

SOUTH AFRICA / JUDGMENT

R.T.W (born H) v G.J.W (2666/2016)

[2016] ZAECHGC 73 (8 September 2016)

[2016] ZAECHGC 73**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

M.J Lowe

CASE / FILE NUMBER

2666/2016

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE DIVISION, GRAHAMSTOWN****CASE****NO: 2666/2016****DATE:****8 SEPTEMBER****In****the matter between:****R****T W (born****H).....Applicant/Plaintiff****And****G****J****W.....Respondent/Defendant**

JUDGMENT

LOWE, J

Date heard: 25 August 2016

Date delivered: 08 September 2016

Introduction:

- [1] In this matter Applicant as Plaintiff instituted action for a decree of divorce in the Regional Court.
- [2] On 5 November 2013 a decree of divorce was issued incorporating the terms of an agreement of settlement between the parties (“the agreement”), concluded prior to the time of the granting of the decree. In summary that agreement dealt with: custody of the three minor children, granting same to Plaintiff; set out Defendant’s obligations to pay maintenance for the children (this included a sum of money, school and related expenses and medical expenses and tertiary education); it provided for maintenance for Plaintiff in a stipulated sum until death or remarriage, and finally set out the division of the assets between the parties on an agreed basis, providing further that Defendant pay the legal costs and that neither party would have any further claims of any nature against the other. A farm “Stormfontein” was to be transferred from Defendant to Plaintiff, as provided in the agreement.
- [3] In due course in June 2015 and in the High Court, Plaintiff issued a further proceeding seeking: relief in a claim founded upon a tacit term that gave rise to an agreement to pay rental by Defendant to Plaintiff; a claim for payment of salary for the period of the marriage in a globular sum; a claim for the cost of providing meals to Defendant’s manager and the use of her light delivery vehicle and a claim for payment of money lent to Defendant.
- [4] Defendant pleaded to these claims and filed a counterclaim. Thereafter Plaintiff indicated by way of a Notice to Amend her particulars of claim that she wished to introduce an entirely new claim (five), founded upon allegations that Defendant (Respondent herein) had fraudulently misrepresented that he was the entire owner of the farm transferred to Plaintiff (S) in the agreement, which in fact he was not, being only a half share owner, this dramatically affecting the financial value of the settlement to the detriment of Plaintiff.
- [5] The relief sought in the Notice to Amend was premised upon the fact that as a consequence of the alleged misrepresentation, Plaintiff was entitled to set aside the proprietary clauses (clause 7, 8 and 10) in the agreement and was further entitled to a recalculation of the accrual in terms of Act 88 of 1984. She claimed relief in the form of an accrual sharing on the basis that her estate showed a lesser accrual than that of Defendant. In order to effect this

she seeks the setting aside of the proprietary clauses in the agreement, as referred to above, and an order compelling Defendant to account to Plaintiff as to the value of his estate at the date of the divorce with a debatement thereof and a subsequent order for payment of the sum found to be due in terms of the accrual sharing calculation.

