

**CASE NO.: (P) I 1823/2008**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**R A**

**APPLICANT**

and

**M A**

**REPOUDENT**

**CORAM: MULLER, J.**

Heard on: 04 October 2010

Delivered on: 29 October 2010

**JUDGMENT**

**MULLER, J.:** [1] The parties entered into an settlement agreement which was made an order of court on 26 November 2007 when the marriage between them was dissolved.

[2] On 26 May 2009 the Applicant, who was the Defendant in the divorce action, approached this court by way of notice of motion and claimed the following relief:

*"1. The Respondents is compelled to forthwith abide and comply with the Settlement Agreement which was made a order of the above Honourable Court on 26 November 2007 within 10 days from date of the order of the above Honourable Court, failing which, Applicant is authorised to amplify her papers, if necessary, for an order*

*declaring Respondent to be in contempt of the Court order, and to ask such appropriate relief as may be necessary to enforce the (settlement agreement) Order of this Honourable Court;*

*2. Cost of suit, only in the event that Respondent opposes this application;*

*3. Further or alternative relief<sup>n</sup>.*

The relief claimed was supported by an affidavit deposed to by the Applicant and certain documents were annexed thereto, including the settlement agreement, the order of court and other documents.

[3] The Respondent opposed the application and filed an answering affidavit in which he provided certain background facts whereafter he dealt with the allegations made by the applicant. The Respondent also attached an affidavit by Ms Mandevhu, the estate agent who sold the particular house that is the subject matter on which the Applicant mainly bases this application.

[4] The Applicant replied to the Respondent's affidavit and dealt with his allegations, as well as that of the estate agent, Ms Mandevhu.

[5] Three issues were dealt with by the parties to the settlement agreement, namely the issues regarding property, custody and control of the minor children born of the marriage and maintenance of the minor children. Although the property issue is the main bone of the contention, it is evident that the custody and control issue, in particular the right of the children to live with a particular parent, as well as maintenance have to be collectively considered, and not property issue in isolation.

[6] It is now necessary to refer to what the settlement agreement has to say in respect of these three issues. Custody and control has been awarded jointly to both parents, ie the Applicant and Defendant, subject to certain conditions regarding where they will stay, how the children will spend weekends, school holidays, as well as access of the parties to them.

Some of these conditions are not really relevant, but it is important to note that the joint custody and control of the minor children has been made subject thereto that they live with their mother, the Applicant, during the week and go to their father during weekends.

The settlement agreement also made the Plaintiff liable to pay maintenance in respect of the minor children in the amount of N\$1000.00 per month per child from 01 October 2007.

The relevant provisions regarding the property issue in the deed of settlement are the following:

*"2. The house in which the parties are currently residing be sold, which sale is not to be at a loss, and the proceeds to be utilized for a deposit for a more affordable house being a house not exceeding a purchase consideration of N\$800 000.00 (Eight Hundred Thousand Namibian Dollars)*

*3. Plaintiff will contribute his housing subsidy i.e. N\$5 600.00 (Five Thousand Six Hundred Namibian Dollars) per month towards the instalments on such alternative house.*

*4. The house be acquired is to be registered into the names of the minor children jointly but for the Defendant to retain a life long usufruct in respect of such house".*

[7] The Applicant was represented in this Court by Ms Nambinga, who made submissions based on her heads of arguments filed on behalf of the Applicant and Ms van der Merwe, who similarly submitted the heads of arguments which she amplified with oral submissions.

[8] Both Counsel agreed that the documents before the Court do not represent the full story of the situation regarding the current situation of the two children. The divorce order was already granted at the end of 2007, but the application to compel the Respondent to comply with that order, which incorporated the settlement agreement, was only brought in May 2009, nearly one and half years later. To compound the matter, it is now another one year and four months later. The importance of that is that the minor children, namely the two sons who were 15 and 17 at the time when the application was launched, as I understand it, are now approximately 17 and 19 years old. Both are nearly majors. Furthermore, although the papers are silent on this issue, counsel agree that I can accept it that the two minor

children are currently living with their father who is now the Namibian ambassador to the United States of America (USA) and all three are living there. From the Respondents' answering affidavit it appears that the parties and the two minor sons there also lived in the USA from 1996 to 2006 before they returned to Namibia. That means that the two minor sons were apparently at school there for a large part of their school careers.

