REPUBLIC OF NAMIBIA Reportable

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2018/00216

In the matter between:

RALF JOACHIM BEHRENS **APPLICANT**

and

ANGELA SCHOLVIN-BEHRENS **RESPONDENT**

Neutral citation: *Behrens v Scholvin-Behrens* (HC-MD-CIV-MOT-GEN-2018/00216) [2019] NAHCMD 459 (1 November 2019)

Coram: ANGULA DJP
Heard: **8 October 2019**
Delivered: **1 November 2019**

Flynote: Application – Final decree of divorce (order) incorporating the settlement agreement – Application for sale of immovable property forming part of the settlement agreement – Court cannot vary a final order of divorce insofar as it relates to proprietary rights and interests covered by the settlement agreement are concerned – Condition resolutive conditions for selling the immovable property namely that (a) the daughter of the parties attains the age of 25 years or (b) becomes self-supporting – Both resolutive conditions not been fulfilled – Application for that relief dismissed – Order for the debatement order of account – Parties joint owners of the immovable property – Respondent rented out the immovable property

without accounting to the applicant for rental income received – Order for the debatement of account granted.

Summary: The applicant applied for an order directing the sale of immovable property – It was agreed in the settlement agreement which was incorporate into the final order of divorce the parties' common house jointly owed would only be sold once their minor child had reached attained the age of 25 years or had become self-supporting, which ever happened first – Further that upon the occurrence of one of these events, the property would be sold and the parties and the proceeds be divides in equal shares between the parties – Custody and control of the minor child was granted to the respondent – In the meantime the respondent and the child would each be entitled reside on the property – In the meantime and before the resolutive conditions had been satisfied the, respondent and the child left Namibia and went to live in Germany – Respondent rented out the house and had been and receiving the rental amount without sharing with the applicant – Applicant lodge this application contending that the resolutive conditions have been met and accordingly the house should be sold – Furthermore the respondent should be order to account to the applicant in respect of the rental income the respondent had been receiving in respect of the jointly owned house.

Held; the resolutive conditions for the sale of the immovable property have not been met accordingly the house cannot be sold.

Held; this court cannot vary a final divorce order insofar as it relates to property as an order in respect of the proprietary rights and obligations of parties was final in nature.

Held; as joint owner of the immovable property, the applicant was entitled to a debatement of account in respect his half of the rental amount received by the respondent from the tenants of the jointly owned property.

ORDER

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1. The relief relating to sale of the property being Erf 1038, No. 13A Herbst Street, Klein-Windhoek, Windhoek, held by Deed of Transfer T5184/2000, (the property) is dismissed.

2. The respondent is ordered to furnish a statement of account in respect of all the rental income received in respect of the property showing the applicants portion on the one hand and the respondent's on the other hand is shared equally:

   (a) this statement of account shall be made under oath and shall include all relevant invoices in possession of the respondent in support thereof;

   (b) the statement of account shall include the reference of tax liabilities and payments, including copies of submitted VAT returns, if any, from the time applicant started renting out the property to the date of this order;

   (c) any money from the rental income expended in respect of the maintenance of the parties' child; and

   (d) the statement of account must be delivered within sixty days of this court order.

3. The respondent is to pay half of the applicants costs, such cost to include the cost one instructed and one instructing counsel.

4. This matter is removed from the roll and is considered finalised.

JUDGMENT

ANGULA DJP:

<u>Introduction:</u>

[1] The dispute between the parties in this matter arose from a divorce settlement agreement ('the agreement') concluded between the parties and which was incorporated in the final order of divorce. The subject matter of the present dispute is the parties' erstwhile matrimonial home, being immovable property situated in a suburb known as Klein-Windhoek, in Windhoek. The parties have one minor child, a girl, who was 4 years of age at the time the parties divorced.

