

SOUTH AFRICA / JUDGMENT

N v N (21694/2010) [2011] ZAGPJHC 247 (9 December 2011)

[2011] ZAGPJHC 247**COURT**

South Gauteng High Court, Johannesburg

BEFORE

EF Dippenaar

CASE / FILE NUMBER

21694/2010

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Policy**IN****THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG****(REPUBLIC****OF SOUTH AFRICA)****CASE****NUMBER: 21694/2010****DATE:**

09 DECEMBER 2011

In

the matter between

[J.....]

[N.....].....Plaintiff

And

[F.....]

[V.....]

[N.....].....Defendant

JUDGMENT

EF Dippenaar AJ

- [1] This is an action in which the Plaintiff sues her former spouse, the Defendant, for payment of 50% of the value of the former matrimonial home “the immovable property” in an amount of R400 000.00, together with interest and costs.
- [2] At the inception of the hearing, the Plaintiff indicated that she was persisting only with a claim for 50% of the proceeds of the immovable property, which had subsequently been sold to a third party.
- [3] This claim arises pursuant to a Divorce Order granted by the Central Divorce Court on 10 October 2001, in terms of which the parties’ marriage was dissolved and it was ordered that the joint estate be divided. It is common cause that the parties had previously been married in community of property and the aforesaid Divorce Order has never been altered.

COMMON CAUSE FACTS

- [4] It was common cause between the parties that they had previously been married in community of property and that the marriage was terminated by Order of the Central Divorce Court on 7 October 2001. The Order contained a provision that the parties’ joint estate be divided.
- [5] On or about 15 July 2002, an application was launched by the Defendant for the appointment of a receiver and liquidator to divide the joint estate. At Court, negotiations commenced between the parties regarding the division of the joint estate.
- [6] The parties’ evidence diverges as to the nature and outcome of these negotiations. The Plaintiff contends that no agreement was reached regarding the immovable property although the parties had agreed on the division of their movable assets; whereas the Defendant contends that the negotiations ultimately resulted in a written settlement agreement being concluded which forms the subject matter of the trial.
- [7] Pursuant to the signature of the settlement agreements, the Defendant instructed conveyancers to transfer the entire property into his name during or about March 2007.
- [8] It is common cause that the Defendant thereafter sold the immovable property for an amount of R550 000.00. Plaintiff’s counsel at the commencement of the trial informed me that the Plaintiff was only claiming 50% of such proceeds, being an amount of R275 000.00.
- [9] The relevant clause in the written settlement agreement provides as follows:

“1. DISSOLUTION OF THE ESTATE

1.1 That F..... N..... is to take ownership and possession of the matrimonial home described as Stand No.1 7..... P..... C..... Street, C....., S....., hereinafter referred to as “the matrimonial home”.

1.2 F..... N..... will attend, arrange with the bond holder and for a change of the bond into his name.

1.3 F..... N..... will assume all the responsibilities, obligations and benefits of ownership of the house.

1.4 All house hold contents up to and including cutlery, bedding, furnisher (sic) and all the contents of the house will be sole property of J..... N..... and the said items will be removed from the matrimonial home.

1.5 Further to 1.1. and 1.2 supra J..... N..... will vacate the matrimonial home.”

THE PLAINTIFF’S EVIDENCE

[10] Three witnesses testified on behalf of the Plaintiff, being: the Plaintiff; a representative from the offices of the Registrar of Deeds; and a handwriting expert, Mr Landman.

[11] The attorney who had represented the Plaintiff at the time, Mr L F Mnguni, has in the interim passed away and could not be called as a witness.

[12] The Plaintiff testified that she has been employed by Edgars for the past twelve years and was not unemployed for certain periods as testified by the Defendant in cross-examination. It was also never put to the Plaintiff in cross- examination that she was unemployed for certain periods of time.

[13] During July 2002 at the hearing of the receivership application, she had agreed with the Defendant to vacate the former matrimonial home as she could not afford to pay the bond. The Plaintiff was emphatic that she did not verbally or otherwise agree to transfer her share in the immovable property to the Defendant.

