

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-MAT-2020/00122

In the matter between:

PATRICIA DOROTHIA SOROSSES

PLAINTIFF/RESPONDENT

and

SAGARIAS GAMASEB

DEFENDANT/APPLICANT

Neutral citation: *Soroses v Gamaseb* (HC-MD-CIV-ACT-MAT-2020/00122) [2020]
NAHCMD 530 (18 November 2020)

Coram: **PRINSLOO J**

Heard: 2 November 2020

Delivered: **19 November 2020**

Reasons: **24 November 2020**

Flynote: Law of Contract – When two or more persons conclude an agreement they agree to create a legal relationship between them – Courts will give effect to the expressed intention of the parties – Parties bound by the terms of the agreement they concluded and the court has to enforce those terms.

Court-connected mediation – Settlement agreement reached between parties – Client freely chose her own legal practitioner to advise her and her failure to raise her discontentment towards all or part of the terms of the settlement at mediation is a clear indication that the settlement was reached for the benefit of both parties who, through their legal representative, indicated that they understood the terms and accepted the said terms.

Ethics – Ethical for a legal practitioner to notify a fellow legal practitioner if there are adverse allegations and criticism levelled against an erstwhile legal practitioner by a new client.

Summary: The applicant and respondent got married to each other on 20 September 2014 in Windhoek in community of property and they are still so married. The respondent instituted divorce proceedings against the applicant during January 2020 and the said proceedings were defended by the applicant on 19 February 2020. Subsequently, the matter was referred for court-connected mediation, which mediation was held on 22 May 2020. A settlement agreement was concluded between the applicant and respondent. The application before me concerns the enforcement of a settlement agreement that was reached between the parties at the mediation session which the applicant refuses to be bound to, citing ill advice by the erstwhile legal practitioner.

Held that the respondent fails to allege that the terms were altered or to deny that there was a verbal agreement. All she does is allege that her erstwhile legal practitioner gave her ill advice that induced her to settle. However, the respondent freely chose her own legal practitioner to advise her and her failure to raise her discontentment towards all or part of the terms of the settlement at mediation is a clear indication that the settlement was reached for the benefit of both parties who, through their legal representative, indicated that they understood the terms.

Held that it is a sound principle of law that when a man signs a contract, he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. However informal it is, the parties are bound to the terms of the contract and the consequences thereof.

Held that where a legal practitioner acts for a client and he or makes prejudicial remarks about a previous legal practitioner, it would be ethical for the new legal practitioner, to bring the allegations and criticism levelled against the erstwhile legal practitioner, to the latter's attention.

ORDER

Ruling

1. The verbal settlement agreement concluded between the Applicant and the Respondent on 22 May 2020 is hereby declared binding on the parties and enforceable.
2. No order is made as to costs.

Further conduct

3. The case is postponed to **3 December 2020** at **15h00** for RCR Proceedings hearing (Reason: Restitution of Conjugal Rights Proceedings).
 4. Defendant's notice of withdrawal of defence and draft order must be filed on or before 30 November 2020.
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RULING

Brief background

- [1] For ease of reference the parties will be referred to as they in this application.
- [2] The applicant and respondent got married to each other on 20 September 2014 in Windhoek in community of property and they are still so married.
- [3] The respondent instituted divorce proceedings against the applicant during January 2020 and the said proceedings were defended by the applicant on 19

February 2020. Subsequently, the matter was referred for court-connected mediation, which mediation was held on 22 May 2020.

[4] The application before me concerns the enforcement of a settlement agreement that was reached between the parties at the mediation session.

