

SOUTH AFRICA / JUDGMENT

Mphahlele v Mphahlele and Another (A3089/07) [2008] ZAGPHC 333 (24 October 2008) [2008] ZAGPHC 333

COURT

High Courts - Gauteng

BEFORE

FHD Van Oosten, MM Joffe, HK Saldulker

CASE / FILE NUMBER

A3089/07

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO A3089/07

In the matter between

RAMATSIMELA MARIA MPHAHLELE APPELLANT

and

JAMES PAPI M MPHAHLELE FIRST RESPONDENT

SHERIFF OF THE HIGH COURT

(GERMISTON NORTH) SECOND RESPONDENT

J U D G M E N T

VAN OOSTEN J

[1] This appeal turns on the interpretation of clause 4.1.6 of an agreement of settlement (the agreement) entered into between the appellant and the first

respondent (the respondent). The appellant and the respondent were formerly married. Their marriage was dissolved on 25 May 2005 and the agreement was made an order of court.

- [2] In broad terms the agreement awarded the custody of the two minor children born of the marriage to the appellant, the respondent was ordered to pay maintenance for both the minor children at the rate of R 2 500-00 per month per child with effect from 1 June 2005, and the joint estate was to be divided in equal shares on the basis of each party being entitled to 50% of the net assets of the joint estate.
- [4] One of the assets in the joint estate was the former matrimonial home of the parties. It is situated at 2 Fox Street, Edenglen, Edenvale (the property). The property was registered in the name of the respondent, who as the mortgagee was responsible for payment of the monthly mortgage instalments. The agreement contains a number of specific provisions relating to the property. Clause 4.1.1 of the agreement conferred upon the appellant the first option of buying the respondent's right, title and interest in the immovable property. The option was valid for a period of 60 days from the date of divorce and a further period of 30 days was allowed for the appellant to make provision for suitable payment to the respondent. In the event of the appellant's failure to acquire the property the right was given to the respondent to buy the appellant's right, title and interest in the property on the same terms and conditions.
- [5] Clause 4 contains a number of provisions catering for the situation that would arise in the event of the appellant exercising the option and acquiring the property. The relevant sub-clauses are the following:
- 4.1.2 Should the Defendant (appellant) elect to acquire the immovable property, the value of the Plaintiff's (respondent's) 50% interest in the aforesaid immovable property shall be credited to the Plaintiff and subtracted from the Defendant's 50% interest in the joint estate of the estate of the parties.
- 4.1.3 The Defendant will assume liability for payment of the full amount due to the bond holder and will apply to have the mortgage bond transferred into her name, in the event of her acquiring the immovable property.
- 4.1.4 ...
- 4.1.5...
- 4.1.6 In the event of the Defendant acquiring the immovable property, the Plaintiff shall continue to pay the existing bond instalment until such time as the immovable property is transferred into the name of the Defendant and the maintenance payments referred to in paragraph 2 above, shall be correspondingly reduced by that amount for that period; In the event of the Defendant not electing to purchase the immovable property referred to above, the bond instalment referred to herein shall be reimbursed by the plaintiff to the defendant.(my underlining: the underlined portion appears in manuscript in the agreement).
- [6] It is common cause that the respondent and the minor children continued to live in the property after the divorce. The appellant

duly exercised the option to acquire the property. She was however unable to raise the necessary funds and therefore did not acquire the property. The respondent however continued to pay the bond instalments and the resultant reduced maintenance in terms of clause

4.6.1 of the agreement. The appellant eventually vacated the property whereafter it was sold by public auction as part of the division of the joint estate.

[7] On 21 November 2006, the appellant caused two writs of execution to be issued against the respondent. One of the writs related to a maintenance order which the appellant had obtained pendent lite the divorce action (the first writ). The other was issued to recover the difference between the reduced maintenance paid by the respondent and the full amount of maintenance payable by him after the decree of divorce had been granted (the second writ). Upon execution of the writs the respondent launched an urgent application to set aside both writs. The appellant opposed the application and it eventually came up for hearing before Makhanya J. During argument in the court a quo it was conceded by counsel for the appellant that the first writ was erroneously issued and that it ought to be set aside. On the second writ the learned Judge decided in favour of the respondent and granted the relief sought. It is against this order that the present appeal lies with leave of the Supreme Court of Appeal.

[8] The respondent's contention which was upheld by the court a quo was that the appellant's election to acquire the property, notwithstanding that she did not in fact acquire it, was sufficient

to bring the parties within the ambit of the first part of clause 4.1.6 with the result that his continued payments of the bond

instalments after the appellant's election, in effect correspondingly reduced his maintenance obligation from R2 500-00 to

R1 000-00 per month per child. The appellant on the other hand contended that as she had not acquired the property the respondent

was not entitled to reduce the maintenance by the amount of the bond instalments.

[9] The intention of the parties must be determined from the language which they used against the background of the agreement as a whole. Had the appellant not been given the right to acquire the property the respondent would have remained liable to pay firstly, the bond instalments and secondly, the full maintenance payments in respect of the children. The provisions quoted above provide for a different scenario which is when the appellant acquired the property. The appellant's election to acquire was nothing more than a step in the process of eventually obtaining registration of transfer of the property into her name. For the first part of clause 4.1.6 to become operative the parties in my view clearly intended the determinative fact to be the appellant's acquisition of the property. It would simply make no sense to impose the provisions of the clause on the parties if merely the option had been exercised. The appellant did not acquire the property and the first part of clause 4.1.6

therefore did not come into operation. The respondent accordingly remained liable for payment of the bond repayments as well as the maintenance for the children as provided for in the agreement. The second writ was accordingly lawfully issued and it follows that the appeal must succeed.

[10] In the result the following order is made:

10.1 The appeal is upheld with costs.

10.2 Paragraphs 2, 3, and 5 of the order of the court a quo are set aside and substituted with the following order:

“Prayers 3 and 4 of the Notice of Motion are dismissed with costs.”

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

I agree.

MM JOFFE

HK SALDULKER

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DATE OF HEARING 8 SEPTEMBER 2008

DATE OF JUDGMENT 24 OCTOBER 2008

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Prepared on 14 October 2026 · Esheria