[9] The Applicant's submissions are based thereon that the Respondent not only failed to comply with the provisions regarding the property issue, but also that the Respondent forcefully removed the two minor children from her custody and fails or refuses to pay maintenance in respect of them. According to the Applicant, the Respondent signed the settlement agreement, which he is bound to comply with and that he cannot escape his obligations in respect of the court order which incorporated the settlement agreement. On that basis the Applicant claims that the Respondent should be compelled by this court to comply with the settlement agreement as incorporated in the court order and failing to do that within 10 days, that she be allowed to approach the court in the same papers, duly amplified, for an order declaring the Respondent to be in contempt of court with further appropriate relief. On the other hand, the Respondent denies that the children were forcefully removed by him and alleges that they stay with him because they requested the Respondent to live with him for various reasons, which he complied with in their interest. As a result of the fact that they now live with him, he submits that he does not have to pay maintenance in respect of them, although the Applicant still remains responsible for certain contributions in respect of their clothes, etc in terms of the settlement agreement, which he alleges she did not comply with. With regard to the property issue, it is the Respondent's case, as I understand it, that he is not responsible to comply with the property arrangement as formulated in the settlement agreement whilst the children are now living with him. It is also submitted on the Respondent's behalf that the order that the Applicant seeks to be enforced is too vague to be implemented and enforced. I shall deal with the separate provisions with regard to the property issue later herein. Ms van der Merwe also advanced certain submissions in respect of the validity of the contract entered into between the parties. In the light of my decision as set out hereafter, it is not necessary to consider that

argument.

[10] I have briefly referred to the lack of information in the papers regarding the current situation and what occurred since the application was launched. There is also a lack of information in the papers regarding several other issues. While this Court, as upper guardian of minor children is concerned about the interest of the two minor children, the papers contain very scarce information regarding those two boys. I have already mentioned that they are apparently now of an age where they can probably decide for themselves on many issues. The papers do not contain any information in respect of their schooling, religious upbringing, the care that they received while they lived with the Applicant and the care that they are now receiving while living with the Respondent. Nothing is also said about their removal from this court's jurisdiction to that of the USA. The Applicant is significantly silent in respect of the fact that the children spent approximately 10 years in the USA and that it is probable that they may prefer to live there. Even in regard to the property-issue and the *usufrutus* which the applicant alleges she has now lost due to the non-compliance of the court order by the Respondent, the information she provides is very limited, although references to that issue is made in the correspondence attached to the application. As will become clearer hereinafter, the issue regarding the minor children has also not been properly dealt with in the papers. The effect of the agreement in this regard by the parties has certainly not been duly considered when it was entered into.

### **Custody and control of the two minor children**

[11] In my opinion the proper starting point to approach this whole matter is the custody arrangement which was made an order of court. Under the heading of custody and control, it is stipulated in the settlement agreement that the Plaintiff and Defendant are awarded joint custody and control of the minor children. That award of joint custody is made subject thereto that the minor children live with the Defendant during the week and spend a day of every weekend with the Plaintiff, alternatively every second weekend. I find this provision incomprehensible. Does it mean that if the children do not live during a week with the Defendant that the parties do not have joint custody? As it stands, the joint custody is

"subject to" their stay with the Defendant during the week and that they spend weekends with the Respondent. That is certainly not what the parties contemplated. The use of the words "subject to" seem to be misplaced. What is clear, however, is that guardianship of the father, namely the Respondent was never an issue and no change in that respect was ever agreed upon. In our law the father of minor children remains their guardian and only in exceptional circumstances will such guardianship be taken away from him by the court. (*Walters v Walters* 1949(3) SA 906 (O)). This was obviously not done in this case. Custody is only one incident of guardianship. If no order is made in respect for guardianship, the father is left with the guardianship of the child, minus custody if the mother is awarded custody. (*Hahlo-Husband and Wife*, third edition, p456. This edition deals with the legal situation as it still exists in Namibia).