[5] In his founding affidavit the applicant alleges that he and the respondent resolved to settle the matter in the following manner:

- a) That the respondent would retain the house situated in Otjomuise erf 166 Beijing Street Windhoek as her sole and exclusive property;
- b) That she would retain the motor vehicle Nissan March;
- c) That she would retain all the movable property currently in her possession;
- d) That the applicant would retain the property situated in Otjiwarongo as his sole and exclusive property;
- e) That the respondent would retain the Ford Ranger motor vehicle; and
- f) That the respondent would retain the 17 heads of livestock and the movable property in his possession.
- g) It was a further agreement that the respondent would pay maintenance in the amount of N\$ 5500 in respect of the minor child. In addition, he would pay all scholastic and extra-mural activities on behalf of the minor child until the respondent obtains meaningful employment.
- h) They further agreed that the applicant would retain the respondent on his medical aid for a period of 6 months.

[6] As a result thereof, a settlement agreement was concluded between the applicant and respondent on the terms alluded to above.

Evidence

[7] The applicant alleges that on 26 May 2020 his legal practitioner received a letter from the respondent's erstwhile legal practitioner indicating that the respondent is not happy with the terms of the settlement agreement and that the respondent

proposed different terms, which the applicant was however not amenable to. The refusal to amend the terms was conveyed to the respondent's legal practitioner. The erstwhile legal practitioner however withdrew and the current legal practitioner was appointed by the Directorate of Legal Aid. Likewise, the current legal practitioner in turn informed the applicant's legal practitioner that the respondent was not happy with the settlement agreement and the applicant decided he would retain the respondent on his medical aid for a period of two years, subject to certain conditions, as opposed to the 6 months initially agreed upon, which proposal the respondent was amenable to.

[8] The parties thereafter filed a joint status report on 15 June 2020 indicating that the matter has become settled and that the parties are in the process of finalizing the settlement agreement. The matter was postponed to 6 July 2020 to enable the parties to finalize the settlement agreement and file same. However, during the week of 6 July 2020 the applicant was informed that the respondent has yet again changed her mind in respect of the settlement agreement, and the respondent was accordingly informed that the applicant was not amenable to a change in the terms of the agreement.

[9] The applicant alleges and submits that parties negotiated in good faith at the mediation and he has every intention to meet his obligations in terms of the settlement agreement that was reached on 22 May 2020 and therefore seeks for the enforcement of the said agreement.

[10] In her answering affidavit, the respondent agrees that she gave instructions to her current legal practitioner to propose to the applicant that he retains her on his medical aid for two years. But she alleges that she also informed the lawyer to propose to the applicant that the home loan on the property situated at erf 166 Beijing Street Otjomuise Windhoek be reduced to N\$ 400 000.

[11] The respondent denies that the parties negotiated in good faith and puts the applicant to the proof thereof. She alleges that the entire mediation took place with estimated values of the assets of the joint estate as well as based on assumptions. She alleges that she agreed to the terms of the settlement agreement on the ill

advice of her erstwhile legal practitioner, who advised her that it will cost her a lot of money to get the immovable properties valuated and to also get the real value of the livestock. She alleges that this was communicated to her during mediation.

[12] She asserts that after the mediation was concluded and in the days thereafter, she informed her erstwhile legal practitioner that she was not happy with the terms of the settlement agreement and the manner in which she was represented at the mediation. Hereafter her erstwhile legal practitioner withdrew and she approached the Legal Aid Directorate to appoint a new legal practitioner on her behalf. Her current legal practitioner was appointed to represent her.

[13] The respondent contends that the real values of the properties (being N\$ 1 450 000 in respect of the Otjomuise property and N\$ 1 500 000 in respect of the Otjiwarongo property) were not considered at the time of mediation, neither did her previous legal practitioner provide proof of the values the respondent had submitted to her. The decision of the applicant to retain the property in Otjomuise was made based on estimations and assumptions that the property was more valuable than the property in Otjiwarongo that the applicant was retaining. She contends that the outstanding amounts on both home loan accounts in respect of both properties were not considered during mediation. She alleges that when she indicated during mediation that she might not be able to afford the bond on the Otjomuise property, she was advised by the mediator that she had the option of selling the property after the divorce.

