" or "post school training". The child was enrolled at Motheo TVET College in the year he was supposed to have been in grade 11. He failed grade 10 and the first respondent decided unilaterally to enrol him at the college. The applicant never gave consent for such a step

nor did he support the decision by the first respondent in that regard. The tuition provided to the child prior to his passing grade 12 did not qualify as either “tertiary education” or “post school training”. The applicant was therefore not liable for payment of 50% of the cost of the child’s schooling as claimed.

[6] The first respondent stated in his opposition that the grounds on which the applicant sought to rescind the warrant of execution was not sustainable both in law and fact. The applicant overlooked the fact that the relevant deed of settlement was made an order of court. When parties agreed to ask the court to give judgment on the issues raised by the action in accordance with the terms of a settlement agreement, the advantage is that the court retains a jurisdiction over the matter in the sense that it has the inherent power or authority to ensure compliance with its own orders[1]. This enables the parties, in the event of a failure by any one of them to honour the terms of the order, to turn directly to the court that made the order and to seek the enforcement thereof without the necessity of commencing a new action[2].

[7] The implementation of the order was not left to the discretion of either of the parties as the order was capable of ready enforcement

without the need to resort to further litigation. It was not the applicant’s case that she had made payment of her half share of the child’s tuition fees. To the contrary, she asserted that she was not obligated to do so as the son’s course of study did not constitute tertiary education. The applicant’s non-compliance with the court order led to the tuition fees falling into arrears. Consequently, the first respondent signed an acknowledgement of debt and made payment arrangements to avoid the child from being kicked out of college on 15 January 2008[3].

The Parties’ submissions

[8] The applicant submitted that the settlement agreement which was made an order of the court, was not a judgment granted in favour of the first respondent as envisaged in sub-Rule 45 (1) and that the proper cause for enforcing the agreement required further proceedings by the first respondent on notice to the applicant. The warrant of execution failed in material respects to comply with Form 18 of the First Schedule. It was further submitted that if the judgment was one *ad pecuniam solvendam*, namely, one in which the court ordered the debtor to pay a sum of money, it was appropriate to seek its enforcement by way of a warrant of execution[4]. Clause 2.3 of the deed of settlement did not constitute a judgment *ad pecuniam solvendam* and was clearly distinguishable from the so-called “expenses clause” contained in maintenance orders which are subject to the condition that the amount must be easily ascertainable and is ascertained in an affidavit filed on behalf of the judgment creditor[5]. The applicant, in substantiation of its submissions in this regard, relied on a passage in *Butchard v Butchard*[6] (this decision, as will be shown below, though relevant to the present circumstances, does not bolster or assist the applicant’s case. On the contrary, it is fatal to her case).

- [9] It was contended on behalf of the first respondent that the applicant's failure to comply with clause 2.3 of the deed of settlement galvanised the first respondent to issue a writ in the amount of R 16 152.50 in line with the decision of *Ex Parte Le Grange*[7]. The obligation, in clause 2.3 of the deed of settlement imposed on the applicant and the first respondent, was indisputably one *ad pecuniam solvendam*. The first respondent did precisely what was proposed in *Butchard v Butchard*[8] as he quantified the expenses in an affidavit.

Discussion

- [10] In *Eke vs Parsons*[9], it was held that once a settlement agreement had been made an order of court, it was like any other order and to be interpreted as such. As far as enforcement went, this could be by execution, contempt proceedings, or in some other manner that the order permitted. A settlement order brought finality to litigation; gave rise to *res judicata*; was enforceable like any other order; and that the manner of its enforcement depended on the nature of the order itself[10]. In paragraph 57 of the judgment, the court expressed itself as follows:

"It is the inherent power sitting in s 173 which enables superior courts to convert settlement agreements of litigants into court orders. As stated in the main judgment, such orders have a status equal to every court order and have legal force equivalent to that of other orders of court. This means that the High Court was wrong to hold in cases like Thutha and Tasima that there is a class of court orders, based on settlement agreements, which are not enforceable as court orders and are regarded as nothing more than a recordal of the parties' agreement."

- [11] In *Le Grange*[11], Van Zyl ADJP, writing for the full bench, expressed himself as follows[12]:

"A further issue which the court by law is required to determine and regulate is the interest of the minor or dependent children of the marriage. Our law, as it is now reflected in the constitution, the Children's Act and the Divorce Act prescribes that the child's best interests must determine the outcome when the court has to make an order regarding a child. In terms of section 6 of the Divorce Act the court may not grant a decree of divorce until it is "satisfied" that the arrangements that have been made with regard to the welfare of the children of the parties are satisfactory or the best that can be achieved in the circumstances. The factors to be considered in this regard are reflected in section 7 of the Children's Act. Once the court is so satisfied it may make any order it deems fit with regard with the guardianship, custody, access and maintenance of the children.....Should the court sanction the terms of the settlement and incorporate it into its order it represents a decision of the court made on the evidence placed before it".

- [12] The court must be satisfied that the parties to the agreement have freely and voluntarily concluded the agreement and that they are *ad idem* with regard to the terms thereof. The order must be a competent and a proper one to make in the circumstances. The order must relate

directly or indirectly, to an issue or *lis* between parties that is properly before the court and in respect whereof, but for the

settlement agreement, it would possess the necessary jurisdiction to entertain. Secondly, the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view of being included in a court order.[13]

[13] In the light of the above, there is no justification whatsoever why the court should accede to the applicant's prayers as set out in the notice of motion. I agree with the submissions made relating to and the reliance on *Buchard vs Bucthard* in that there is no reason in principle or practice why a judgment for payment for a category of expenses which can be quantified without difficulty should not be able to sustain a writ, if the accrual and the amount of expenses, on the basis on which liability therefor is established in a judgment, are proved, for example by an affidavit of the judgment creditor. The applicants' liability for payment of the tertiary or after school expenses is clearly established in clause 2.3 of the deed of settlement. The rest of the arguments raised by the applicant are not on point and without substance. This application must therefore fail.

[14] In the result, costs should follow the event.

[15] I therefor make the following order:

Order:

The application is dismissed with costs.

Counsel for the Applicant: Adv. A Lechwano

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: Bloemfontein

Counsel for Respondents: Adv. W Van Aswegen

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[1] Para 16:1st respondent's opposing affidavit; Ex Parte Le Grange and another 2013(6) SA 28 (ECG) para 9

[2] Para 17: Opposing affidavit; Ex Parte Le Grange, supra

[3] Para 22: Opposing affidavit

[4] Paragraph 4.17 of the applicant's heads of arguments

[5] Para 4.21 4.22: Applicant's heads of argument

[6] 1996 (2) SA 581 (W) at 587 paras G-I

[7] Ex Parte Le Grange, supra, at paragraph 10

[8] supra

[9] 2016 (3) SA 37 (CC) para 29

[10] Eke, supra, paras 31 and 53

[11] supra

[12] Paragraph 12, 13 and 15 of the judgment

[13] Le Grange, supra para 15

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