[12] Normally, custody of minor children is awarded after all circumstances are taken into account, namely after determining what is likely to be best for the child. Such circumstances involve the child's sex, age and health; his/her educational and religious needs; the social and financial position of its parents; the character of the parents; his or her temperament and past behaviour towards the child. (*Hahlo, supra* at 453). Furthermore, where the child has reached the age of discretion, his or her personal preferences has also to be taken into consideration and the court will consider which of the spouses will provide the best care, not only for the physical well being of the child, but also for his or her moral, cultural and religious development. (*Hahlo, supra*, at 454 and the cases quoted therein).

[13] Without going into detail, it is necessary to have a closer look at what the term custody and control entails. It namely the care and control of the minor's person. In short it means that the custodian parent has control over the minor's daily life and can decide all issues regarding the minor's education, training, religious upbringing, where the child might go or visit and with whom he or she might associate. (*Hahlo, supra*, at 456). Furthermore, it includes the duty to provide adequate accommodation, food, clothing and medical services to the child. (*Law of South Africa (LAWSA)*, Vol 16, par 160 at 189). The custodian parent has possession of the minor child. (*LAWSA, supra*, par 161 at 190).

[14] Joint custody of minor children has sometimes been awarded in South Africa, because it has been regarded in the exercise of the courts discretion to be in the best interest of such children. (*Kastan v Kastan* 1985(3) SA 235(C) at 236D) However, joint custody has been refused in other cases. (*Heimann v Heimann* 1948(4) SA 926(W); (*Edwards v Edwards* 1960(2) SA 523(D) at 524G). In *Edwards, supra*, Jansen J) expressly stated the following at 524 in respect of shared or joint custody of minor children:

*"It is plain that an agreement of this nature should not be made an order of Court. In this regard I refer to the case of Heimann v Heimann, 1948(4) SA 926 (T), where Murray, J., refused to make a similar agreement in respect of custody, an order of Court. It seems to me a legal impossibility that the legal custody of a child could be shared equally between two individuals. The legal custody involves the privilege and responsibility of taking certain decisions in regard to, for example, the education of the child. It would seem that such a decision should appertain to a single individual. If the responsibility is shared between two individuals there is the continuing possibility of a deadlock arising over every triviality. Essentially, it would seem that an agreement in regard to the custody of the child after divorce cannot affect the legal custody as determined by common law and not otherwise arranged by the Court".*

[15] The issue of joint custody has been frowned upon by our courts to say the least. With reference to several decisions which were also relied on, the author *Hahlo* stated the following at 462:

*"As a child must know where its stands, the courts are loath to allow responsibility to be divided or to put the non-custodian spouse in a position where he can dispute or undermine the authority of the custodian parent. Accordingly, they will generally refuse accept an agreement under which the spouses agree to share custody or a young child is to spend alternate periods of approximately equal length with each parent. 'It is most undesirable that a child of tender years should be subject to these constant changes.'"*

[16] In our law malicious discretion must still be proved where adultery is not an issue. I find

it difficult to comprehend that parties who demonstrate such animosity against each other that they cannot live together, and often fight each other in an opposed divorce litigation, can be a position to decide jointly on issues involving the interest of minor children. It is the duty of the court as an upper guardian of the minor children to be vigilant in this regard. To award joint custody to both parents of minor children is to retain the position that they were in while the marriage still existed and the parents lived together. That cannot be the situation after the marriage broke up because of malicious desertion or even adultery of one of the parties. One of them has to have custody and control of the minor children. The only possible instance that I can see where joint custody might work, is where the minor children are old and mature enough to decide for themselves and the parents have a mature and responsible relationship to be able to take responsible decisions in the interest of the minor children. Such situation would in my opinion be very rare. This matter supports that opinion. Only in exceptional circumstances, based on evidence, should joint custody of a minor be granted.