[14] The respondent claims that the applicant stands to benefit more from the division of the joint estate than the respondent, should the Court enforce the settlement agreement in that the applicant will retain the livestock and the property with a higher value and a lower outstanding bond and also retain the Ford Ranger motor vehicle with a higher value¹ while she retains Nissan March which is estimated to be N\$ 30 000.

[15] The respondent takes cognizance of the fact that she agreed to the terms as indicated in para 6 above, however she argues that such terms were only agreed

¹ Although the respondent does admit that she does not what the true value is of the vehicle.

upon on the ill advice of her erstwhile legal practitioner. She submits that the applicant stands to suffer no prejudice whatsoever as he is aware of the consequences of a marriage in community of property ie that the joint estate should be divided equally between the parties in the event the parties do not agree to the distribution of the joint estate.

[16] The respondent also alleges that she had to sell two motor vehicles of the joint estate as defendant failed to pay the mortgage bond of the Otjomuise property and to maintain herself and the minor child.

[17] On the issue of the livestock the respondent confirms that she agreed that the applicant keeps the 17 livestock, although she submitted proof that there were 109 livestock as at 2 February 2020 as opposed to 17. She alleges that she was informed that the figure was inflated to 109 so that the applicant could be eligible and obtain a resettlement farm.

[18] In reply to the allegations made by the respondent, the applicant states that indeed he agreed to retain the respondent on his medical aid for a period of two years in order to reach an amicable solution and for a speedy finalization of the matter, subject to certain conditions. He also states in his replying affidavit that he refused to accept the proposal to reduce the home loan of the Otjomuise property because during the mediation he agreed that the respondent can utilize the maintenance amount of N\$ 5500 that he pays towards the servicing of the mortgage bond until such time the respondent becomes self-sustainable. He further states that he agreed to be responsible for all scholastic and extra mural activities of the minor child, including all part payments in favour of medical bills. Further to this, the applicant asserts that there are two flats and a garage that was transformed into a bar on the Otjomuise property from which income is generated.

[19] Applicant reiterates that the mediation was held in good faith and states that before the mediation commenced the mediator informed the parties that they should not feel obligated to accept any terms proposed by the other party and that the legal practitioners are merely there to guide the parties through the proceeding. He also argues that both parties had an opportunity to caucus with their respective counsel

before a settlement was reached. The applicant admits that the mediation took place with estimated values of the assets of the joint estate but contends that it was unlikely that the respondent was ill advised having considered what the mediator had informed all the parties before the commencement of the mediation. He submits that if the respondent is of the view that she was ill advised by her erstwhile legal practitioner, the applicant should not be prejudiced by her decision to appoint a legal practitioner of her choice as she accepted the advice she received at the time of concluding the settlement agreement. In addition the applicant submits that the respondent was offered an opportunity to choose which property she wants to retain, which choice still remains open to the respondent. The respondent was at no point coerced as she alleges.

[20] The applicant denies that there was or is 109 livestock as at 2 February 2020 and attached an updated list of the available livestock and states that the respondent is welcome at any given time to inspect the premises and verify the amount of livestock.

[21] On the issue of the two vehicles sold by the respondent, the applicant avers that the respondent sold the vehicles without his consent. The respondent even fails to indicate how much money she generated from the sale of the vehicles and how much maintenance was spent on her and the minor child.

[22] The applicant submitted that he is cognizant of the consequences of in community of property but argues that the parties were provided with an opportunity to agree on the terms of the agreement and that both parties were present at mediation and duly represented.

Submissions by the parties on the applicable legal position and the application thereof to the facts

Applicant

[23] The applicant's position is that the parties appeared at mediation in person and with their legal representative of choice and came to an agreement with regard

to the division of the joint estate. Parties were advised at the mediation that mediation is not preemptory, however the respondent now wants to renegotiate the terms of the settlement despite the fact that parties reached an agreement as to the terms of the said settlement at mediation.