[14] The Plaintiff testified that the parties agreed to divide their movable property, which was divided equally. She denied that she took all the movable property and testified that the Defendant retained a music centre, a portion of the cutlery, a lawnmower and a toolbox. The Defendant denied receiving most of these items.

[15] No improvements were effected to the property whilst the Plaintiff lived there. She was unaware of any improvements done after she vacated the property.

[16] The Plaintiff had subsequently sought assistance from various different legal representatives to obtain her share of the immovable property. Her previous attorneys declined to assist her after being furnished with the so called settlement agreement. Her current attorney of record, Mr Dudula, however enlisted the assistance of a handwriting expert who after investigation concluded that the Plaintiff's signature had indeed been forged on the settlement agreement, resulting in the present action being instituted during 2010.

[17] The Defendant had in his cross-examination of the Plaintiff relied on a letter dated 12 August 2002 emanating from the Plaintiff's erstwhile attorney, Mr Mnguni, contending that the letter confirmed the settlement agreement contended for by the Defendant.

[18] The relevant portion of the letter provides the following:

"We advise that we have confirmed the following with your ex husband's attorney:

1 that you will vacate the common home on the date to be agreed upon by all the parties.

2 that all movable goods in possession of your ex husband which formed part of the joint estate will be returned to you;

3 that this agreement will and (sic) binding upon all parties."

[19] If this letter is read in context, it does not in its terms confirm that the Defendant would obtain Plaintiff's half share in the immovable property or that the Plaintiff agreed to thus transfer her share in the property to the Defendant. The letter is entirely silent on this point and does not support a finding on the probabilities that the issues surrounding a division of the

immovable property had been resolved between the parties. The letter in its terms, does accordingly not support the version of the Defendant, but rather supports the version of the Plaintiff.

[20] The Plaintiff testified that during the period 2002 to 2003 when the settlement agreement was allegedly signed, she used the name J.... N..... exclusively. Thereafter she reverted to her maiden name and used the surname Tshabalala when she obtained a new identity document in that name. When utilising the name J..... N....., the Plaintiff generally used capital letters. When on the odd occasion she used small letters, she still utilised a capital "J" and "N".

[21] The Plaintiff was emphatic throughout cross-examination that she did not conclude any agreement regarding the division of the immovable property with the Defendant and that she did not sign the settlement agreement.

[22] At the time the correspondence between Messrs Mnguni and Nkosi took place, the Plaintiff did not see the letter or the settlement agreement. She saw the letter for the first time during 2006, when one of her subsequent attorneys showed it to her. She could not explain the contents of the letter, nor the impression it created.

- [23] The Plaintiff conceded under cross-examination that she has different signatures in the name of N.... and T..... and that she sometimes uses capital letters and on other occasions small letters. She explained that she had subsequent to the divorce reverted to her maiden name and obtained an identity document in that name.
- [24] The Plaintiff testified that when the arrangements were made for her to vacate the immovable property, it was agreed that the Defendant would put up the house for sale after he had paid off the outstanding bond. She had not been notified of any subsequent sale of the property by the Defendant, but found out about it by chance years later. Since that time she has been attempting to prove her rightful share.
- [25] The evidence of Mr Landman was that he was an expert in the field of document examination with some 35 years experience. He noted 17 points of divergence between the Plaintiff's normal N..... signature and the signature which appears on the settlement agreement. His ultimate conclusion was that the settlement agreement allegedly signed by the Plaintiff on 17 October 2002 contained a simulated forgery and was not signed by the Plaintiff.
- [26] Mr Landman made no concessions throughout his evidence that he may have made a mistake or that the disputed signature could be that of the Plaintiff.
- [27] In the expert summary and report filed on his behalf, Mr Landman had invited a second opinion from a competent and credible expert. The Defendant did not however enlist the services of such an expert and no expert was called to testify on his behalf.
- [28] The representative from the offices of the Registrar of Deeds, Mr Mukhakhululi's evidence was that the property had originally been purchased for R76 000.00. It had been represented in the documentation submitted to those offices during March 2007 that the immovable property had been awarded to the Defendant pursuant to a Court Order of the Central Divorce Court. This was not true. One of the documents which had been submitted to the offices of the Registrar of Deeds was the settlement agreement here in dispute.
- [29] Absent the documentation and representations made to the Registrar of Deeds, the Defendant would not have been able to have the property transferred into his name only and would not have been able to sell the property to a third party without the co-operation of the Plaintiff.
- [30] The Defendant testified, as did his attorney, Mr Nkosi, who had represented him throughout the divorce proceedings and in the current matter.
- [31] Mr Nkosi testified that at the hearing date of the receivership application during July 2002 and at the Central Divorce Court he and Mr Mnguni, in consultation with the parties, their respective clients, orally agreed that the parties' joint estate would be divided on the basis that the Plaintiff retain all the movable assets and the Defendant retain the immovable property as their respective exclusive property. Mr Nkosi further testified that the attorneys