[17] However, an order incorporating the settlement agreement and in particular the issue of joint custody and control has been made in this case. Although it is difficult, for the reasons, set out before, to enforce such an arrangement, and having regard to the circumstances to be taken into consideration with regard to custody, as set out above, it has to be determined what a practical effect of such joint custody and control would be in this situation. It seems to me that having joint custody, the Applicant cannot decide on issues regarding the minor children on her own. The father also has to agree, because he has the same rights as she has. Furthermore, he remains the guardian of the minor children. Against this background the further issues have to be considered.

[18] It is evident from the papers that the two minor children are living with their father and not anymore with their mother. Although she has the right of access to them, the arrangement with regard to where they would live during the week and where they will go during weekends are not relevant anymore. Taking the ages and sex of the minor children into account, which are apparently not in dispute, it appears that they at least have reached



the age of discretion, as the author *Hahlo, supra*, puts it. That means that they are able to take decisions on their own. Unfortunately the papers are silent on what really happened; whether they are still in school and in what grade; whether they are studying or self-supporting and what their current living conditions are. The only indication, except that they are apparently living with their father, seems to be found in the correspondence, namely that they do not want to live with their mother anymore, and in particular not in the house that she has bought. Against this the Applicant alleges that they were forcefully removed by the Respondent, an issue which is in dispute and cannot resolved on the papers.

[19] Although the affidavits are silent in respect of the current situation of the Respondent and the two minors, it does not seem that there is any objection from the Applicant's side that they should be in the USA. If that was the position it would have been expected that she would have applied to have further affidavits dealing with the current situation be accepted by the court. She did not and her legal representative clearly had no instructions in this regard. The only reasonable inference to be drawn, is that she has no objection in that regard. This attitude also seems plausible and sensible, because the Respondent has the same custodial rights as she has in respect of the two minors, coupled with their current ages and that they spent the larger part of their school-going years in the USA.

[20] The provision in respect of custody and control of the minor children in the settlement agreement cannot be interpreted as the Applicant proposes it should be and in my opinion is not enforceable against the Respondent.

### **Maintenance**

[21] With regard to maintenance the Respondent excuses himself from this obligation in the settlement agreement on ground that the two minor children are now living with him and he supports them. Maintenance in respect of minor children is of course a burden that rests on both spouses according to their respective means. In the settlement agreement the ages of

the two minor children has not been fixed in respect of the time that the obligation to pay maintenance would last. Normally an order in respect of maintenance becomes inoperative as soon as a minor becomes self-supporting or becomes a major. I have already alluded to the lack of particularity in this respect in the papers before me. The Respondent obviously took it upon himself to maintain the two minors, who are now living with him. Also in this regard, the order that the Applicant seeks, is unenforceable.

### **Property provisions**

[22] The paramount consideration of the Applicant in bringing this application is obviously the property-issue. The Applicant's allegations in this regard seems to be a misinterpretation of the property provisions quoted earlier herein. It also appears to me that the main complaint of the Applicant is that she will now lose her right in respect of a life long *usufrutus* in respect of the new house that has to be bought from the proceeds of the sale of the house that they were living in when they entered into the settlement agreement and which house has to be registered jointly in the names of the minor children. It is important therefore to analyse the particular provisions under the heading "*Property*" in the deed of settlement.