- [6] The Notice of Objection to this amendment is short and takes only one point which is that the relief claimed is not “competent, in delict or contract, in that the only competent relief in law is to set aside the whole of the settlement agreement.”
- [7] Counsel for both parties followed their heads of argument, which they persisted in.
- [8] My task is to determine whether there is any merit in the Notice of Objection, the crux of which is that the particulars of such amendment would render the new intended claim five excipiable. This, as I have said, is the sole basis of the objection, construed as set out above. *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153 SE 1157 E-G
- [9] It is trite that the primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd and Others* 2008(2) SA 156 (D) at 158D.
- [10] An amendment will be allowed, unless the circumstances are such that this would cause an injustice to the other side which cannot be compensated for by a costs order, and if necessary, a postponement. It is also correct that generally an amendment will not be allowed if it renders a pleading excipiable.
- [11] Further, our courts have recognized that in many cases it may be convenient to incorporate fresh causes of action in original proceedings. This will be allowed unless prejudice is occasioned thereby, there being no objection in principle to a new cause of action or defence being added by way of amendment even though it may affect the character of the action, if that is necessary to determine the real issues between the parties.
- [12] It is clear in our law that an agreement, even in such circumstances as this, granted by consent in terms of an agreement of settlement is one from which a party may in appropriate circumstances resile on account of the other party’s fraud. Whether the fact that the agreement has been made an order of court affects the position I need not decide, as this is not the objection made, which is limited to the fact that this is a claim in contract (or delict) and that the only competent relief is to set aside the whole of the agreement.
- [13] I find the objection as it is worded difficult to understand of itself and somewhat obtuse.
- [14] Even if it were necessary for me to rule on the fact as to whether the agreement having been made an order of Court had a nugatory effect on the right to resile, this seems to me to be answered against Respondent, see the remarks in *Gollach and Gomperts* 1967 (Pty) Ltd v *Mills and Produce Company (Pty) Limited* 1978 (1) SA 914 (A) at 922 B-F.

- [15] It seems to me, that this matter whilst somewhat different from the case mentioned above, has no impact on the fundamental proposition that an agreement, even if made an order of Court, induced by fraud during the course of proceedings at least, may be set aside by the Court, upon this being proved, simply on the basis that the Court would not have made the order in its present form had the truth be known.
- [16] In *Brookstein v Brookstein* [2016] ZASCA 40 March 2016, the Court assumed, in my view correctly, that a claim based in fraud which resulted in the conclusion of a matrimonial deed of settlement on divorce, gave rise to a claim to delictual damages based on fraudulent misrepresentation. The Court of Appeal referred to the fact that the non-disclosure made in that matter was deliberate and was intended to induce Respondent into agreeing to the accrued value of Appellant's estate that was materially undervalued. The Tribunal's decision, which was being considered, had been satisfied that all the other elements of a delictual damages claim for pure economic loss had been established

such as to award Respondent damages, being the difference between the true value of the accrual and the amount she agreed to in terms of the settlement agreement. The court in referring to the legal consequences of a settlement agreement being made an order of Court, approved the statement in *Eke v Parsons* 2015 (11) BCLR 1319 (CC) par 31: that the effect of a settlement agreement being made an order of court "is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature

of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata. It changed the terms of the settlement agreement to an enforceable court order...". In *Brookstein* it was held that after the order is granted there is no longer any matrimonial cause to speak of. There was also nothing incidental to such cause as all of the matrimonial issues were disposed of when the Court granted the order incorporating the settlement agreement.

Consequently there cannot be any issue (said the court) still outstanding relating to the marriage. The Court pointed out that the marriage and all its natural consequences ended and anything relating thereto such as proprietary consequences became res judicata.

- [17] The Court held, accordingly, that the delictual claim (based on the fraudulent misrepresentation inducing the conclusion of the agreement of settlement) cannot be said to be incidental to any matrimonial cause. The Court went on to say that the failure to disclose the true value of the accrual arose in the context of the accrual regime which existed between the parties, and that it was accordingly unavoidable that the pleadings and the tribunal would refer to the accrual system and the Matrimonial Property Act (as is the case here).
- [18] This, however, said the court did not detract from the true cause of action that was rooted in delict.