[2] In terms of the agreement, custody and control of the minor child was granted to the mother, the respondent in the present proceedings and that the applicant would pay maintenance for the minor child in the sum of N$1 000 subject to a yearly escalation of 10 per cent. It was further agreed that the jointly owned matrimonial home would not immediately be sold, but the respondent and the minor child would remain and reside in the house until the minor child becomes self-supportive or reaches the age of 25, which ever happens first. In the meantime the applicant and the respondent would maintain their co-ownership in respect of the house.

[3] The clauses of the agreement relevant to the present proceedings read as follows:

> *'Proprietary claims:*
>
> *4.2 It is furthermore specifically agreed that defendant may remain or reside on the Erf 1038, No. 13A Herbst Street, Klein-Windhoek, until the minor child has obtained the age of twenty-five years or becomes self-supportive, whichever is the earlier.*
>
> *4.3 Once the minor child has reached the age of twenty-five years or becomes self-supported, whichever is the earlier, Erf 1038, No. 13A Herbst Street, Klein-Windhoek. It will be sold at the reasonable market value thereof and the plaintiff shall pay an amount equal to 50% of the purchase price over to the defendant.*
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> *4.4 In respect of Erf 1038, No. 13A Herbst Street, Klein-Windhoek:*
>
> *4.4.1 Plaintiff will continue to effect the monthly bond payments until the minor child had reached the age of twenty-five years or becomes self-supportive, whichever is the earlier.*

> *4.4.2 Defendant will continue to pay water & electricity towards the relevant authority until the minor child has reached the age of twenty-five years or has become self-supportive, whichever is the earlier.*
>
> *4.4.3 All rates and taxes and all necessary and reasonable repairs to the aforesaid Erf 1038, No. 13A Herbst Street, Klein-Windhoek shall be shared equally by the parties until the property is sold as provided for in clause 4.3 supra.*

<u>Relief sought:</u>

[4] The applicant seeks the following relief in his notice of motion:

> '1. That the immovable property situated at Erf 1038, No. 13A Herbst Street, Klein-Windhoek, Windhoek, held by Deed of Transfer T 5184/2000 be sold at the reasonable market value thereof, the bond be cancelled from the proceeds and that the applicant shall pay the respondent an amount equal to 50% of the net proceeds of the sale of the aforesaid immovable property (after settling the debts in respect of the property and after a debatement of account in respect of the expenses for an income generated from the said immovable property).
>
> 2. That the respondent be ordered to sign all documents and do all things necessary for the sale of the immovable property within 30 days from being requested to do so by the applicant, failing which the Deputy Sheriff of this Court is authorised to sign such documents and to do such things on the respondent's behalf.
>
> 3. Costs of suit, only in the event of this application being opposed.'

<u>The applicant's case:</u>

[5] It is the applicant's case that the intentions of the parties at the time when they concluded the settlement agreement was that the respondent and the minor child would reside in the house until the child became self-supporting or reached the age of 25. However the child left for Germany in August 2015 and shortly thereafter the respondent joined the child in Germany. They have ever since been permanently living in Germany.

[6] The applicant complains that the respondent has refused to speak to him or to inform him about the whereabouts of the child in particular whether she is attending a tertiary institution. He says that his attempts to communicate with the child have been blocked or frustrated by the respondent. In the meantime the child has reached the age of 20.

[7] As regards to the house, after the respondent and the child vacated the house the applicant states that he suggested to the respondent that the house be sold in accordance with the terms of the settlement agreement, however the respondent avoided the issue and proceeded to rent out the house at a monthly rental of N$11 500. The applicant continues to say that despite the fact that the parties are still co-owners of the house, the respondent has not been sharing the rental income with him. In the meantime the applicant continues to pay the monthly bond instalments in addition to other expenses in respect of the house. The applicant points out in this connection that as a co-owner of the house he is entitled to have the income and expenses of the house debated and any amount found due to him be deducted from the proceeds of the sale of the house and thereafter the balance be divided in equal shares between him and the respondent.

[8] The applicant further alleges that it was never the parties' intention that the house be rented out for the sole benefit of the respondent. In this regard the applicant contends that the respondent is in breach of the terms of the agreement.