[23] All the other provisions regarding the property-issue depends on the provision that the house in which the parties were living when they entered into the settlement agreement, is sold, and that sale should not be at a loss so that the proceeds derived from that sale can be utilised as a deposit to purchase another house of which the purchase price should not exceed N\$800 000.00. Although it is not stipulated who will be responsible to sell the house, the parties apparently were *ad idem* that the Respondent will have that responsibility. Furthermore, the house must not to be sold at a loss. It is not stipulated that it should be sold at a profit. The '*proceeds*' of such sale has to be utilised to purchase a more affordable house. The word '*proceeds*' is to be understood in law to be '*profit*'. (*Claasen-Dictionary of Legal Words and Phases*, Volume 3, P-108). In *Estate Khan v B Ebrahim Israil and Co* 1930 NPD 316 the court held that "*proceeds*" means "*net proceeds*". My understanding of this provision is that if sale does not yield any proceeds or profit, there would not be any money

to be used for a deposit on another house. What is also not stipulated in this provision is when such more affordable house has to be purchased. Even if the sale of the existing house would be profitable, there is no obligation when another house has to be purchased, except that it would obviously have to be within a reasonable time. However, without any profit from that sale, this consideration is irrelevant.

[24] The next paragraph regarding the issue of property in the settlement agreement provides that the Respondent will make a contribution towards the instalments in respect of the new more affordable house that the parties envisaged will be bought. Although not stipulated, instalments apparently mean bond instalments. The first issue that clearly arises from this provision is that the Respondent's contribution is stipulated as his housing subsidy. It is not clear whether the Respondent will be entitled to housing subsidy if he does not have a house yet, but he will apparently receive a housing subsidy once a house is bought. The other inference that may be drawn from the wording of that paragraph is that he would not be only one to make a contribution to the instalments, but the Applicant also. If there is a profit from the sale of the previous house it has to be utilised as a deposit on the new house, but in respect of the monthly instalments, it appears that the Respondent is limited to his housing subsidy and the rest of the instalments has to be paid by somebody else. The settlement agreement is silent in this regard, but it can only be the Applicant that will be responsible for the balance of the monthly instalments.

[25] The last provision in respect of the property issue is also incomprehensible. It makes provision for the registration of the new house in the names of the minor children. Of course that is again subject thereto that the first provision is feasible, namely to sell the house at a profit. Whether there can be implementation of the previous provision of the contribution of the Respondent's housing subsidy in respect of a house not registered into his name, but in the name of someone else, in this case the minor children, remains an open question. However, the papers are silent on this issue and I shall not give it further attention. What is incomprehensible is the remainder of that provision, namely the retention of a life long *usufrutus* in favour of the Applicant. Reading of that sentence does not make any sense to

me. The remainder of the sentence reads:

..."**but** for the Defendant to retain a life long usufrutus in respect of such a house." (My emphasis).

The word "*but*" makes it impossible to understand what the parties really meant when inserting these words into this paragraph. It appears that the parties might have had two separate issues in mind, namely in whose name(s) the new house should be registered and lifelong *usufrutus* for the Applicant. However, if it was designed to mean that the Applicant would be entitled to a life long *usufrutus* when a new house is bought, it remains dependent on the execution of the first property provision, namely if the house that the parties had been living in when the settlement agreement was entered into did not produce any profit when sold, no other house could apparently be bought. At least it does not seem that the Respondent would incur any responsibility in such circumstances to buy a new house. The word "*retain*" seems to imply that she had the right of a lifelong *usufrutus* before. There is no indication that the Applicant had any rights of a *usufrutus* in respect of the old house. One would have expected that if the parties intended to provide a life long *usufrutus* for the Applicant, it would have been clearly stipulated as such, namely that the Respondent would provide a house to her in respect of which she would retain a life long *usufrutus*.