[24] Ms Nyashanu, counsel for the applicant, submitted the case of *Markus v Telecom Namibia Limited*² on the legal position underpinning an agreement between the parties wherein the case of *Printing Registering Company v Sampson* was referred to and where Jessel, J held the following:

‘If there is one thing which, more than another, public policy requires, it is that man of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice.’

[25] Counsel further submitted that it was held in the case of *Palastus v Palastus*³ that a verbal agreement concluded between the parties is binding and stated that in the event of the legal formalities not being required in the execution of an agreement, verbal agreements are binding as much as written agreement, as long as it is capable of being demonstrated that the parties reached consensus and merely desire the reduction of the verbal agreement in writing as a memorial.

[26] She also referred to the case of *AN v PN*⁴ where the court declared the verbal agreement reached by the parties at mediation binding on them and emphasized that as long as the parties are of age and were in full possession of their mental faculties when the agreement was made, they will be held to their verbal undertaking.

[27] Counsel argued that the respondent fails to set out a case as to whether she was not in possession of her mental faculties or whether she was under some kind of undue influence. But instead she agrees that there was consensus, although she alleges that she was not fully satisfied with the terms. Further to this counsel argued

² (I 286/2009) [2014] NAHCMD 207 (23 June 2014).

³ (I 194-2014) [2015] NAHCNLD 29 (08 July 2015).

⁴ (HC-MD-CIV-ACT-MAT-2017/00135) [2017] NAHCMD 275 (27 September 2017).

that the respondent does not make out a case of whether the agreement is *mala fide*. All she says is that applicant negotiated in bad faith, but she fails to set out the grounds upon which she was persuaded to agree to settle by the estimations, which were in any event common cause between the parties. Counsel therefore submits that the consensus to agree to the terms was there between the parties at mediation.

[28] On the issue of ill-advice, counsel submits that the respondent, as can be deduced from her affidavit, is a well-informed, educated woman with the mental faculties required to enter into a valid and binding agreement. She referred the court to the case of *MB De Klerk & Associates v Eggerschweiler*⁵ wherein it was stated that:

[54] Duress is not satisfied if one exerts pressure in circumstances in which it is open to the affected party to adopt an alternative course of action for dealing with his predicament.⁶ . . .

[55] The court pointed out (at 208H-I) that duress embraces the use of compulsion or other pressure in order to induce the victim thereof to do an act or make an omission which the victim would not normally want to do or omit to do. . . . The court added that a threat amounting to duress must be such as to overcome a mind of ordinary firmness from which the victim cannot protect him or herself.'

[29] Counsel submits that the respondent is the *dominis litis* in the divorce and despite anything that may have been said to her by her legal practitioner she should have obtained the information regarding the value of the properties, outstanding bond on the said properties, the value of the livestock and the vehicles as well as her capability to afford the bond before mediation, but she failed to do so. She was at all material times freely part of the mediation proceedings which was based on estimated values of the assets of the joint estate. Nothing in the respondent's affidavit suggest that any of the terms of the settlement were new facts to her at the time of the mediation.

[30] Ms Nyashanu submits that the respondent's failure to raise her discontentment towards all or part of the terms of the settlement at mediation is a

⁵ (I 2674/2005) [2013] NAHCMD 285 (16 October 2013).

⁶ *Lombard v Pongola Sugar Milling Co Ltd* 1963 (4) SA 860 (A).

clear indication that the settlement was reached for the benefit of the parties who, through their legal representative, indicated that they understood the terms. In conclusion counsel argued that the agreement reached is not bad in law, neither has same been raised by the respondent. In fact, both parties retained one property, each retained the movables currently in their possession and the applicant, being the one who is more financially sound and strong, took bulk of the expenses of the minor child. Therefore the agreement is just, equitable and fair.

Respondent

[31] It is the respondent's main position that her previous legal practitioner at mediation advised her that it would be costly to obtain the valuation of the properties and that further litigation would be costly as well. It is with regard to this advice that the respondent is unhappy with and the basis on which she sought alternative advice and upon which she wants the variation of the settlement terms.