[9] It is further the applicant's contention that the circumstances as previously contemplated by the parties at the time of conclusion of the agreement, have changed in that the respondent and the child are no longer residing in the house and the respondent is renting out the house without the applicant's consent. In the circumstances, so contends the applicant, it would be just and equitable, that the house be sold and the proceeds be divided equally between him and the respondent after settling the bond and deduction of the expenses incurred by the applicant in respect of the house.

[10] Lastly, the applicant submits that given the changed circumstances the resolutive condition that the house be sold upon the child having reached the age of

25 or have become self-supporting should be deemed to have been fulfilled. Alternatively, so the applicant contends, it is just and equitable that the terms of the settlement agreement be varied to have the house sold. It is to be noted in this regard that the applicant is not asking that the resolutive conditions be deemed to have been varied by changing circumstances.

The respondent's case:

[11] The respondent raised two points of law *in limine* in her answering affidavit; first, that the applicant is seeking a declaratory order which is in conflict with the court order of 1 September 2003 in terms of which the settlement agreement was made an order of court and which stipulates *inter alia* that the house will only be sold once the minor child has reached the age of 25 or becomes self-supporting whichever happens earlier. The respondent stresses that applicant has not alleged nor proved that the child has reached the age of 25 nor did he alleged or prove that the child is self-supporting. Accordingly, the respondent prays that the application be dismissed with costs.

[12] The second point *in limine* raised by the respondent is that the applicant has failed to satisfy the requirement for the variation of a court order stipulated by rule 103. In this connection the respondent points out that the applicant does not seek relief in his notice of motion for the variation of the court order by which the terms of agreement were incorporated in the final divorce order. The respondent therefore submits that for this reason alone, the application should be dismissed.

[13] Turning to the merits, the respondent explains that the reason why she moved out and rented out the house is that: she lost her job in 2012 and was unable to meet her financial commitments. Meanwhile, she was offered a four bed-room house by a friend rent-free. According to her the applicant had been aware but did not object to her renting out the house nor did he claimed half of the rent.

[14] The respondent confirms that the child left for Germany in August 2015 to attend school and that at the time of deposing to the affidavit the child was doing her Abitur (a 13th school year which is a requirement to be able to be accepted by universities in Germany) and at the same time the child was studying to become a

laboratory assistant. The child further intends to thereafter study to become a veterinary surgeon.

[15] It is the respondent's case that the idea behind the clause of the settlement agreement which provides that the respondent and the child may 'remain or reside' in the house was so that she could utilise the property as and how she deemed fit until the child reached the age of 25 or became self-supporting. The respondent contends further that she is in law entitled to use the property including the leasing thereof until the child reaches the age of 25 or becomes self-supporting. According to the respondent she rents the house out in order to obtain additional income for the maintenance and education of the child in Germany.

[16] As far as their relocation to Germany is concerned, the respondent points out that such relocation is not permanent as they will return to Namibia once the child has finished her studies in Germany. She points out further that the child is residing with her and is still dependant on her. The respondent attached an untranslated document in the German language which appears to demonstrate that the child is enrolled at an institution in Germany until end of October 2019.

[17] The respondent denies that the child is self-supporting and in support thereof she attached a list of monthly expenses which she says she pays for the child together with the monthly maintenance she receives from the applicant. She stresses that the minor child is still dependant on her and the applicant until she finalises her education in Germany thereafter they will return to Namibia.

[18] In response to the applicant's allegation that the circumstances have changed that justify the selling of the house, she points out that the resolutive conditions set out in the agreement have not yet been fulfilled and for that reason the property cannot be sold. In this connection the respondent denies that the applicant is entitled to vary the existing court order.

[19] Lastly the respondent denies that the applicant is entitled to a debatement of account in respect of any amounts she received whether rental or any other amount. She denies further that she is obliged to account to the applicant for the income derived or to be derived from the renting of the property.