[26] Although it is unnecessary to go into detail into what the particular right of *usufrutus* or usufruct in our law entails, the nature of that particular right shows that this so called right that the Applicant avers she has lost because of the Respondent's alleged failure to comply with the settlement agreement and consequently the court order, is not enforceable. A *usufrutus* is a personal servitude that is a limited real right which imposes a burden on a servitude tenement or a movable for the benefit of a particular person. In South African (and our) law a fixed number of personal servitudes are recognized, of which a usufruct is one. A usufruct is a highly personal limited real right, which entitles the holder thereof (the usufructuary) to the use and enjoyment of another's property (the usufructuary property). In the light of its highly personal nature it cannot extend beyond the lifetime of the usufructuary. (*Wille's Principles of South African Law*, 9<sup>th</sup> edition, 604-5). By its very nature the usufructuary is entitled to possession, administration, use and enjoyment of the

property, as well as its fruits. (*Wille's Principle, supra*, 606-7). The usufructuary has also certain duties. (*Wille's Principle, supra*, 608-610). Another personal servitude is *usus* (the right of use), which is a lesser right than *usufructus*, because the usuary is entitled to use the usuary property, but not to appropriate its fruits. A usuary may for instance occupy a house. (*Willes Principle, supra*, 610). A further personal servitude known by our law is *habitatio*, which entitles the holder thereof to live in a building, which he may sublet, other than a usuary who may only let out part of a house. (*Willes Principle, supra*, 61011). What is further of importance is the constitution of a personal servitude. Only the owner or co-owners can grant a servitude with regard to property. A deed of a personal servitude is executed by the owner of the property burdened by the servitude and the person in whose favour it is created. Registration against the title deed of the property is considered notice against the whole world or any third party. Registration is not compulsory, but is advisable. If the servitude is unregistered, it may have serious consequences against a third party with knowledge thereof, but is of course binding *inter partes*. However, in *Grobbelaar v Freund* 1993(4) SA 124(0) it was held at 131A that an Applicant must establish the nature and ambit of a servitude in a clear, unambiguous and objectively determinable way. The abovementioned serve to indicate that the Applicant's claim that she is entitled to an *usufructus* is not only vague, but is probably unenforceable.

[27] From the papers the provisions regarding the property-issue are not clear at all and it is furthermore undisputed that the house, in which parties resided at that time, had been sold. It was not sold for a profit, because of the undisputed circumstances, namely that the house had been in the market for a nearly 14 months, without any success to sell it. Such sale for a profit is in my opinion a pre-requisite to all the further property provisions. Because there was no profit, there was no money to be utilised for a deposit on a more affordable house. It is common cause that no such alternative house had been bought. Even if that provision can be construed to place any responsibility on the Respondent to buy a more affordable house, within a reasonable time, the rest of the property provisions appear to be unenforceable. The other event that occurred which is common cause, is the fact that the children are now living with the Respondent in the United States of America. No other provisions pertaining to

the property-issue can in my opinion be enforced.

[28] On the papers alone it is not possible to determine that the Respondent forced the minor children to live with him and move with him to the USA. The contrary is seems more possible to me. Furthermore, I cannot find that the Applicant is entitled to receive maintenance in respect of the minor children as discussed earlier herein. They are now living with their father who maintains them. In respect of the agreement that the parties be awarded joint custody, I can also not find on the papers before me that the Respondent did not act *bona fide* in the interest of the two minor children in the circumstances.

[29] The following indicates that the Applicant actually acted contrarily to what she wanted this Court to believe. This concerns the house that she has purchased. I have questioned Ms Nambinga in this regard, but did not receive a satisfactory answer or explanation. In her founding affidavit the Applicant averred that she was informed on 17 March 2008 by the estate agent Ms Mandevhu that the "old" house was sold. She also alleged that she was left homeless and was dependant on the graciousness of friends for accommodation. The Applicant further stated that she had indeed purchased a house and signed a deed of sale on 6 March 2008, namely 11 days before she allegedly learned from the estate agent that the common house had been sold. On he own version she had decided to purchase another house to live in **before** the other house had been sold. That does not correspond with the conduct of a person who relies on the provisions in the settlement agreement and who claims to have a right of a lifelong *usufrutus*. The Applicant's conduct is more indicative of a person who did not place any further reliance on the property arrangements in the settlement agreement and decided to obtain he own house, probably because she saw no prospects in the house being sold for a profit and that all the provisions regarding the property-issue would not materialise.