[32] It is apparent from the papers that the mediation conference took place on estimations of the immovable properties and Ms Kavijene submits that if the court is to endorse the terms of the settlement agreement as far as it relates to the immovable properties, the applicant will benefit more as opposed to the properties being sold and the joint proceeds equally shared between the parties. She submits that this will be prejudicial to the respondent given that the parties are married in community of property and the estate is to be divided equally. Counsel further submits that although the respondent is the *dominis litis*, it was incumbent upon the applicant to provide proof what he alleged at mediation as far as it relates to the market value of the properties, which he failed to do.

[33] Counsel submits that the fact that the respondent was emotional and in tears when she left the mediation room speaks of her unhappiness with the agreement reached at the mediation.

[34] Counsel further submits that the minor child's maintenance money cannot be used to assist the respondent with the servicing of the Otjomuise property as that money is meant for the maintenance of the child and that a party who negotiates in

good faith could not at any stage suggest that a child's maintenance should be used to service a bond. In any event this offer was made after the settlement agreement.

[35] Counsel referred to the case of *Ex parte Le Grange and Another; Le Grange v Le Grange*⁷ wherein it was stated that"

' . . . there are two basic requirements that are to be met when the court considers a request to grant a judgment in accordance with the terms of a settlement agreement. The first is that the court must be satisfied that the parties to the agreement have freely and voluntarily concluded the agreement and that they are *ad idem* with regard to the terms thereof. The second requirement is that the order sought must be a competent and proper one to make in the circumstances.'

[36] Counsel therefore submits that the applicant's claim be dismissed with costs and that the court must order the division of the joint estate in view of the parties' marriage in community of property.

[37] Having considered the submissions by both counsel as summarized above, I am in agreement with the applicant that a verbal agreement concluded between the parties during mediation is valid and binding on the parties. From the evidence adduced by both parties in their respective affidavits, it is evident and not disputed that the parties reached consensus as to the terms of the agreement and merely desired, if I understood correctly, the reduction of the verbal agreement to written form. It would however appear that the respondent, when the mediation was concluded and a few days later got cold feet and had a change of heart in that she was no longer in agreement with the terms agreed to at mediation. It would however, in such circumstances, be unfair on the applicant to now be told that the terms concluded have changed because the respondent had a change of heart. There was nothing at all prohibiting the respondent from not continuing with the mediation if she was not entirely happy with the terms of the settlement. Further, the respondent, as the *dominis litis*, knew that there is property involved and had to acquire the necessary documentation as to the value of the property if she was of the opinion

⁷ (984/2011) [2013] ZAECGHC 75; [2013] 4 All SA 41 (ECG); 2013 (6) SA 28 (ECG) (1 August 2013).

that there would not be a fair distribution of the property. However she failed to do so. Nothing prohibited her from getting such valuation.

[38] I agree with Cheda J when he stated in the case of *Palastus v Palastus*⁸ that:

[6] An oral agreement which has all the necessary ingredients of a legal contract and has no new terms or conditions added at the time of signing is binding on both parties, see

N C Williams v First Consolidated Holdings 1982 (2) SA 1.

[7] . . .

[8] Defendant is not alleging any alteration of the settlement agreement or neither does she deny that there was such a verbal agreement which was reached after protracted negotiations. In my mind, therefore, it is an unavoidable conclusion that the object of a written agreement was to facilitate proof of the verbal agreement . . .

[9] It was not submitted by the parties, let alone the defendant herself that the verbal agreement was to become effective after it had been reduced into writing. Defendant only reason is that her marriage was contracted in Heaven. This is not a legal reason but a religions one.'

[39] As appearing in the matter before me the respondent also does not allege that the terms were altered nor does she deny that there was a verbal agreement. All she does is allege that her erstwhile legal practitioner gave her ill advice that induced her to settle. However, as rightfully submitted by the applicant, the respondent freely chose her own legal practitioner to advise her and her failure to raise her discontentment towards all or part of the terms of the settlement at mediation is a clear indication that the settlement was reached for the benefit of both parties who, through their legal representative, indicted that they understood the terms.