Issues for decision:

[20] It appears to me that there are three issues for determination in this matter: firstly, whether the child is self-supporting; and secondly, whether the circumstances have changed since the settlement agreement was concluded and made an order of court justifying the court to vary the order; and thirdly whether the applicant has made out a case for rendering of account and debatement thereof.

[21] Before proceeding to consider the issues identified for determination, it bears pointing out that this matter had previously been postponed on not less than three occasions to allow the parties to negotiate a settlement. Those efforts were however futile. The matter was therefore set down for hearing. Subsequent thereto the legal practitioner for the respondent withdrew his representation and respondent proceeded unrepresented. When the matter was called on 8 October 2019, the respondent did not appear. She uploaded a letter on the E-justice system in which she stated that she did not have the funds to travel from Germany to attend the hearing in Namibia; that she could not afford the services of a lawyer; and she further pleaded with the court to postpone the matter to enable her to gather evidence to place before court in order to support her opposition to the relief claimed by the applicant. She further stated that she will have to remain in Germany until the parties' child has obtained her veterinary degree which is a five years course.

[22] The court took the view that the matter has been dragging for a long-time and could unfortunately not accede to the respondent's request namely to let the matter stand down for what appears to be an indefinite period or at least a period of five years. Accordingly, the matter proceeded in the absence of the respondent. The respondent is in any event automatically barred from participating in the proceedings due to her non-compliance with this court's order of 20 June 2019, which ordered the parties to file heads of argument. The respondent failed to file such heads and in terms of the rules of this court she is automatically barred. However, had she appeared on the hearing date, the court would have afforded her an opportunity to be heard.

Discussion

[23] The court takes into account the respondents first point *in limine* namely the child has not yet attained 25 years of age and therefore one of the two resolutive conditions agreed upon by the parties in the settlement agreement have not materialised for the property to be sold. In my view, this fact is common cause. It is not the applicant’s case that the child has reached the age of 25. The child was at the time of the launching of this application still 20 years of age and has not attained the agreed 25 years of age and therefore one of the resolutive conditions which would entitled the applicant to demand the sale of the house have not been met. For this reason, the point *in limine* fails.

[24] As regards to the second point *in limine* namely that the applicant has failed to meet the requirements for the variation of the court order of 1 September 2003 as stipulated by rule 103 of the rules of this court, I am of the view that this point is intertwined with the merits. Its success depends on whether the applicant succeeds in proving whether the child is self-supportive or not. In reply to this point *in limine* the applicant states that ‘Rule 103 does not find application in this matter. This will be addressed in legal argument’. I will consider this point when I consider the merits.

Is the child self-supporting?

[25] The applicant bears the *onus* to prove that the child is self-supporting. He is in a disadvantageous position in that he has no access to the child or to information regarding the child’s present living conditions. There are however certain facts which appear to be common cause with regard to the child’s current living conditions.

[26] Ms Van der Westhuizen who appeared for the applicant set out in her written submissions the common cause facts as follows: the child is presently 20 years of age; she has been residing in Germany since August 2015 and is still so residing; she receive a subsidy from the Germany Government equal to N$3 201 per month; and the applicant has little to no contact with the child.

[27] Counsel submitted that there is no evidence that the respondent maintains the child. There is further no evidence that she is paying any tertiary expenses for the

child; that there is no evidence that the child needs more than the monthly allowance the receives from the German Government; that there is further no evidence as to whether or why the child is unable to secure employment even on part-time basis given the fact that she is at an age where she can be gainfully employed.

[28] Relying of the court pronouncement in *VW v VW*[1] where it was held that in a case where a child has reached the age where he or she can support himself or herself but for no reasonable ground refuses or fails to do so, the court has a discretion not to insist that the maintenance order be enforced. Counsel urged the court to exercise its discretion and to hold, based on the facts of the present matter, that the child has become self-supporting.