agreed that Mr Nkosi would prepare a written settlement agreement which would be forwarded to Mr Mnguni for signature.

- [32] Mr Nkosi duly drafted the settlement agreement in the terms agreed and sent it to Plaintiff's attorney for amendments, if any. He testified further that Mr Mnguni contacted him telephonically and advised that the agreement was in order.
- [33] The Defendant signed the settlement agreement at Mr Nkosi's offices whereafter Mr Nkosi personally took it to Mr Mnguni's offices for signature by the Plaintiff. He left the agreement and a covering letter dated 3 October 2002.
- [34] Mr Nkosi later collected a signed version of the settlement agreement together with a covering letter, duly signed by the Plaintiff. The letter is dated 29 January 2003. Mr Nkosi was never advised that the signature was not that of the Plaintiff.
- [35] The settlement agreement was never made an Order of Court as he did not think it was necessary to do so as the agreement was binding between the parties. He did not consider whether the terms of the settlement agreement were at variance with the Court Order.
- [36] Mr Nkosi had not witnessed the settlement agreement being signed by the Plaintiff, but believed that it belonged to the Plaintiff.
- [37] This belief that the settlement agreement was signed by the Plaintiff, together with the letter of Mr Mnguni to the Plaintiff referred to above, is the high-water mark of the Defendant's case and there was no direct evidence led that the Plaintiff did indeed sign the settlement agreement.
- [38] Mr Nkosi testified that he had not been involved in the drafting of the documents which were sent to the Registrar of Deeds which enabled the Plaintiff's half share in the immovable property to be transferred to the Defendant during March 2007 and could not comment on this issue. He had represented the Defendant from 2002.
- [39] According to Mr Nkosi, the settlement agreement had been signed by the Defendant on 17 October 2002. According to his further evidence he had thereafter taken the signed settlement agreement to Mr Mnguni's offices accompanied by a covering letter. The said accompanying letter is however dated 3 October 2002. On Mr Nkosi's version, he received the settlement agreement, now signed by the Plaintiff back, accompanied by a letter from Mr Mnguni some time thereafter. This letter is dated 29 January 2003.
- [40] Mr Nkosi had drafted and signed the Defendant's Plea in which it is alleged that the originally signed settlement agreement was received from the Plaintiff's attorneys during 2002. This was repeated in the responses to the Plaintiff's pre-trial questions.
- [41] These contradictions were in my view never satisfactorily explained.