[40] Counsel on behalf of the applicant argued that the respondent fails to set out a case as to whether she was not in possession of her mental faculties or whether she was under some kind of undue influence. But instead she agrees that there was

⁸ Supra note 3.

consensus, although she alleges that she was not fully satisfied with the terms. I agree with the sentiments by Uietele J in the case of *Markus v Telecom Namibia Limited*⁹ who referred to the case of *Burger v Central South African Railways*¹⁰ where Innes, C J summarized the principle of law of contract as follows 'It is a sound principle of law that when a man signs a contract, he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.' However informal it is, the parties are bound to the terms of the contract and the consequences thereof.

[41] For the respondent to now come and argue that her erstwhile legal practitioner gave her wrong and/or ill advice while she was of full mental capabilities to refuse the terms of the settlement and/or postpone the mediation to obtain valuation of the properties, does not hold water. There was nothing that prohibited the respondent from informing the applicant and the mediator to postpone the mediation in order for the parties to obtain the said valuation. The respondent in any event fails to set out the grounds upon which she was persuaded to agree to settle by the estimations, which were, it would appear, common cause between the parties.

[42] On the issue of the allegation that the respondent was ill advised by her erstwhile legal practitioner and the fact that the legal practitioner was not afforded an opportunity to state her side of the story, I fully agree and associate myself with the findings made by Masuku J in the case of *Maestro Design t/a Maestro Operations CC v The Microlending Association of Namibia*¹¹

[60] It accordingly appears to me that where a legal practitioner acts for a person like the applicant in this matter, and a client makes prejudicial remarks about a previous legal practitioner, it would be ethical for the new legal practitioner, to bring the allegations and criticism levelled against the erstwhile legal practitioner, to the latter's attention, say under cover of a letter.

[61] This would enable the affected legal practitioner to decide whether or not to respond to the allegations, as Ms. Samuel did. That in my view, is the least that a legal

⁹ Supra note 2.

¹⁰ 1903 TS 571 at 578.

¹¹ (HC-MD-CIV-MOT-GEN-2018/00414) [2020] NAHCMD 140 (7 May 2020).

practitioner owes to a colleague, who is learned brother or sister, especially where these allegations will be in the public domain, on a platform like eJustice, where they will be readily available for the whole world to ingest.'

[43] As a result of my findings above, the respondent cannot and should not be allowed to frustrate the applicant merely because she changed her mind after the fact. In the case of *AN v PN Masuku J* rightfully held that:

'[18] Applying the above principles to this matter, it undoubtedly appears from the statement, that the plaintiff and the defendant, being adult persons, capable of and with the intention of contracting, reached consensus regarding the settlement of their dispute. This is inescapably so, given the defendant's non-contention of the coming into effect of the agreement nor the terms thereof.'¹²

[44] There is nothing before me that indicates that the respondent was forced to settle. I therefore accordingly hold the respondent bound to her obligations in terms of the settlement agreement reached between the parties.

Order

[45] My order is therefore as set out hereunder

Ruling

5. The verbal settlement agreement concluded between the Applicant and the Respondent on 22 May 2020 is hereby declared binding on the parties and enforceable.
6. No order is made as to costs.

Further conduct

7. The case is postponed to **3 December 2020** at **15h00** for RCR Proceedings hearing (Reason: Restitution of Conjugal Rights Proceedings).

¹² Supra, note 4.

8. Defendant's notice of withdrawal of defence and draft order must be filed on or before 30 November 2020.

JS Prinsloo
Judge

APPEARANCES:

PLAINTIFF: Ms Nyashanu
Of Shikongo Law Chambers
Windhoek

DEFENDANT: C Kavitjene
Of Tjombe-Elago Incorporated
Windhoek