[30] I gave serious consideration to the option of requesting a welfare report in respect of the situation of the two minor children and both parents, as well as other relevant circumstances. I also considered referring this matter to the evidence regarding the situation of the two minor children in order to assist me to determine what is in their best interest. I

have decided not to follow either of these options, mainly because both options would involve costs and such costs would be very high because the Respondent and the minors are currently in the USA. Furthermore, the time involved therein would inevitably cause further delays, as well as the fact that, as set out above, the order craved for by the Applicant cannot be made in any event.

[31] It is obvious that such a vague order as the Applicant applied for in her notice of motion cannot be made, in particular because of the unenforceable and vague, and sometimes incomprehensible, provisions in the settlement agreement, as well as the present circumstances which I have referred to. There is no indication of any *mala fides* by the Respondent. Although the Respondent could have applied for a variation order, due to the changed circumstances, he is entitled to resist the order prayed for by the Applicant. The Respondent may of course still apply for a variation order, in particular with regard to the custody and control of the two minors.

[32] In the result, the application of the Applicant in her notice of motion is dismissed with costs, which costs shall include the costs of one instructing and one instructed counsel.

**MULLER, J**

**ON BEHALF OF THE APPLICANT:**

**Ms Nambinga**

**Instructed by:**

**Lorentz Angula**

**ON BEHALF OF THE RESPONDENT:**

**Ms Van Der Merwe**

**Instructed by:**

**Conradie & Damaseb**



Case No.: I 1823/2008

**REPORTABLE**

**SUMMARY**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between

**R A v M A**

**MULLER, J.**

29 October 2010

- Applicant applied that the Respondent be compelled to comply with a settlement agreement made an order of court in a divorce action within 10 days, failing which, an order declaring the Respondent to be in contempt of Court.
- Applicant's application based on alleged non-compliance of issues such as custody and control regarding where the minors should live, maintenance of the minor children and property-issues.

Very scarce or no information on relevant current circumstances, that have changed since the Court order contained, in the papers before Court. Current circumstances include the present age of the minor children (now 17 and 19), that they went with their father, the Respondent to the USA and are living with him there.

All relevant issues contained in the settlement agreement and the effect thereof discussed - e.g. joint custody of the minors, maintenance and the property-issue.

**Joint custody**

The awarding of joint custody, together with retention of their father's guardianship, analysed against the practicality of such an award and previous Court decisions.

**Held:** that joint custody and control of minors should only be awarded in exceptional circumstances based on evidence. **Held:** the application in respect of the Respondent's alleged non-compliance with the settlement agreement and Court order in this regard unenforceable.

**Maintenance**

In the light of the minors now living with the Respondent and that he supports them, the Respondent not *male fide* in refusing to pay the Applicant maintenance in respect of



them. **Held:** that the order craved unenforceable in this regard.

### **Property**

All property provisions in the settlement agreement dependant on the sale of the common house of the parties for profit. From the proceeds of the sale of such house a deposit will be paid on the purchase of a new house. The said house sold, but not at a profit.

Further property provisions relate to a contribution to instalments in respect of the new house by the Respondent, that the new house be registered in the names of the minors and that the Applicant "retain" a lifelong *usufructus*. The consequence of the house not sold for a profit discussed. The alleged retention of a lifelong *usufructus* discussed and the meaning of the particular clause in the settlement agreement analysed and discussed. **Held:** Proceeds mean profit.

**Held:** The sale of the house at a profit a prerequisite for all further property clauses.

**Held:** There is no evidence that the Applicant had a lifelong *usufructus* that she could retain and it is not clear that by the insertion of such a provision the parties understood what the right was.

**Held:** The property provisions are not enforceable as the Applicant craves.

**Held:** In general, the order craved for is too vague and cannot be granted.

**Held:** The Application dismissed with costs (one instructing and one instructed counsel).