- [42] The Defendant testified that he is presently employed as a prison warden where he attends to preparing the duty roster. He has been thus employed for some 20 years. He has a grade 12 qualification and has passed a prison administration course. The Defendant is accordingly an educated man, well capable of reading and understanding the documents here in issue.
- [43] Regarding the negotiations with the Plaintiff during July 2002 at the Central Divorce Court, he did not support the evidence of Mr Nkosi as to how the negotiations were conducted and testified that he and the Plaintiff had personally negotiated with each other and not via the attorneys, as had been testified by Mr Nkosi.
- [44] He testified that the Plaintiff thereafter vacated the former common home and took all the movable assets with her, other than the stove, for which she returned later, although it had been built-in. On advice of Mr Nkosi, the Defendant assisted the Plaintiff in disconnecting and removing the stove. The Plaintiff disputed that it was a built-in stove.
- [45] Regarding the signature of the settlement agreement, the versions of the Defendant and Mr Nkosi were also not consistent. The Defendant testified that he had been called to Mr Nkosi's office to sign the settlement agreement after it had been signed by the Plaintiff. He saw her signature on the document. This evidence, together with the inconsistencies in Mr Nkosi's evidence, casts further doubt on the veracity of the Defendant's version.
- [46] The Defendant estimated the value of movable goods taken by the Plaintiff at between R50 000.00 and R60 000.00. There was however no specific evidence led on this issue to verify this estimate.
- [47] Subsequent to the Plaintiff vacating the said property, the Defendant obtained a further bond on the property and effected certain improvements thereto, being a new bedroom and dining room and an extension to the lounge. The property was eventually sold for R550 000.00. The Defendant received R140 000.00 as net proceeds from the sale, after settlement of the outstanding bond.
- [48] The Defendant denied personally forging the Plaintiff's signature on the settlement agreement. He reiterated that when he was called in by Mr Nkosi to sign the settlement agreement, it had already been signed by the Plaintiff. This is in stark contrast to the version proffered by Mr Nkosi.
- [49] The Defendant confirmed that he had signed the documents which had been sent to the offices of the Registrar of Deeds in order to effect transfer of the Plaintiff's half share in the immovable property into his name.
- [50] In the application in terms of section 45bis(1) of the Deeds Registries Act, 47 of 1937, as amended, the Defendant deposed to an affidavit dated 6 March 2007 in which he, inter alia, states under oath: "I was married in community of property to Julia Ngcobo.....but the marriage was dissolved by divorce in terms of an order of the High Court of South Africa , Johannesburg dated 10 October 2001, under case number..... in terms whereof the share in

the said property of my former spouse was awarded to me. I am entitled to one-half share in the said property by virtue of the marriage in community of property and to one-half share in terms of the court order as aforesaid". One of the documents provided to the Registrar of Deeds in support of the application was the settlement agreement containing the Plaintiff's signature which, it is common cause, was never made an Order of Court.

- [51] The contents of this affidavit were in various respects false. It must be accepted that the Defendant read the affidavit before signing it, although he protested to the contrary. He had furnished the conveyancers, who had drafted the documents, with instructions. He testified that he did not remember reading the documents. This evidence is unconvincing and no explanation is tendered by the Defendant for the false information provided under oath in order to obtain the transfer of the Plaintiff's half share in the immovable property to him.
- [52] The Defendant testified that as the Plaintiff had not worked throughout the marriage, he paid the bond on the immovable property. This issue had not been raised with the Plaintiff during cross-examination. The Plaintiff had testified that she had been working throughout the marriage.
- [53] The Defendant could not positively testify as to whether the settlement agreement had been signed by the Plaintiff, but simply testified he did not think it was forged.
- [54] He testified that the report of Mr Landman, dealing with the forgery of the Plaintiff's signature on the settlement agreement, had never been discussed with him. This appears improbable as the issue of the forgery of that signature is central to the matter. His version was also in other respects contradictory and unsatisfactory.

THE ISSUES AND EVALUATION OF EVIDENCE

- [55] The issues centre around whether a signature which appears on a deed of settlement which was concluded after the parties' divorce had been granted and the aforesaid division Order had been made is that of the Plaintiff.
- [56] The Defendant contends that it must also be determined that if the signature is forged, who forged it.
- [57] The versions of the Plaintiff and Defendant are irreconcilable in material respects and are mutually destructive.
- [58] It is common cause between the parties that the Plaintiff bears the onus.
- [59] The technique generally adopted by Courts in resolving factual disputes when dealing with two irreconcilable versions is set out in *SWF Group Limited and Another v Martell ET CIE and Others*[1], wherein the following relevant applicable principles are stated:
 - [59.1] Findings must be made on:

[59.1.1] the credibility of the various factual witnesses which depends on a Court's impression about the veracity of the witnesses;

[59.1.2] their reliability; and

[59.1.3] the probabilities.