- [19] It seems to me, that relevant to the objection which is made to the amendment, the above is dispositive thereof. There can be no doubt that the cause of action in this matter has been pleaded in contract, and cannot in any circumstances impact on the granting of the decree of divorce or those paragraphs of the agreement of settlement relating to the children, their maintenance as aforesaid or maintenance for Plaintiff. The same applies to the proprietary claims.
- [20] Inevitably the claim is one in delict (or contract) for damages, and this impacts on several of the terms of the agreement of settlement, which whilst standing in the face of the relief sought in such an action, give the basis for claim in damages in either contract or delict.
- [21] Whether in fact the manner in which the relief sought has been claimed is perfectly correct, is open to question in the light of the above, but this is not, it seems to me, fundamental to the question as to whether the claim is excipiable on the basis of the objection.
- [22] Generally fraud must be pleaded clearly and distinctively as in this matter.
- [23] In contract generally if fraud led to the conclusion of a contract, cancellation may be claimed. See: *North West Provincial Government v Tswaing Consulting CC*
- [2007] 2 ALL SA 365 (SCA)
- [24] One may of course keep the contract alive and claim damages. See: *Feinstein v Niggli* [1981] 2 SA 684 (A).
- [25] The innocent party may proceed in delict or contract – the measure of damages differing in each. See: *Hunt v Van der Westhuizen* [1999] 4 ALL SA 533 (C).
- [26] As I have said, in this matter the new intended claim is brought in contract as it has been pleaded – that is an attempt at a claim setting aside certain of the contractual terms and a reversion to a fresh accrual calculation based on fraud.
- [27] The pleading is certainly capable of refinement in the light of *Brookstein* and should probably be amended somewhat and couched in a claim for either contractual or delictual damages alone, at Plaintiff's election. However on the basis of the objection that the only claim is to set aside the "whole of the settlement agreement" the objection is simply incorrect.
- [28] The agreement brought finality to the lis, and the matrimonial cause and matters incidental thereto are disposed of. That the accrual system will be referred to in the claim is inevitable but the true claim (for damages) is rooted in delict or contract.
- [29] I do not, in the circumstances, find merit in the objection on the basis advanced.
- [30] In the circumstances, I propose to allow the amendment sought.

- [31] This brings me to the question of costs.
- [32] Costs occasioned by an amendment have been held to include the costs of such opposition as is in the circumstances reasonable, and not vexatious or frivolous.
- [33] In other cases unsuccessful opposition did not result in the costs occasioned by the opposition being included, and an unsuccessful objector has been ordered to pay the cost of opposition even though not unreasonable. Erasmus D1-345 stresses however that in deciding whether the party to whom an indulgence is granted is to pay the cost of the opposition, the recognition of a single criterion for liability, such as the reasonableness of the opposition, tends to fetter the discretion

which the court has. The exercise of that discretion is essentially a matter of fairness to both sides. Reasonableness though, as the criteria of opposition when an indulgence is sought, need not necessarily be the only criteria. In the result each case depends on its own facts.

- [34] Applicant seeks an indulgence, though based on alleged fraud. As I have suggested, the opposition to the notice to amend was misguided in the terms in which it was raised. The question is whether the objection is reasonably and responsibly taken.
- [35] In my view, that opposition, somewhat vague as to its basis, might well be said to have been a vain attempt to avoid having to deal with the issues raised, claiming the pleading to be excipiable – as opposed to arguable deficiencies in how it has been pleaded.
- [36] In the exercise of my discretion I have decided, on consideration of the relevant issues, to order that Applicant pay Respondent's costs of the application on an unopposed basis, whilst the costs occasioned by the opposition, must be borne as to each party paying their own costs in this regard.
- [37] In the result the following order issues:
1. Applicant, as Plaintiff, is given leave to amend her particulars of claim in accordance with the Notice of Intention to Amend, dated 30 May 2016 in accordance with paragraph 1 of the Notice of Motion;
 2. Applicant is to pay Respondent's costs occasioned by the Notice of Intention to Amend on an unopposed basis;
 3. Both Applicant and Respondent are each to pay their own costs relevant to the opposition to the application to amend.

M.J LOWE

JUDGE OF THE HIGH COURT

Obo the Applicant: Adv. S.H Cole

Instructed by: Wheeldon Rushmere & Cole

119 High Street

Grahamstown

(Ref: Mr Brody)

Obo the Respondent: Adv. D.H De La Harpe

Instructed by: Whitesides

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(Ref: Mr G Barrow/mk/C11449)

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