[29] It would appear to me that counsel's foregoing argument loses sight of the undisputed version of the respondent. According to the respondent the child is residing with her and is still dependant on the respondent. Furthermore, the child is currently attending school. On *Plascon-Evans* rule the respondent version prevails. I am of the further view that the fact that the child receives subsidy does not prove that she is self-supporting: to the contrary, in my view, such an undisputed fact serves to prove that she is depended on the German Government's subsidy and thus not self-supporting.

[30] This finding is re-enforced by the common cause fact that the applicant is still paying the child's maintenance in the sum of about N$2 700 per month. This fact was confirmed by counsel on the court's enquiry, that the applicant is still paying such maintenance. In my view, this fact alone is destructive of the applicant's case that the child is self-supporting. The conclusion that the child is presently not self-supporting is inescapable. I have therefore arrived at the conclusion that the child is not self-supporting. I proceed to consider the next issue that is whether the circumstances have changed since the conclusion of the agreement.

<u>Have the circumstances change so that the resolusive conditions are no longer relevant or applicable?</u>

[1] 2015 JDR 2302 (GP) at para 15.

[31] As has been observed from the summaries of the parties respective positions, they are at variance as to what was their intention behind the clause of the settlement agreement that the respondent may ‘remain or reside’ in the house until the child has reached the age of 25 or becomes self-supporting. On the applicant’s version the intention was to provide a place for the minor child to stay and the respondent since the respondent was awarded custody and control of the child and the child was thus dependent upon the respondent. The respondent on her part contends that the intention was that she and the child could utilise the property as and how they thought fit until the child reaches the age of 25 or become self-supporting.

[32] The Supreme Court in *Total Namibia*[2] cautioned that the construction of an agreement remains a matter of law and not of facts and therefore interpretation is a matter for the court not for witness or the function of the parties to try to tell the Court what was their intentions when they concluded the agreement[3]. The court held at para [23] that the context in which the document was drafted is relevant to its construction. Such approach ‘makes plain that interpretation is essentially one unitary exercise in which both text and context … and the knowledge that the contracting parties had at the time the contract was concluded, are relevant to construing a contract’. I procced to apply the foregoing principles to the facts of the present matter.

[33] It is common ground that the context in which the settlement agreement was concluded was the divorce proceedings between the parties which culminated in the parties agreeing, upon the dissolution of the marriage, who should be granted the custody and control of the minor child and how the jointly owned immovable property would be treated going forward. The text of the agreement is clear and is not ambiguous.

[34] The duration of the retention of the property, which is co-owned by the parties, is linked to the child either attaining the age of 25 or becoming self-supporting. It is clear to me from a reading of this provision of agreement that the intention was to provide accommodation or home for the child until she reaches the age of 25 or

[2] *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC (*I 3625/2007) [2017] NAHCMD 54 (3 March 2017).

[3]

become self-supporting. Since the respondent was awarded the custody and control of the child it appears sensible and logical that it was agreed that she 'resides or remains' in the house with the child. In the light of this conclusion, I do not agree with the respondent's assertion that the idea was for her to utilise the property how she thought fit including leasing it out until the child has reached the age of 25 or has become self-supporting.

[35] In my view, any reasonable person reading the agreement would arrive at the conclusion that the primary object for the retention of the house was to provide accommodation or home for the child until she is 25 years of age or has become self-supporting. I reject the respondent's assertion that the intention was that she could utilise the house as she deemed fit. I say this this for the reason that the house is jointly owned and she can only utilise the house subject to the terms of the agreement and taking into account the right and interest of the applicant in the house. The agreement does not make provision that she could rent out the house in order to earn an income for the maintenance of the child. If the maintenance amount agreed upon became insufficient to maintain the child the legal route open to the respondent was to request the applicant to increase the maintenance amount failing which she could approach the maintenance court for an order to vary and increase the maintenance amount.

[36] It is further common cause that both the respondent and the child have not been residing in the house since August 2015 and are residing in Germany; that the house is no longer serving as a home for the child and is instead being rented out. On the respondent's version the child intends to study as veterinarian in Germany thereafter they intend to return to Namibia. The applicant states that he has established that such course takes not less than six years to complete in Germany. As mentioned earlier, the child is currently 20 years of age. It follows thus by the time she will finish her studies she will be 25 years of age. The obligation by the parties to provide her with a home would therefore have been extinguished.