[59.2] In regard to the credibility of a witness, a number of factors must be taken into consideration: (i) the witness' candour and demeanour in the witness-box, (ii) his latent and blatant bias, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with the established facts or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

[59.3] A witness' reliability will depend, in addition to the aforesaid factors mentioned in paragraph 59.1 (ii), (iv) and (v) above, on: (i) the opportunity he had to experience the event in question, (ii) the quality, integrity and independence of his recall of the event.

[59.4] Having regard to the probabilities, this necessitates an analysis and evaluation on the probability or improbability of each party's version on each of the disputed

issues.

[59.5] In light of its assessment of the factors in 59.2 to 59.4 above, a Court should then, as a final step, determine whether the party burdened with the onus of proof, has succeeded in discharging it.

[59.6] When a Court's credibility findings compel it in one direction and its evaluation of the general probabilities compels it in another direction, the more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities will prevail.

[60] I have carefully weighed up all the evidence in light of the above principles.

[61] The Plaintiff contends that the evidence led on behalf of the Defendant was unsatisfactory, improbable and contradictory.

[62] The Defendant contends that the Plaintiff's evidence was not truthful, specifically in relation to the number of different signatures which she uses.

[63] The evidence which the Plaintiff gave was consistent, despite rigorous cross-examination and she remained emphatic that she had not signed the settlement agreement, nor has she agreed to the terms contained therein in terms of which she was to retain the movable property in the former matrimonial home and the Defendant was to retain the immovable property itself.

- [64] She readily conceded that she retained most of the movable property although there is a dispute between her and the Defendant regarding certain items. It is not necessary to comment further on the movable property as there is no claim before me relating to any such items.
- [65] The Plaintiff's evidence that she did not sign the settlement agreement is the only direct evidence on this issue, and neither the Defendant nor Mr Nkosi could tender any positive evidence to the contrary. The circumstantial evidence in my view supports the probabilities in the Plaintiff's favour.
- [66] I accept the Plaintiff's evidence as being credible, consistent, reliable and probable.
- [67] The handwriting expert, Mr Landman, impressed me as a witness, both in respect of the detailed and thorough examination he had conducted in determining whether the Plaintiff had signed the settlement agreement and in the way he responded to the cross-examination of the Defendant who confronted him with examples of writing he had no time beforehand to study.
- [68] When confronted with the signature which the Plaintiff had adopted after her divorce and when she reverted to her maiden name of Tshabalala, Mr Landman was able to identify corresponding characteristics in the Plaintiff's signatures with proper motivation and without resorting to speculation.
- [69] The conclusion reached by Mr Landman was that the signature appearing above the Plaintiff's name on the settlement agreement, was a simulated forgery of the Plaintiff's signature. This was not refuted by the Defendant.
- [70] The evidence tendered by Mr Mukhakhululi of the Registrar of Deeds was not disputed and I accept this evidence as reliable and credible.
- [71] The evidence of the Defendant and Mr Nkosi were contradictory in various fundamental respects relating, inter alia, to the settlement negotiations and the timing and circumstances relating to the Defendant's signature of the written settlement agreement.
- [72] In addition, neither the version of Mr Nkosi nor that of the Defendant accords with the inherent probabilities of when the Defendant signed the agreement, having regard to the available dates as they emanated from the correspondence. It would be resorting to speculation to estimate when the Defendant actually appended his signature to the agreement, and I shall refrain from resorting thereto.
- [73] I was not impressed by the veracity or reliability of the evidence of either the Defendant or Mr Nkosi. I am of the view that I cannot safely rely on either of their evidence in light of the glaring inconsistencies and improbabilities contained in their respective versions and in light of the Defendant's blatant misrepresentations to the offices of the Registrar of Deeds.

- [74] From the evidence as a whole, it is not possible to determine the identity of the individual responsible for appending the forged signature of the Plaintiff to the settlement agreement and it would be speculative to attempt to do so.
- [75] The Defendant contends that the Plaintiff was obliged to prove who forged her signature on the settlement agreement in order to be successful in this action. I do not agree. In my view, in order for the Plaintiff to be successful, it is only necessary to prove on a balance of probabilities that she did not sign the settlement agreement. If no settlement agreement was concluded, the matter must be determined on the basis of the Order of the Central Divorce Court. It is common cause that the proceeds of the immovable property have not been divided between the parties.
- [76] There is no cogent evidence to contradict the evidence of the Plaintiff that she did not sign the settlement agreement. Similarly, the evidence of Mr Landman that the signature on the settlement agreement is a simulated forgery of the Plaintiff's signature, stands uncontroverted. Even if I had found the Defendant or Mr Nkosi's evidence to be credible, they cannot add or detract from this evidence.
- [77] On the probabilities, it is further uncontroverted that the information provided to the Registrar of Deeds by and on behalf of the Defendant was misleading and induced it to allow the transfer of the Plaintiff's half share in the immovable property to the Defendant. If the true facts had been disclosed, this would not have occurred. The original Court Order of the Central Divorce Court remained unaltered that the joint estate should be divided. Absent a valid settlement agreement and an amendment of the aforesaid Court Order, that was at all times the true position.
- [78] It is undisputed that, had the signature not been forged, if indeed it was, the Registrar of Deeds would not have permitted the transfer of the immovable property, either to the Defendant or thereafter to the purchaser thereof who had purchased the immovable property from the Defendant in due course. The evidence of Mr Mukhakhululi on this issue was not disputed.
- [79] I accordingly find on the probabilities that the Plaintiff did not agree to the terms contained in the settlement agreement and did not sign the settlement agreement.
- [80] It follows that the Plaintiff is entitled to her half share in the immovable property as that part of the joint estate which has not yet been divided. No basis has been pleaded or evidence led that the division should not be equal.
- [81] The question now rises how the amount should be calculated. It is common cause that the property was originally purchased for R76 000.00, which was financed by a financial institution and was secured by way of a mortgage bond in its favour. After the Plaintiff vacated the immovable property and after the Central Divorce Court Order was granted, the Defendant effected certain improvements to the property which were financed and secured by way of a further mortgage bond. The property was ultimately sold for R550 000.00 and the

Defendant received net proceeds of R140 000.00, after settlement of the outstanding amount secured by the mortgage bonds. It was further common cause that at the time the section 45bis(1) transfer of the Plaintiff's half share to the Defendant occurred, a clearance certificate was issued for further expenses in an amount of R15 000.00.

[82] In my view, these expenses and the original mortgage bond at the time of the aforesaid transfer should be taken into account in determining the amount which is to be awarded to the Plaintiff.

[83] I have been invited by the Plaintiff to grant a punitive costs order on the scale as between attorney and client against the Defendant in the circumstances in light of the apparent dishonesty which has taken place. Although the facts and probabilities as they emerge are disturbing, I am not on the evidence before me and on the inherent probabilities able to make an accurate determination of the identity of the party responsible for the dishonesty without resorting to some speculation and after careful consideration I am not persuaded to grant such an order.

[84] I accordingly make the following Order:

[84.1] Judgment is granted in favour of the Plaintiff in an amount of R229 500.00.

[84.2] The Defendant is directed to pay interest on the amount in 84.1 above at the rate of 15.5% per annum a tempore morae from date of service of the summons to date of payment.

[84.3] The Defendant is directed to pay the costs of suit, including the costs relating to the report, qualification, reservation and trial fees of the Plaintiff's expert witness, Mr Landman, on the scale as between party and party.

E F DIPPENAAR

ACTING JUDGE OF THE HIGH COURT

Date of hearing :14, 15 and 16 September 2011

Date of judgemen: 9 December 2011

For Plaintiff :Adv SL Ress

:Dudula Incorporated

For Defendant :Adv L Dikolomela

: TS Nkosi Attorneys

[1] 2003

(1) SA 11 SCA at paragraph [5]; See also Dreyer & Another NNO v AXZS Industries (Pty) Ltd, 2006 (5) SA 548 (SCA) at 558 paragraph 30; National Employers General Insurance Co Ltd v Jagers, 1984 (4) SA 437E.

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