[37] Earlier this judgment, I deferred dealing with the respondent's second point in law *in limine* namely that the applicant has failed to meet the requirements for the variation of the court order of 1 September 2003 as stipulated by rule 103 of the rules of this court. I stated that the resolution of that point is in my view, intertwined

with the merits and that its success depends on whether the applicant succeeds in proving whether the child is self-supporting. I have found that the applicant has failed to discharge the onus that the child is self-supporting.

[38] Ms Van der Westhuizen, in her written submissions submits that the interim arrangement pending the sale of the house can be compared to this court considering a variation of a custody order, maintenance, interim or interlocutory orders where the circumstances have changed such that it would be just and equitable to vary the terms of the order. In support of this proposition counsel referred to a number of cases where there had been change of circumstances and where the court as a result exercised its discretion and varied the terms of the order in order to do justice between the parties. Counsel thus urged this court to follow suit in the present matter.

[39] I have considered the case law cited by counsel and found that two of the cases support counsel's proposition. The first case relied on by counsel is *S K v S K*[4]. The issue for determination in that case was whether the settlement agreement which dealt with the custody and control of minor children was *res judicata*. The Prinsloo J held that a court order dealing with the custody and control of the minor children is always subject to variation and therefore the portion of the settlement agreement that dealt with the custody and control of the minor children was liable to be set aside. I agree with the learned Judge's exposition of the law on that point. I should mention that in that matter the respondent filed a counter application for the variation of the agreement and to award the custody on one of the children to him.

[40] In my view, the *SK matter* is distinguishable from the present matter in two respects; first, the matter dealt with the custody and control of the minor children. In this matter custody and control is not an issue. The issue in the present matter is the property. Secondly, in *SK* matter, there was an application to vary the agreement. In the present matter there is no relief prayed for to vary the final order of divorce or the terms of the settlement agreement.

[41] The next judgment referred to by counsel which I think is relevant to the present matter is *Government of Namibia v African Personnel Services (Pty) Ltd*[5]*.*

[4] *S K v S K* (I 3754/2012) [2017] NAHCMD 344 (17 November 2017).
[5] 2010 (2) NR 537.

The Court was called upon to decide whether the High Court could vary its own order. The court held that provided that the order sought to be varied is a simple interlocutory order, the court has an inherent jurisdiction to alter or vary an order given by the same court. It stated that the circumstances under which the order may be varied as: in respect purely procedural or incidental matters or where the substratum or reason why the order was granted disappears as a result of new facts arising since the granting of the order. At para [34] the court referred with approval to the South African Constitutional Court judgment in *Zondi v MEC Traditional and Local Government Affairs and Others 2006 (3 SA 1 (CC) BCLR 424* where the court held that in terms of the common law:

> 'the general rule is that a judge has no authority to amend his or her own final order. The rationale for this principle is two-fold. In the first place a judge who has given a final order is *functus officio*. Once a judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order.
>
> But,
>
> simple interlocutory orders stand on a different footing. These are open to reconsideration, variation or rescission on good cause shown. Courts have exercised the power to vary simple interlocutory orders when the facts on which the orders were based have changed or where the orders were based on an incorrect interpretation of a statute which only became apparent later. The rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action.'

[42] What emerges from the pronouncements by the courts in the cases referred to in the preceding paragraphs is that a final order cannot be varied by the court which made it, although a court can, however vary its interlocutory order. A question then arises whether a clause in the deed of settlement dealing with the proprietary aspect of the parties made an order of court can be varied by the court. I am of the considered view that that clause of the final order of divorce is final and is not interlocutory in nature or effect and cannot therefore be varied. There is nothing interlocutory about a division of the jointly owned estate. I am fortified in this conclusion having regard to the comments made by the learned author *Hahlo: The*

South African Law of Husband and Wife, Fifth edition page 385-386 where the learned author states as follows with regard to divorce settlement agreements: 'The parties may by mutual consent modify their agreement even if it was embodied in an order of court, and the court modify its order accordingly. Failing an agreement between the parties, the court cannot vary its order'.

[43] What the applicant is asking the court to do in the present matter, is in my, opinion closely related to what happened in the matter of *Ex parte Willis*[6] except for the fact that in that matter, the parties had agreed to alter the terms of the settlement agreement which had been made an order of court. In that matter, after the parties had agreed to vary the terms of the agreement, they applied to court to have the whole clause of the agreement dealing with their property deleted and a new clause substituting the previous clause. The court in declining to make any order on the application held that there was nothing before court to justify it in concluding that the order made did not clearly express the intention and decision of the court; and furthermore there was no omission to include anything accessory to the principal order and further that there was nothing ambiguous about the order.

[44] In the matter of *Shikangalah v Ihula*[7], the applicant sought an order setting aside the settlement agreement which had been made an order of court on the ground that the agreement had been tainted by *inter alia* fraudulent misrepresentation, justus error, common mistake and the like. Miller AJ declining to grant the relief sought said the following at para [14] and [15]:

> '[14] Faced with the spectre of two conflicting orders issued by the same court on the same issue, counsel sought to persuade me that my apprehension was not warranted. The argument advanced was that the order issued by Unengu AJ will simply and seemingly without more cease to exist once the settlement agreement is set aside.
>
> [15] I need not deal with that by using a thousand words. The short answer is that it does not. The order issued by Unengu AJ continues to exist until it is varied or set aside. If the settlement agreement is to fail by the wayside, then conceivably the court can be approached to vary the order it issued to the extent that the order

[6] *Ex parte Willis* 1947 (4) SA 740.

[7] *Shikangalah v Ihula* (HC-MD-CIV-ACT-OTH-2017/00766) [2017] NAHCMD 283 (29 September 2017)

incorporated some portion if not all of the settlement agreement, but that is about as far as it goes.'

I am of the view that the remark by Miller AJ are applicable to the facts of the present matter.

[45] The difficulty created by the applicant's approach to these proceedings is this: even if it is to be accepted that the intention of the parties was to provide a home for the minor child and further that the circumstances have changed since the agreement was made an order of court, the effect of the order the applicant seeks in my view amounts to a variation of a court order relating to the proprietary aspect of the settlement agreement. I say so for the reason that clause 4.2 of the settlement agreement which was made an order of court stipulates that the house would only be sold once the child has reached the ages of 25 or become self-supporting. I have found those conditions have not yet materialised. If the court were to grant the order sought such order would contradict and be in conflict with the final order of divorce granted on 1 September 2003.

[46] It is common ground that the applicant has not sought as one of the relief, the variation of the order of 1 September 2003, which incorporated the settlement agreement. In any event even if the applicant had applied for a variation of the order, as has been observed when considering the case law, the law does not permit the variation of a final order. I have already found that part of the agreement which deals with proprietary aspect of the parties, falls in the category of final orders. It is not an interlocutory order such as custody and control or maintenance orders which may be varied or altered as circumstances change. In addition, that part of the order does not fall under the exceptions to the general rule namely that once a court has delivered a judgment or made an order it 'become thereafter functus officio so that it cannot thereafter alter supplement amend or correct the judgment or order'.

[47] I have therefore arrived at the conclusion that the relief sought in the first part of prayer 1 of the notice of motion cannot be granted and stands to be dismissed. I proceed to consider the remainder of prayer one of the notice of motion.

<u>Debatement of account:</u>

[48] Part of the relief sought by the applicant is the debatement of account in respect of the income received and expenses incurred in respect of the property.

[49] In support of this relief the applicant alleges that it was never the intention of the parties that the respondent would rent out the property and retain the rent for herself to the exclusion of the applicant as a co-owner.

[50] As has been noted earlier in this judgement the respondent's position is that she is entitled to utilise the property as she deems fit including renting it out in order to obtain additional income to maintain the child. The respondent further asserts that she is exclusively entitled to the income and enjoyment of the property until the child has attained the age of 25 or becomes self-supporting. She denies that she is obliged to account to the applicant for any income derived from the property.

Applicable legal principles

[51] The procedure to be followed in obtaining an account and a debatement therefore was restated by Masuku, J in *Mofuka vs Bank Windhoek Limited* (I 2508/2012) [2019] NAHCMD 200 (20 June 2019) paras [19] to [20][8]. That is that the plaintiff or applicant should aver: (a) his right to receive an account and the basis for such right, whether by contract or by fiduciary relationship or otherwise; (b) any contractual terms or circumstances having a bearing on the account sought; and (c) that a statutory provision created such an obligation to deliver and debate an account and (d) the defendant's or respondent's failure to render an account.

[52] It has been stated that every time an order is made for account and debatement whether by application or action, the consequence may be a subsequent action if, as a result of the rendering of the account and the attempted debatement, the parties are still unable to agree. On proof of the foregoing the court would in the first instance order only the rendering of an account within a specified period of time[9].

[53] Keeping in mind the foregoing legal principles, I now turn to consider whether the applicant has made out a case for that relief. In my view, applicant has made out

[8] See also *Doyle and Another v Fleet Motors P E Motors (Pty) Ltd* 1971 (3) SA 760 at 762 E – 763D.
[9] *Afrimeric Distributors (Pty) Ltd v E I Rogoff (Pty) Ltd)* 1948 (1) SA 569 (W) at 576.

a case. As a co-owner of the property which generates rental income, he is entitled to receive an account of such rental income. As regard to the contractual terms having bearing on the rendering the account, the parties have agreed to share costs in respect of the property; in that the applicant continues to pay the bond instalments whereas the rates and taxes in respect of the property are shared in equal shares. It follows in my view as a matter of contractual obligation and based on the fact that the parties are co-owners of the property that the applicant has a legal right to demand the rendering of the account in respect of income received through the renting of the property. As regards the third requirement whether the respondent has failed to render an account, that fact, in my view is common cause. The respondent has unequivocally stated that she is not obliged to render an account to the applicant. The respondent is wrong in her position in that regard. This court is of the firm view that there is a legal obligation on her to render an account to the applicant in respect of the income she received as rental for the jointly owned property.

[54] It follows therefore from my findings in the preceding paragraph that the applicant is entitled to an account and the debatement thereof from the respondent in respect of the rental income received from renting the property. As regards the expenses incurred in respect of the property, the parties have already agreed how the expenses are to be shared between them and there is no dispute in that connection.

Costs

[55] The applicant has marginally succeeded with the smallest relief of his application. He failed to make out a case in respect of the main relief. In the exercise of my discretion I am of the view that he should be awarded half of his costs of the application.

[56] In the result, I make the following order:

1. The relief relating to sale of the property being Erf 1038, No. 13A Herbst Street, Klein-Windhoek, Windhoek, held by Deed of Transfer T5184/2000, (the property) is dismissed.

2. The respondent is ordered to furnish a statement of account in respect of all the rental income received in respect of the property showing the applicants portion on the one hand and the respondent's on the other hand is shared equally:

   (a) this statement of account shall be made under oath and shall include all relevant invoices in possession of the respondent in support thereof;

   (b) the statement of account shall include the reference of tax liabilities and payments, including copies of submitted VAT returns, if any, from the time applicant started renting out the property to the date of this order;

   (c) any money from the rental income expended in respect of the maintenance of the parties' child; and

   (d) the statement of account must be delivered within sixty days of this court order.

3. The respondent is to pay half of the applicants costs, such cost to include the cost one instructed and one instructing counsel.

4. This matter is removed from the roll and is considered finalised.

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H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	C E VAN DER WESTHUIZEN Instructed by Theunissen, Louw & Partners, Windhoek
RESPONDENT:	No appearance